# THE GOVERNMENT OF THE AMERICAN PEOPLE

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*To Irene*

# PREFACE

This book was written to serve the purpose of both the college student and the general adult reader. The intent went beyond the mere description and explanation of the structure and functioning of the American government to the general field of social relationships commonly referred to as political. The form of the book was dictated by the author's conception of the inherent character and nature of the American state. This was the guide in the choice and arrangement of materials.

While objectivity and accuracy in the presentation of facts are the only defensible viewpoint for a scientific treatise in any field, this does not preclude, but on the contrary presumes, an over-all working conception on the part of the author of the subject with which he deals. Somewhere in the American state, an entity which has had an uninterrupted life of nearly one hundred and sixty years, a unifying force must exist. The ready answer is that it is found in the constitutions and the laws; but in view of the characteristic looseness of these bonds this seems hardly adequate. Is it not, rather, in the people themselves, whose common ideals are impressed on the government by the institutions of universal suffrage and public opinion?

On this assumption the purpose throughout has been to relate the structure, the objectives, and the functioning of the government to the political activities of the people. In the judgment of the author this constitutes the most accurate and adequate conception of the American system of government and, for that reason, the one most easily grasped by the student.

The functional approach follows logically. By this is meant a presentation designed to show in bold relief the actual performance of the functions and services of government. The viewpoint is government in action. If this consisted only in a rearrangement of conventional materials, the end would be only half accomplished. In fulfillment of the plan the governmental functions of the people as an electorate, the lawmaking processes, and the administration of the governmental services have been emphasized and given their proper interrelation. The organization and structure of elective, legislative, and administrative machinery have not been treated as an objective but, rather, as a means to the end of services to the community. From the standpoint of the student the advantages are these: a view of government as a coherent whole; a sequential treatment of political processes; and an elimination of duplication in exposition. Important, also, is an avoidance of the letdown in interest almost inevitable in the old plan of textbook organization, according to which the student is taken over old ground in the consideration of State and local problems of legislation, administrative organization, finance, and adjudication.

As to the use of theory, the author has assumed that it should play neither a greater nor a smaller part than is customary in descriptive treatises in the various fields of learning. An assembly of facts without an interrelation which gives them meaning has a minimum of usefulness. Theory has not been set aside in a separate section as an objective in itself, but has been used where it is necessary to explain the structure or the acts of government. Popularly held theories and beliefs, moreover, have been treated as among the social forces which give power and direction to government.

In full appreciation of the value of parallel courses in American history, historical narrative, except in a few instances, has been employed sparingly, and then as a case record or with the purpose of giving perspective. The work of the Philadelphia convention of 1787 has been analyzed in some detail as an example of the technical steps in constitution-making; and the New Deal legislation of 1933 to 1935, for its technique of social and economic planning and administration. For obvious reasons, unusual emphasis has been given the foreign policies of the United States and the constitutional and legal means of their formulation.

To one who reviews the research in government of the period between the two world wars, its amount and substantial character are sources of pride. An attempt has been made, so far as the purposes of a general treatise are served, to make use of the significant findings of the various monographs and research projects, and to give due credit in the footnotes.

To the numerous scholars upon whose labors he must depend; to his students in Adelbert College and Mather College, whose collective judgment, manifested in the way peculiar to themselves, gave shape to the book; to the staff of the Western Reserve University Library for unnumbered services; to his fellow homesteaders of the New Mexico "short grass," from whom he learned many unforgettable lessons in civic rights and obligations; and to his wife for inspiration and wise counsel: to all of these the author owes more than he can express. His hope is that, with a minimum of errors, a true explanation of mankind's greatest experiment in self-government has been given.

EARL L. SHOUP

CLEVELAND, OHIO

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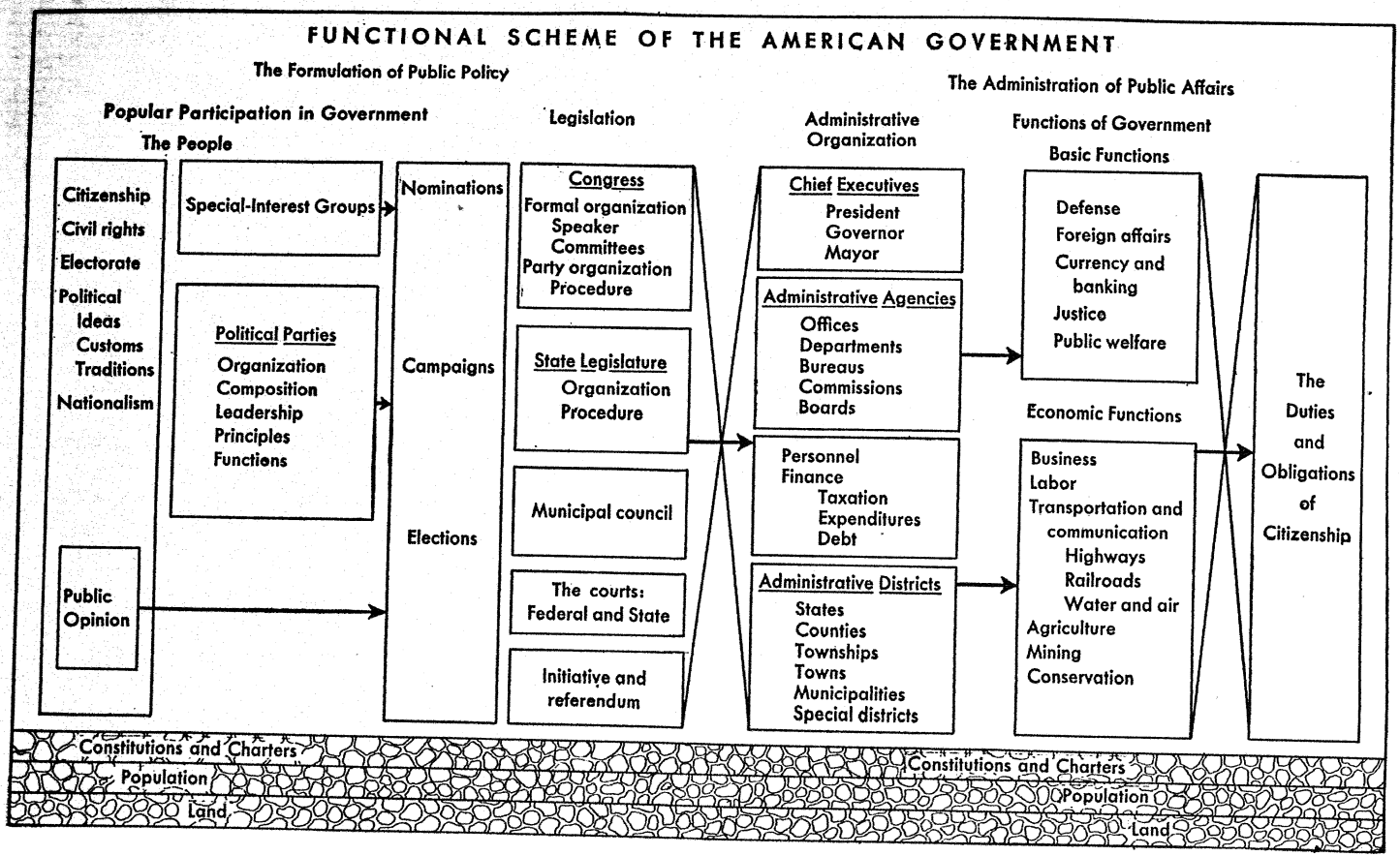
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# PART I

# FOUNDATIONS, POPULAR CONTROL, AND LEGISLATION

## CHAPTER I

## *The Modern State*

A person from another world, landing on the mid-Atlantic coast of North America and traveling westward to the Pacific, would find a population of more than one hundred and thirty million people very similar in language, dress, and general appearance. At the outset he would probably be struck by the apparent confusion and lack of direction of the scene. The uniformed officials who met his boat at the pier and those guiding traffic in the city streets were the only outward evidence that somewhere there was a directing authority for this vast aggregation of people. But if he tarried long enough in the land, other details of an established order would crowd upon him. He would soon find that for every piece of valuable goods there was someone with a conceded right to its possession and use; and for every injury done another, an established basis of compensation. He would note that the occurrence of disaster, whether of fire, hurricane, or flood, brought forth men designated and trained to combat it and extend aid to the sufferers; and the outbreak of violence called forth others to apprehend and punish the malefactors. He would discover facilities maintained by the people collectively: parks, playgrounds, and highways for the use of all; homes and hospitals for the care of the poor, the ill, and the defectives; schools and laboratories for the education of youth and the promotion of science; and vast areas of woodland reserved for the common benefit. Finally, he would note that all persons must contribute to a common treasury a portion of their income for the support of the community enterprises.

After he had visualized the whole picture, he would realize that all the people of the continent, within the lines comprising the United States, were bound together in one great association for the accomplishment of certain ends. Through mutually agreed-upon rules binding all its members, the rights, privileges, and duties of each individual are established. By persons especially set apart to act for the community, these rules are administered. To the former is given the name *law*; to the latter in their

collective capacity, *government*; and to the association of the American people, the term *state*.

THE POLITICAL ORGANIZATION OF MANKIND · The United States is only one of the sixty-odd independent communities into which the human race, totaling nearly two billion people, is grouped. These units are usually referred to as states, nations, or commonwealths. One of the earliest students of politics, Aristotle, observed that man was by nature a political being, that he might exist as a normal person only in association with others, and that the primary associations were held together by bonds of authority which he called political. Historical records, as well as the life of primitive peoples of our times, bear evidence that men have always been organized into some kind of political community. Indeed, the entire habitable portion of the world's surface today is staked out and claimed by such political associations. In the earlier years of the race these were based on a real or supposed blood kinship. In other cases the political head was a military chieftain whose rule was sanctioned by the belief in blood kinship. The Middle Ages brought forward in Europe a new type of political authority, the overlordship of the great landowners, whose domains originally were founded on military prowess. The Industrial Revolution, of the early nineteenth century, introduced a much greater density and mobility of population. The ties of blood and land-ownership already had ceased to act as the bases of political groupings. Nationalism, or the feeling of an identity of culture, language, and religion, had begun to serve as the chief cohesive force, and this bond both fostered the monarchies which sprang up everywhere in the modern world and was fostered by them. Monarchy, beginning with the nineteenth century, steadily yielded ground to government based upon the rule of the masses, but nationalism still remained the single strongest principle in the political groupings of the world's peoples.

NATURE AND CHARACTER OF THE STATE · The state is a community of human beings occupying a definite territory, possessing an authoritative agency called government, and independent in laws and government of all outside agencies. There are many political associations in the world today meeting all these conditions except that of political independence. They consequently fall short of being real states, being parts or dependencies of larger units. The states of the world are far from uniform in size. The British Empire, or, as it is sometimes called, the British Commonwealth of Nations, is the largest in both territory and population, the latter numbering more than four hundred million people. In sharp contrast is the ancient republic of Andorra, in the high Pyrenees between France and Spain, with its 175 square miles of territory and its population of 5000.

Naturally there are many other social groups in the modern world which share significance with the state in the life of the individual. Family, church, and economic, professional, and cultural associations may touch

some individuals even more intimately, but the state has several unique characteristics. First, it alone may claim all persons within its borders as members of its body politic; secondly, it alone may prescribe rules of conduct to which all are obliged to give obedience; and thirdly, it alone may levy on all persons within its reach for contributions of money, goods, and services. It is true that all these prerogatives must be exercised discreetly if they are to receive general approval and obedience, but the fact remains that in the modern world there is no other organization with a comparable position and authority. *Sovereignty* is the term used to describe this supreme position of the state; *allegiance*, the obligation of obedience owed by the citizen; and *eminent domain*, the superior claim of the state to the property of its citizens, real and personal.

FORMS OF GOVERNMENT · The peoples of the world throughout the ages have experimented with a great variety of states and governments which, however, are found to fall into a few simple types. The ancients classified all governments according to whether the rule was by one, by a few, or by the many, namely, monarchy, aristocracy, and democracy. The corresponding degenerate types were called despotism, oligarchy, and anarchy. Conditions of easier travel and accelerated communication brought the *federal state* into being, one in which a number of commonwealths, or "states" as they are called in the United States, are the component parts. Its distinguishing characteristic is the presence of two governments or classes of governments, each supreme and not subject to the other in its own field of authority. Sovereignty in the democratic federal state is thought of as residing neither in the central nor in the commonwealth government but in the people. In contrast is the *unitary* state, by far the most numerous in the world today, in which there is one central government to which all other units of government are subordinate. Another distinction in governments is between those with a hereditary and those with an elective chief magistrate, or *monarchy* and *republic* respectively. James Madison, writing in 1788, said:

> We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period or during good behavior. It is essential to such government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.

The more recent term *totalitarian* is applied to those states in which a one-man, autocratic, irresponsible government rules, with a program embracing all the affairs of the citizens, without legal or constitutional limitations.

For well over a century following the opening of the last century the tide had run steadily in the direction of the democratic or republican state. Even those with the trappings of monarchy came more and more to derive

their powers from the "great body of the people." World-wide economic dislocations extending from the time of the First World War reversed the current; the duration of this change no one at this time can prudently prophesy. If a government is operated in the interest of the great masses of the people, if it is generally responsible to them through free and untrammeled elections, through public opinion, or through other popular pressures, it should be classified as democratic even though it possesses the external appearance of some other form. The majority of the states of the Occident in 1915, tested by this yardstick, were democratic. The United States, then, falls in the category of a democratic *federal republic.*

THE SOCIAL NATURE OF GOVERNMENT · Government today is an agency which performs a wide variety of functions for the body of citizens. In few of the Occidental states is it operated chiefly in the interest of a hereditary privileged class. Even totalitarian Germany and Italy carried on programs with broad social objectives. In the democracies government is society's instrument for the performing of those functions which are best performed collectively,—in which the force of all the people behind an undertaking is more likely to ensure success than if it were left to private individuals. Through its powers of taxation, police, and regulation the government may both confine private enterprise to a restricted compass and itself undertake far-reaching projects. The line separating public from private enterprise is constantly being redrawn.

THE SCIENCE OF GOVERNMENT · Political science is that body of knowledge which deals with those activities of man which relate to the state. Like the other social sciences, it is a study of man in association with his fellow beings; but it is confined to that set of relations which are called political. The subject of American government properly includes all those social activities which have to do with the organization, motivation, control, and work of the government.

CHARACTER OF POLITICAL ACTIVITIES · The stranger from another world, even if wearing glasses which revealed only our political activities, might hastily conclude that they were a welter of variegated and explosive events without relation and harmony. A soap-box orator haranguing on a busy street, a petition-passer ringing doorbells, a black-robed magistrate intoning ponderous words from the bench, a battery of newspaper men questioning a pompous dignitary, an electrician testing the motors of the Grand Coulee Dam, a city councilman handing out Christmas baskets in a dilapidated street, do not at first seem to be parts of the same picture. Moreover, the seeming incoherence of the American political structure is not lessened by a study of its basic laws. Among forty-nine governments, each by law largely independent of the others, are distributed fragments of the powers of sovereignty, which are exerted within each of these units by three largely independent departments. The States, in turn, delegate the principal part of their powers to thousands of local governments.

THE BASIS OF UNITY · The state possesses those features which characterize the organisms of the plant and animal worlds. It has a structure, marked by specialized organs; it performs a definite set of functions; and its whole material being, land and people, is under a central control. Inevitably, too, it must possess that quality which all organisms need in order to exist, unity. Without this the American state obviously could not have persisted over a period of more than a century and a half. But what is the source of its unity, if not provided in its fundamental laws? The answer is that it is found in the masses of the people. Outside the purely political realm the similarity of customs, domestic institutions, and social ideals is an integrating force; but in the political field the institution of universal suffrage, with public opinion as a warning and a sanction, is the force which brings coherence and unified action to the fragmented elements of the American government. Without an understanding of this principle the complex American government is to the student only a congeries of States, counties, municipalities, legislators, administrators, statesmen, and politicians.

THE PHASES OF GOVERNMENT · The vast number and variety of the political activities of citizens and officers appear much simpler when grouped according to the phase or step of the governmental process to which they contribute. All are carried on within the limits of the permanent or semipermanent features of the state, the land, and the fundamental laws or constitutions. The phases are four in number and are, in a sense, sequential even though all are in operation at the same time. The first is concerned with the nature of the body politic itself; social organization and social attitudes and beliefs, in so far as they are of political significance; the formation of voters' and propaganda organizations and of public opinion; the conduct of elections; and the eventual control of the government by political parties. The second is legislation, or the adoption of those rules which society has deemed necessary in the interests of survival, order, and general welfare; the third, public administration, or the day-by-day execution of the functions of the state; and the fourth and last, the acts of the citizen in obedience to the administration. These four constitute the major divisions of American political activities and, preceded by a consideration of the physical bases of the state, are the outline of this text. A short characterization at this point will serve to make clearer what each is and what are its contents.

1. *The People as Rulers.* If society were static and its elements unchanging, there would be small occasion for political agitation, cliques, and parties. But each generation and, indeed, each year brings its new problems. Perhaps those of an economic nature—problems of food, shelter, and the distribution of those goods which modern science has made available for the comfort and pleasure of mankind—are the most

prolific of all in inducing people to desire change. Close behind follow those of a cultural and social nature, such as the adjustment of race to race, religion to religion, and class to class. These and other problems give rise to differences of opinion and desires among the people, and out of such differences grow parties and interests each desiring to establish its program as the policy of the nation through control of the government. The struggle for the attainment of this objective calls forth manifold popular political activities. Political parties do not spring into being alone through the ferment of conflicting opinions among the masses; there must be the leadership of strong individuals, political doctrines must be preached, and the lukewarm must be convinced, public opinion formed, and an effective organization constructed capable of placing men in office and giving them continuing support. In short, these activities of the electorate furnish the power which moves the ship of state. Their character, aims, and vigor condition the government which is to result.

2. *Legislation.* The second step in the process of government is legislation. The elections have already shown the will of the people as to certain questions and have filled the offices with persons of the same mind. The problem now is to enact statutes in fulfillment of the expressed popular desires. Statute-making in the United States is mostly in the hands of legislative bodies of three grades: the Congress, representing the entire nation; the legislatures of the forty-eight States; and the councils of the numerous cities, towns, and villages. While the three cover different jurisdictions, all have problems in common. Popular desires are not always readily translated into law. A consensus is not always to be found. In a legislative assembly, therefore, there is need for a leadership that is able to reconcile conflicting interests, and that will place the more important measures first, direct the deliberations to the end that the program may proceed in an orderly way and with an expedition consistent with a reasonable freedom of debate, and promote a proper co-operation with the executive branch of the government. Sufficient technical ability should be found in the legislature or provided in its staff so that the statutes will express accurately in legal terms what the legislators intended.

There are other means of lawmaking than these popularly elected bodies. In a minority of the States and municipalities the people have reserved to themselves the right to enact statutes by means of the initiative, and the right to review the work of their legislatures by means of the referendum. While the courts have as their primary duty the administration of justice, they are constantly called upon in the course of their work to interpret statutes (to say what they mean); and this in very many cases amounts to lawmaking. The growth of custom itself not only is a species of direct lawmaking but furnishes a reservoir of rules which the courts draw upon in interpreting the statutes of legislatures. Again, the rule-making powers of such administrative bodies as the Interstate Com-

merce Commission, and the State public-utilities commissions and boards of health, often are so broadly exercised that they may be regarded as in some degree legislative. It should be stated here, however, that this incidental lawmaking—that of the courts, of custom, and of administrative agencies—is strictly subordinate to that of the duly empowered representative bodies. Incidental lawmaking serves rather to fill the gaps in the body of statutes than to create basic new ones.

3. *Administration.* The third of the steps in government is administration, or the carrying on of the actual work of governing. Needless to say, this is the essential step, the one for which the two foregoing exist. Small use would it be for people to form political parties, raise issues, elect public officials, and, through them, enact laws for the guidance of society and the creation of community enterprises if the laws were never put into effect. In scope, naturally, public administration is as broad as the field which the people through their lawmaking have determined should be covered by the state. This division of government includes the matters of central control and co-ordination; the areas of administration; the agencies set up to carry on the work; the choice of personnel, its management, compensation, and methods of work; and the collection of revenue and its budgeting and expenditure. Naturally the magnitude of the administration is dependent upon the number and extent of the functions which the legislature has given it to perform. Government, in the last analysis, exists only for the services which it renders, and the administrative organization is important and interesting only in so far as it contributes to those ends. The place of administration in the scheme of the American government, therefore, can best be comprehended by a study of its central problems and organization and how it performs its various functions.

4. *The People as Subjects.* The fourth and final stage of the governmental process brings the student back to the subject matter with which he started, the people of the United States. Every enfranchised citizen bears a dual relation to his government. As a member of the body politic he helps to determine its policies and to choose its corps of officers. But as an individual the relation is reversed: he ceases to be a ruler and becomes a subject. He must obey the mandates of the government, but at the same time he is a beneficiary of its services. What is the extent of the citizen's obligations to the state? Has a proper balance been struck between state control and individual freedom and initiative? What are the various popular attitudes toward law observance? What are the bases of the resistance offered to law enforcement by gangs and by individuals and corporations? Why the widespread nonobservance of basic laws such as the Fourteenth and Fifteenth and the late Eighteenth Amendment? What organized efforts are there to foster correct civic attitudes among the people at large? The answers to these questions constitute a true appraisal of the utility of that plan of government which the Fathers embodied in the Constitution.

# II

## THE FOUNDATIONS OF THE AMERICAN COMMONWEALTH

*The constituent elements of the American as of all modern states are three: the land, the people, and the fundamental laws. The term "land" is understood to comprise the elements of climate, soil, topography, and location. On the character of the people, of course, their intellect, physique, mores, and social heritage, depends chiefly the character of the government. The fundamental laws are included because of their relative permanence.*

*The relative parts played by the elements of land and people in state-building cannot be accurately measured. Physical factors in some instances undoubtedly have been pre-eminent in the emergence, location, and size of states. Switzerland, Norway and Sweden, Denmark, Great Britain, France, Italy, and Japan most certainly owe much to this cause; while the long disunity of Germany, Poland, and Russia was fostered by the lack of natural boundaries. On the other hand, racial, nationalistic, and historical factors were more important than geography in the creation of Holland, Belgium, Czechoslovakia, and Yugoslavia. The occurrence of strong military leaders and political organizers, the vitality and warlike qualities of the masses, the character of their cultural and economic institutions, even the accidents of history, such as the absence of strong and aggressive neighbors, all have been of weight in determining the emergence of states, their size, and their boundaries.*

*The territory comprised by the forty-eight States is greater than the home country of any other nation except Russia, China, and Brazil. The distance from east to west is approximately three thousand miles, and from the Canadian to the Mexican boundary line nearly fifteen hundred miles. Perhaps nothing in the nature of things decreed that this vast domain should become the seat of one state rather than of a half dozen. The reluctance of the French Canadians in 1776 to join in a rebellion against the British crown, the colonizing efforts of the Spanish in the West and Southwest, and British dominance of the seas, which kept out all rival nationalities, were human factors in giving the United States its present boundaries.*

*In all thirteen of the contiguous North American colonies the stock was overwhelmingly English, as well as the political and social viewpoints and the language. Into this mold were poured, throughout the succeeding years, a stream of varied nationalities, but the original cast was able to give form to the accumulated mass.*

*The fundamental laws of a people, whether they take the form of written documents or merely are engraved on the national character as customs, attitudes, and beliefs, enter into the structure of any government which may emerge. Thus in every written constitution adopted by the States after 1776 there appeared about the same offices and organization of government, and all betrayed generally the same sentiments respecting individual freedom and representative government. The fundamental laws of the new American nation were those evolved in the centuries of English experience as modified by colonial experience.*

## CHAPTER II

# *The Land and The People*

In the early 1830's a brilliant young Frenchman, Alexis de Tocqueville, was sent by his government to execute a certain commission in the United States. Received with great cordiality by officials and civilians high and low, he was given every opportunity to observe and study the American people, their social and political institutions, and their natural resources. Perhaps no other foreign traveler of similar competence until the Englishman James Bryce, nearly sixty years later, ever devoted himself so methodically and intensively to the task of observation. The literary outcome of De Tocqueville's trip was his two-volume work *Democracy in America*, written with a detachment and perspective which no native American could have achieved. Two motifs of the great picture stood out distinctly to his eye: the scarcely touched but fabulously rich and salubrious lands of the North American continent, and the few million people, able, buoyant, and vigorous, of the newly forming nation, poised at its eastern fringe for the conquest. Never before in the recorded history of the earth had a branch of the human family been afforded a comparable opportunity. Thus pondered De Tocqueville:[1]

> No power upon earth can shut out the emigrants from that fertile wilderness which offers resources to all industry and a refuge from all want. Future events, whatever they may be, will not deprive the Americans of their climate or their inland seas, their great rivers or their exuberant soil. Nor will bad laws, revolutions, and anarchy be able to obliterate that love of prosperity and [that] spirit of enterprise which seem to be the distinctive characteristics of their race, or extinguish altogether the knowledge which guides them on their way. . . . The time will therefore come, when one hundred and fifty millions of men will be living in North America, equal in condition, all belonging to one family, owing their origin to the same cause, and preserving the same civilization, the same language, the same religion, the same habits, the same manners, and imbued with the same opinions, propagated under the same forms. The rest is uncertain, but *this* is certain and it is a fact new to the world,—a fact which the imagination strives in vain to grasp.

The picture must have been all the more impressive to the Frenchman because of its sharp contrast with the many-tongued and politically discordant continent of Europe.

[1]Alexis de Tocqueville, *Democracy in America* (H. Reeve, Tr., 1898), Vol. I, pp. 556, 558.

## *THE LAND*

*Natural Resources and Democratic Institutions.* The great resources of the lands incorporated in the United States made possible a social order in which the great majority of the people were able to attain a high standard of living and a high degree of individual economic independence. American democratic institutions would seem to be the natural expression of such a social order. Indeed, Thomas Jefferson believed that they must of necessity be confined to those countries whose economy is rural and at least moderately prosperous. Political observers have quite generally agreed that a country of extreme poverty cannot be democratically or even well governed; nor can a rich country, if the wealth is mostly in the hands of a few. So Aristotle observed two thousand years ago:[2]

> The state which is composed of middle-class citizens is necessarily best governed; they are, as we say, the natural elements of a state. And this is the class of citizens which is most secure in a state, for they do not, like the poor, covet their neighbors' goods; nor do others covet theirs, as the poor covet the goods of the rich; and as they neither plot against others, nor are themselves plotted against, they pass through life safely. . . . Great then is the good fortune of a state in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy (anarchy), or a pure oligarchy; or a tyranny may grow out of either extreme—either out of the most rampant democracy, or out of an oligarchy; but it is not so likely to arise out of a middle and nearly equal condition.

CLIMATE AND DEMOCRACY · Some able students of human environment conclude that a high civilization cannot be produced or, if already existing, cannot be maintained under conditions of extreme heat or cold, dryness or wetness, or high altitude. Such conditions require a struggle for mere bodily survival so severe as to leave little surplus energy for the higher achievements of civilization, including the art of self-government. It is pointed out that no examples of high native civilization involving political democracy exist in the tropical or subtropical regions; and, furthermore, that such institutions, when implanted, are dependent for their continuance upon a stream of new recruits from the temperate zones. Ellsworth Huntington, a careful investigator of climatic influences, sets up three tests which the climate of a country must meet if its people are to be capable of creating and sustaining a high civilization.[3] (1) There must be a fairly strong but not extreme contrast between summer and winter, the summer temperature averaging not much higher than sixty-five degrees for night and day together, and the winter not much lower than forty degrees. (2) There must be rain at all seasons; not constantly, but enough

[2] *Politics*, iv, 11 (Jowett trans., Oxford Press, 1931).
[3] E. Huntington, *Civilization and Climate* (2d ed., 1922), chap. vii.

so that the air is moderately moist. (3) There must be a constant but not undue variability of weather. The regions of the world which most nearly meet Huntington's three tests are Europe, except for its extreme northern part; Japan and large portions of China in Asia; the southern tip of Africa; southern and central Argentina; and all of the United States except parts of the Southwest and a small belt fringing the Gulf of Mexico. Continental United States possesses about one third of this highly favored portion of the world's land area.

GEOGRAPHIC INFLUENCES IN GENERAL · An occasional political philosopher now and then throughout history has shown an awareness of the necessary interrelation of the physical environment and politics. Plato, in the construction of his ideal republic, used the same care in the choice of the material factors of physical environment and climate as he did in the choice of political, social, and cultural ideals; and Aristotle did not neglect those factors in fashioning his well-rounded and scientific treatise on government, entitled *Politics*. Two Frenchmen of the seventeenth and eighteenth centuries respectively, Jean Bodin and the Baron de Montesquieu,[4] gave penetrating analyses of the relation of geography and climate to political institutions—analyses which, surprisingly, were not adequately followed up by other scholars until early in the present century.

It is plain that the cultural development of mankind has grown side by side with the struggle of group against group, nation against nation, and race against race—how much because of and how much in spite of handicaps no one can say with confidence—and that the game has been played on Nature's gridiron, with its advantages and obstacles of fertile lands and barren wastes, mineral, plant, and animal resources and their dearth, isolated islands and valleys and defenseless plains, the connecting links of deep streams and natural highways and the obstacles of mountain ranges and oceans. The relative parts played in the development of civilization by the physical world and the world of ideas also defy exact appraisal. The geographer is apt to overplay the former. He points to the influence of the physical world on the bodily and mental vigor of individuals and races; of natural resources in furnishing materials for the arts of peace as well as of war; of the configuration of the land in determining political boundaries; and of geographical location in safeguarding national integrity. The insular position of the Japanese and British states, for instance, doubtless accounts for the exceptional persistence of their political institutions over a long period of time. With respect to the latter it might reasonably be argued that to the existence of the Strait of Dover is due the development of the institutions of representative and parliamentary government and the common law, and their subsequent spread throughout large portions of the civilized world.

[4]Jean Bodin, *Six Books concerning the Republic* (first published in 1577); and Baron de Montesquieu, *Spirit of the Laws* (2 vols.) (Nugent, Tr., 1752), Vol. I, Bks. XIV–XVIII.

The cultural historian, however, finds the explanation of human progress principally in the innate capacities of the human mind. He points out that men and nations, inspired by ideals, have established institutions and states in spite of the predetermination of physical factors. Churchmen stress the potency of religious inspiration; philosophers, the resources of the rational faculties; individualists, the strivings for individual freedom; some economists, the determinism of material factors (Karl Marx, for instance, the struggle of classes for economic dominance).

GEOPOLITICS · The geographer is apt to reflect that it required four hundred and fifty years for the statesman and the military leader to comprehend Columbus's demonstration in 1492 that the world is round. *Geopolitics* is the name given to the combined study of certain phases of human geography and political science, the dominant idea of which is the global concept of international relations.

The name seems first to have been employed by a German, Karl Haushofer, whose institute for the collection of the data of political and military geography was subsidized by the Hitler government.[5] The basic concept, however, was first expounded in 1904 by an Englishman, Sir Halford J. Mackinder, and again in 1919, before the Allied peacemakers at Paris. Mackinder's ideas were based on a global conception of the world's surface rather than on that of the generally known Mercator's Projection. He emphasized that the greater part of the world's surface, and consequently its natural resources, is included in the land mass of Europe, Asia, and contiguous Africa—a concept which is made plain by a map projected from a point in western and southern Siberia; and that this great area, if consolidated, would be largely independent of sea power. Outside this "Heartland" or "pivot area," in an inner crescent, are Austria and Hungary, Turkey, India, and China; and in an outer crescent Great Britain, South Africa, the United States, Canada, and Japan. Mackinder's basic concept was taken over by Haushofer and given military and political implications. The control of the Heartland was the key to the control of the entire world, which could be exerted singly, by Russia; jointly, by Russia and the strongest military power on the inner crescent, Germany; or by Germany alone if it could dominate Russia. According to this concept, the vulnerable nations in the outer crescent, including the United States, are doomed to eventual domination by the masters of the Heartland.

Doubtless the Mackinder-Haushofer theories represent certain imponderable forces with which all states in the future, including the United States, must reckon. Their vogue in Germany probably had something to do with the greatest error committed by the German strategists, the

[5]A. Dorpalen, *The World of General Haushofer* (1942). For excellent short summaries of various aspects of geopolitics, cf. the symposium *Compass of the World* (1944), edited by H. W. Weigert and V. Stefansson.

attack on Russia; and the lack of their appreciation in the United States, with the failure to fortify the Aleutian Islands. Over against the Heartland theory are the intangible forces of ideas as exemplified in the social, economic, and political institutions of the "doomed" nations of the outer crescent; and, still not to be left out of account for the United States, the geographic fact of the great expanses of ocean on its two flanks.

CHARACTER OF THE AMERICAN TERRITORY · The nearly three-million-square-mile land area of continental United States contains almost everything necessary for the sustenance and work activities of a numerous population. There is a range in climate and a variety in topography sufficient to suit the needs and tastes of all classes of people. Bounded by two oceans, it has gateways for trade with the other large land areas of the world; but, with three thousand miles of water separating it from the nearest great military power, burdensome military and naval establishments were not required until recently to ensure its integrity. It is pierced by a great system of rivers, the Mississippi, affording an artery of commerce almost from the northern border to the Gulf of Mexico. The Great Lakes afford a natural waterway from the central regions to the Atlantic seaboard; the Ohio River, from the Appalachian Mountains westward to the Mississippi. From Maine to Texas well-spaced navigable streams cut the Atlantic and Gulf of Mexico seaboard. The nation's rivers have an estimated potential electric kilowatt-hour output of 273,400,000 per year, of which 43,700,000 had been developed up to 1937.[6]

THE POLITICAL EFFECTS OF REGIONALISM · Climate and topography divide the United States into seven great economic regions. The Appalachian Mountain chain was historically the approximate western boundary of the original thirteen colonies, and differences in latitude produced there two distinct regions, divided roughly by the Potomac River. In the northern, cereal crops flourished, and the abundant water power was used to develop a manufacturing industry; while in the southern area the plantation crops of tobacco and cotton flourished to form the basis for a distinctive social order. The eastern half of the Mississippi Valley, originally for the most part heavily wooded, is cut into two major regions by climatic differences roughly marked by the line of the Ohio River. Varied agriculture, with cereal crops in predominance, distinguishes the northern part, while tobacco and cotton culture dominates in the southern. West of the Mississippi are the Great Plains, an area approximately eight hundred miles broad and extending fifteen hundred miles from Canada to the Gulf of Mexico. This was originally grass-covered except along the streams, in the Ozark Mountains, and in Louisiana, eastern Texas, and Arkansas. Its eastern half is a region of varied crops; its western half is devoted largely to grazing and stock-raising. The Rocky Mountain region, comprising a vast territory from Canada to Mexico, is semiarid, except in the

[6]National Resources Board, *Energy Resources and National Policy* (1939), pp. 238–240.

high mountains, and is richly endowed with timber and minerals. Stock-raising is its chief contribution to the nation's food supply. The Pacific-coast lands are the seventh distinctive region. Its climate, tempered by the Japan Stream, is mild, running from subtropical in the south to temperate in the north. Here and there water for agriculture is provided by streams from the high mountains, but in parts of the north there is abundant rainfall.

THE NORTH-ATLANTIC AND SOUTH-ATLANTIC REGIONS · Climate and natural resources have produced economic interests peculiar to each of these regions; and these, in turn, have given rise to distinctive social viewpoints and political interests. The first half of our national history witnessed the growth of social institutions in the northern and southern regions so different as to suggest separate nationalities. Commerce and manufacturing dominated the North and were accompanied by a demand for protective tariffs, a central banking system, free land for the small farmers, and the improvement of roads, canals, and railroads at public expense or with public subsidies. In the South large-scale agriculture for the growing of tobacco and cotton, with its demand for cheap labor, fostered the institution of slavery. In turn there followed a demand for cheap manufactured goods and opposition to protective tariffs; while stalwart views of the rights and independence of the States were engendered, as a means of protecting Southern institutions against Federal legislation. With numerous rivers for the transportation of its products, internal improvements at public expense were frowned on; and the nationalization policy of the banking and manufacturing States was not countenanced.

THE REGIONS OF THE NEWER SOUTH, THE NORTHWEST TERRITORY, AND THE GREAT PLAINS · The southern region across the Appalachians, because of similarity in economic interests and the recruitment of its settlers from the Old South, joined with the Old South politically. The northern, with its small farms, and its coal and iron, found a greater affinity politically with the Northeast. The Great Plains region, always predominantly agricultural, has been subject to the periodical shifts of fortune characteristic of an economy based on uncertain rainfall and an uncontrollable volume of production. Since its colonization scarcely a decade has passed without the birth of some new political movement growing out of agricultural discontent. Among these were the Greenback party of post-Civil War days, which represented a debtors' demand for cheap money; the Farmers' Alliance and the Populist party of the last decades of the century, which were all out for cheap money and government-owned shipping and storage facilities; the Non-Partisan League of the First World War period, advocating State-owned grain elevators and banks and State crop insurance; the "farm bloc" of the Harding and Coolidge administrations, with its program of Federal price regulation for farm products; and the acceptance of the New Deal and its AAA and "ever-normal granary" programs.

THE MOUNTAIN AND PACIFIC REGIONS · The Mountain region is too sparsely settled to count much in national politics, but it has always contributed to the strength of the cheap-money parties by advocating the liberal coinage of silver, one of its leading products. The Pacific region too suffers from the handicap of a relatively low voting strength, although this was somewhat overcome by the population increases of the 1930's and 1940's. Because of its production of gold and lumber and of fruits which might face competition with the products of tropical lands, it has stood pretty consistently for policies much like those of the Northeast. The restriction of Oriental immigration has been a cardinal political tenet of this region and has added much to the solidarity of the organized labor movement.

THE SOIL · The most substantial source of wealth which a country can possess is a fertile soil. In time the extractive industries of gold, silver, coal, iron, and oil production must utterly fail or else become decreasingly profitable because of dwindling returns. The soil may erode and decline; but it is always capable of rebuilding, now greatly increased in its possibilities by advances in the science of chemistry. The nations endowed with large areas of fertile land have been the most stable institutionally and the most enduring.

The United States possesses a larger acreage of arable land in the Temperate Zone than any other nation in the world except Russia. Approximately the western third of its territory, with the exception of tracts along the Pacific coast, is classed as arid or semiarid; but within it are great irrigated valleys which together produce more than enough food to support the inhabitants of that portion of the United States. O. E. Baker, of the United States Department of Agriculture, estimates that there exists in that area a total of 973 million acres capable of cultivation, which includes 300,000,000 acres now used for pasture.[7]

The effectiveness of the agricultural worker has steadily increased. One hundred years ago from 60 to 70 per cent of all men having an occupation were needed to produce the food required by the country and for export; now food-growing demands less than 7 per cent of all persons, fourteen years of age or older, gainfully employed. Scientific methods of cultivation and of propagation and the use of artificial fertilizers have greatly increased the possibilities of food production in the United States. "The five years from 1922 to 1926," according to O. E. Baker,[8] "are in several ways the most remarkable in the history of American agriculture. Agricultural production increased about 27 per cent, while crop acreage remained practically stationary and labor engaged in agriculture declined." All

[7]President's Research Committee on Social Trends, *Recent Social Trends* (1-vol. ed., 1933), p. 97.

[8]Ibid. p. 990; National Resources Board, *Forest Land Resources, Requirements and Policy* (1935), sect. iii.

this suggests that the soil of this country can furnish meats, fruits, vegetables, and cereals adequate in quantity and variety for its entire population and its normal increase for years to come.

THE FORESTS · The all-pervading forests furnished logs for the colonists' cabins and fuel for their fireplaces. Wood remains an important material in the economy of our national life, although its importance has been decreased relatively by the greater utilization of metals and plastics. At the time of its discovery the United States east of the Mississippi was mostly wooded, and there were other great wooded tracts in the mountains and the better-watered parts of the West. Of the 800,000,000 acres of original forest only about 100,000,000 of virgin saw timber remain. In addition, there are more than 300,000,000 acres of timber fit only for fuel or for secondary uses, such as pulp. The cutover timber lands, lightly populated and relatively unproductive, have created economic and political problems of importance. Particularly is this true in Minnesota, where the population on this type of land has combined with the farmers and laborers to constitute the Farmer-Labor party. Although after the beginning of the First World War the national and State governments and private individuals tried to conserve the timber supply, the increase in saw timber is at a rate hardly one half that of the continent of Europe.

MINERALS · Nature liberally supplied the American continent with useful minerals. The United States has long been one of the leading producers of the precious metals, gold and silver. It has great resources in iron and copper and in the fuels: coal, oil, and natural gas. According to the account in *Recent Social Trends*, the increase in the physical volume of production of mines from 1899 to 1929 was 386 per cent, which should be compared with an increase in population during the same period of 162 per cent, and an increase in the volume of manufactures of 310 per cent.[9] Our *per capita* consumption of minerals is greater than that of any other people. "From 1860 to 1913, the population increased three-fold, while the production of pig iron increased thirty-eight fold; of coal, thirty-nine fold; of the total mineral fuels, forty-four fold; and of copper, seventy-six fold." The United States more nearly than any other country produces the minerals needed in peace and in war, but there are some essential to its industry which must be imported mostly or altogether from abroad. The chief of these are manganese, tin, nickel, chromite, antimony, and mercury; and all of these except nickel, produced in Canada, must be imported from overseas. Manganese, a necessary ingredient of steel, places that key industry in dependence upon the production of Russia and Brazil.

While, generally speaking, the depletion of our mineral resources is far in the future, rich veins or deposits in many places have been exhausted, with the creation of "ghost towns" and of hardships for labor. Throughout

[9]F. G. Tryon and M. H. Schoenfeld, "Mineral and Power Resources," President's Research Committee on Social Trends, op. cit. pp. 59–90.

sixty years beginning in 1880 labor unrest in the coal fields was particularly marked. The hard conditions of labor, together with seasonal unemployment, added to the difficulties. During the First World War, coal production was greatly stimulated, and many new mines were opened which, with the coming of peace, were producing much beyond the demand. A large number of mine-owners suffered financial ruin; and many mines were either abandoned altogether or operated at a starvation wage. Although the mining area became the seat of as great a discontent as has existed in any area of the United States, miners have seldom played a strong part in American politics. In a few States, such as Pennsylvania, West Virginia, Indiana, Illinois, and Ohio, they have exerted an appreciable influence in State and local political movements. Their voting influence has progressively strengthened the labor codes of these States.

NATIONAL WEALTH AND THE CHARACTER OF GOVERNMENT · Great natural resources in the hands of an energetic and capable people have produced in the United States a higher standard of living than ever before obtained in any country. The diffusion of wealth, while not so general as might be wished, is sufficient to have created a numerous middle class with a relatively high average income, and an artisan class receiving high wages. In 1940 there were 6,096,799 farms in the United States, a decrease of 715,551 in a decade.[10] Although 37 per cent of these were tenant-operated, this number represented a large and stable element of the population possessed of a substantial income and a high degree of independence. The real income of labor in the manufacturing industries rose steadily from the close of the First World War until the depression year of 1929. Trade and transportation, clerical service, government service, and the professions together contributed large numbers to the fair-income group.

The citizen of a simple agricultural democracy might have performed his civic duties well even without higher education or technical knowledge. The citizen of a democracy with a complex industrial society does not get off so lightly. He must possess not only Jefferson's ideal of at least a moderate economic independence and spirit of initiative but a fair degree of formal education. The natural resources of the United States have been ample to provide the means for universal education and technical, scientific, and philosophical schools. The electorate thus has been able to discharge reasonably well its ever-increasing tasks and obligations. The initiative and the referendum are means by which the masses participate in governmental work to a degree that would be unthought-of if the voting population were poor and ill-educated. Wealth provides the source for a large state revenue. Government is thus enabled to undertake functions which a poor state would never attempt. Included among these are the maintenance of museums of fine arts, laboratories for scientific investigations, libraries for purposes of research, and the great areas set aside for recreation

[10]Sixteenth Census of the United States, *Agriculture* (1940), Vol. III, p. 34.

## *THE PEOPLE*

SIZE OF POPULATION · The population of the United States and its possessions in 1940 was 150,621,231, which gave it fourth rank among the states of the world. The population of continental United States was 131,669,275, which, exclusive of the 663,091 of the District of Columbia, is the source from which the country's electorate is drawn. This exceeds that of any other representative democratic state. Of the 83,996,629 persons in 1940 twenty-one years of age and over, 79,863,451 were citizens,[11] all but a negligible portion of whom might qualify themselves for voting by fulfilling the literacy and residence requirements. In these the legal sovereignty of the American state is located.

The population of the thirteen States and of the Western territories in 1776 has been estimated at two and a half million, which means that in the course of a little more than a century and a half there was an increase of nearly fiftyfold. Since 1860 the general rate of population increase by decades has been sharply downward. Because of a greatly lowered birthrate and restrictive immigration laws competent students prophesy a continued decline in the rate of increase until the population becomes stabilized. Some estimate that this point will be reached between 1965 and 1970, with the figure at 146 million; others extend the period of increase to about the year 2000, with the total at 190 million.[12] These estimates are based on a continuation of the present techniques of food and materials production, trends in birthrate, and devotion to a high standard of living. Unforeseen discoveries in science might easily increase national productivity to a point where a much larger population could be supported with an equal or better standard of living.

RACIAL AND NATIONAL CHARACTERISTICS · The population in 1940 was divided between the white and colored races in the ratio of 118,214,870 to 13,453,605. Of the colored, 12,865,518 were Negroes, and 588,887 Indians, Japanese, Chinese, and others.[13] During the decade 1930–1940 the Negro population increased at a rate slightly more than 11 per cent faster than the white. Nearly 77 per cent of the Negroes in 1940 lived in the States of the Old South and the border, the District of Columbia, and Oklahoma, a decline of 3 per cent in ten years; while 3,936,775 lived in other States, an increase of more than 1,400,000 in twenty years. New York led the Northern States with a Negro population of 571,221, followed by Pennsylvania with 470,172 and Illinois with 387,446. In about eight of the large Northeastern States the Negro vote is of significance. Over 86 per cent of the Japanese population of 126,947, before its dispersal in 1942,

[11]Sixteenth Census of the United States, *Population* (1940), Vol. II, p. 31.

[12]National Resources Planning Board, *Estimates of Future Population of the United States, 1940–2000* (1943), pp. 29–35.

[13]Sixteenth Census of the United States, *Population* (1940), Vol. II, pp. 19, 53.

was massed in the three Pacific States, but with a slight voting potential only in California. The Chinese population had a similar distribution. The Mexicans, by the 1940 census for the first time classed as "white," were confined chiefly to the States of the Southwest.

In 1940 the native-born population numbered 118,214,870, which was 89.7 per cent of the whole as compared with 77.8 in 1920. The percentage of the native white population is of significance in indicating the changes in the composition of the population through immigration. Of the native white population of 107,282,420, those with native parentage numbered 84,157,580, a decline of more than two and a half million in ten years. Foreign-born whites totaled 11,419,138. To state the situation in another way, more than thirty-five and a half millions of the population were foreign-born or of the first generation of native-born.

CONCENTRATION OF THE NEWER STOCK · Five of the States, beginning with New York at 22.2 per cent and running through Massachusetts, Rhode Island, and Connecticut to New Jersey, with 17.7 per cent, have more than one sixth of their total white population foreign-born. On the other hand, there are nine States, all south of Mason and Dixon's line, with less than 1 per cent foreign-born. Fifteen, including four of the New England States, three of the Middle-Atlantic States, three States formed from the old Northwest Territory, North Dakota of the Great Plains, Montana and Nevada of the Mountain region, and Washington and California, have more than one in ten of their population foreign-born. The number is sufficient in others so that voting on racial lines may be expected in about half the States. Because there is no State with a proportion of foreign-born approaching that of many municipalities, nationality voting blocs have played a relatively small part in State-wide elections. Sixteen of the ninety-two cities of 100,000 population or more had more than one in five of their population foreign-born. Whatever difficulties in operating a democratic government may be inherent in a nonhomogeneous population, it is seen, would be particularly felt in the municipalities.

THE COMPOSITE AMERICAN · The act of Congress of 1924 laid down the principle that future admissions of immigrants should be so proportioned among the various nationalities as to preserve the composition of the whole population as it stood in 1920. To the Bureau of the Census fell the task of determining our "national origins." While exactness could not in the nature of things be expected, the figures eventually arrived at were doubtless approximately true. Over 41 per cent of the white population was reckoned as of British and North Irish descent, over 16 per cent as of German descent, and 11 per cent as derived from the Irish Free State. No other source approached these in size. The others, arranged in descending order, were as follows: Canada, Poland, Italy, Sweden, the Netherlands, France, Czechoslovakia, Russia, Norway, Mexico, and Switzerland. Each of them had contributed at least 1 per cent. The composite white

American is therefore about 85 per cent of northern and western European stock and 15 per cent of southern and eastern European stock.

TERRITORIAL DISTRIBUTION OF POPULATION · About three fifths of the entire population live east of the Mississippi River and 90 per cent east of the one-hundredth meridian, which cuts through the western part of the prairie States and roughly divides the well-watered part of the country, suited to general agriculture, from the semiarid part. Somewhat more than one half live in the northeastern section of the country, bounded on the south by the Potomac and Ohio rivers and on the west by the Mississippi.

A feature in the distribution of population in both the East and the West is the rapidly growing concentration in urban communities. In 1890 the urban population of the country was only 35 per cent of the whole, and it was the fashion even of many city congressmen to write the term "farmer" after their names in the official directory; at the 1920 census the urban population passed the 50 per cent mark; and in 1940 it amounted to 56.5 per cent. Even this is an understatement of the strength of the urban population; for the figures excluded those living in villages of fewer than 2500 inhabitants and city workers domiciled in the country. The agricultural population was only thirty million out of the total rural population of fifty-seven million. From 1920 to 1940 the rural population increased by 5,682,926, but the actual farm population decreased by more than one million persons; while in the 1930–1940 decade there was a decrease of farm population in seventeen States.[14] In the decade following 1930 the rural population increased 3,325,350, while the urban increased 5,468,879.

Problems of government are greatly complicated in areas of dense population. Regulatory laws multiply, particularly in the fields of sanitation, housing, traffic, recreation, and labor; while, conversely, government is relatively at its easiest and best in the States with a few cities of moderate size and a rural population spread evenly over the land. The cities have become the new frontier of experiments in government, and their problems have sometimes taxed to the limit men's ability to adapt democratic processes to great masses of people.

OCCUPATIONS OF THE PEOPLE · It is natural that government in form, structure, and functions should reflect the economic and occupational character of the people from which it emanates. One type was suited to the wandering herdsmen of Abraham's time; another, to the purely agricultural feudalism of the Middle Ages in western Europe; another, to the city states of the highly sophisticated Greeks of ancient times; still another, to the early national states of modern times. The American government, under its old but flexible constitution, has steadily adapted itself to the changing occupational pattern. It has been shown above how the United States has passed rapidly from a nation of agriculturalists to one in which

[14]Sixteenth Census of the United States (1940), *Agriculture*, Vol. III, p. 33.

manufacturing, business, commerce, and their allied services have become dominant. But this is not the only occupational shift of great political significance. Census reports show that over a long period of time the portion of the population gainfully employed steadily increased, from 32.4 per cent of the total population in 1870 to 39.8 per cent in 1930 and 44.6 per cent of all persons 14 years of age or older in 1940.[15] Considering the great amount of idle time necessarily existing in agriculture because of weather conditions and seasonal work, it is probable that the figures do not tell the whole story. Of significance was the nearly threefold increase in the employment of women, from 9.6 per cent of all persons gainfully employed in 1870 to 24.7 in 1940. The employment of persons under sixteen years of age decreased from 41.3 per cent of the total of all employed in 1870 to 31.2 per cent in 1930, and there was a comparable decrease in the percentage of persons sixty-five years of age or older gainfully employed.

Forty-five million Americans, fourteen years of age or over, were listed by the census report of 1940 as employed. They fall into twelve great occupational groups, as shown in the following table:[16]

| | |
|---|---|
| Agriculture, forestry, and fishery | 8,475,432 |
| Manufacturing | 10,572,842 |
| Transportation, communication, and other public utilities | 3,113,353 |
| Wholesale and retail trade | 7,538,768 |
| Mining | 918,000 |
| Construction | 2,056,274 |
| Finance, insurance, and real estate | 1,467,597 |
| Business and repair services | 864,214 |
| Personal services | 4,009,317 |
| Amusement and recreation services | 395,342 |
| Professional and related services | 3,317,581 |
| Government, not otherwise reported | 1,753,487 |
| Industry not reported | 688,836 |

EFFECTS OF THE SHIFT FROM AGRICULTURE · Of prime political and economic importance was the shift from agriculture to other occupations. In 1870 agriculture, together with lumbering and fishing, absorbed more than half of all the persons gainfully employed; in 1940 the number had fallen to 18.8 per cent. The city home, with its vastly different social aspects, replaced the country home as typical. The farmer, who, from the

[15]The Bureau of the Census, for its 1940 enumeration, adopted the category "labor force," so that its 1940 figures relating to occupations are not exactly comparable with the category "gainfully employed," used from 1870 to 1930. For the more numerous groups, however, the variation is seldom more than 2 or 3 per cent. The Sixteenth Census of the United States (1940), *Population, Comparative Occupation Statistics of the United States, 1870–1940*, gives the totals for both methods of enumeration.

[16]Sixteenth Census of the United States (1940), Vol. II, *Population*, Pt. 1, "Characteristics of the Population," p. 16.

standpoint of economics, is a combination of small capitalist and high-grade laborer, was displaced by the wage-earner, who typically is less independently placed in the social order. The township, the village, and the county declined in relative importance as political units in favor of the municipality. The city machines forged ahead in the struggle for the control of national politics, relegating the county-courthouse bosses to the antechambers. Legislation respecting public utilities, streets, health, hours and conditions of labor, and social insurance moved to the center of the stage, crowding to one side such measures as the registration of livestock brands, the fencing of the highways, and the management of county fairs.

MANUFACTURING AND MECHANICAL INDUSTRIES · Manufacturing, the largest single occupational group in the United States, has come to hold the balance of power in the populous States of the northeast quarter of the country. Its leadership is in the businessmen, corporation representatives, and labor-union officials. This group comprised 23.4 per cent of all persons gainfully employed in 1940, as compared with the 18.8 per cent of its nearest competitor, agriculture and forestry. Four fifths of its numbers were males, the women's proportion being largest in the age group from sixteen to twenty-four years. This occupational group is the source of some of our gravest political and governmental problems. Unemployment, arising from the seasonal or cyclical pace of industry; poverty, arising from the same causes and from low wages; problems of health, welfare, and recreation, growing out of the conditions of employment and the standard of living thus imposed—all are important forces in the making of political alignments. Labor had long exerted considerable influence in city and State elections, frequently running its own candidates or endorsing others. Not until the elections of 1932, 1936, 1940, and 1944 was labor able to assume a major role in national politics, when through its two powerful organizations, the American Federation of Labor and the Congress of Industrial Organizations, it became the single strongest element in the New Deal party.

TRADE AND TRANSPORTATION · Trade and transportation combined now occupy more persons than agriculture and forestry. In spite of the consumer's traditional feeling that there were too many hands between the producer of the raw materials and the consumer, the trade and transportation category steadily grew in number from 9.1 per cent of those gainfully employed in 1870 to 23.6 in 1940. The tying together of the land by railroads, hard-surfaced roads, canals, and airplanes has created a system of exchange in which production is generally for a national rather than a neighborhood market. Both trade and transportation include occupations ranging from the unskilled laborer to highly trained technicians and skilled managers. Since the membership of these groups cuts across numerous industries, all sections of the country, and all levels of income, it has little opportunity to function as an independent political force.

MINING · The proportion of the population engaged in the extraction of minerals from the earth had almost doubled in the fifty years following 1870, but by 1930, owing to temporary causes, there had been a small recession. Miners in 1940 numbered only 918,000 of the employed; but this was not a true gauge of their political importance. Set apart by their mode of working and living, the distinctive character of their employment, and their labor-union affiliations, they offered an opportunity for mass political action. The United Mine Workers of America became the core of a new and powerful labor organization, the CIO, which entered the field as a major political force. The miners constitute a low-income group, even when averaged with the operators and managers. The prostrate condition of the industry, induced in part by the overproduction stimulated by the First World War, created an economic and social problem which the needs of the Second World War have only temporarily alleviated. In local government the miners' vote is a significant political force chiefly in a half dozen of the Middle Atlantic and North Central States.

DOMESTIC AND PERSONAL SERVICE · Persons classed as in domestic and personal service numbered 1,168,000 in 1870 and 4,009,317 in 1940. These general figures, however, hardly begin to tell the story of the basic changes. Household servants and waiters in 1870 made up over three fourths of the group, while in 1940 they amounted to less than 60 per cent. Included now are hotel and restaurant keepers, barbers, elevator operators, janitors, laundry workers, amusement-hall and dance-hall keepers. Persons working in commercial laundries increased in the period tenfold, and there were comparable increases in establishments offering food and lodging. There were fewer household servants *per capita* in 1940 than at any previous time in our history. Smaller families and more and better labor-saving devices had reduced the need for servants. The home decreased in importance and ceded many of its functions to the eating, living, and amusement establishments across the way. The political ramifications of these changes are too intricate to permit careful examination here, except to note the decrease in personal contact between those who use and those who serve, and the increase in the potential labor vote.

PROFESSIONAL SERVICE · This category includes those vocations in which higher education and advanced technical training are characteristic. From their numbers, variety, and quality an approximate measurement of America's standing in the scale of modern civilization might be taken. From 1870 to 1940 the increase was nearly tenfold, or from 338,000 to 3,317,581 in a population which had increased less than threefold. New occupations which did not exist at all in 1870 came into being with thousands of members; others with a few hundreds or thousands grew to tens of thousands. Technical engineers, in considerable part responsible for the achievements of the machine age, in 1940 numbered 274,504; architects, 20,376; physicians and surgeons, 164,649; lawyers, judges, and justices,

177,643; trained and student nurses, 355,786. Persons classified as professional authors rose from a handful in 1870 to nearly 12,000 seventy years later; artists, from 4000 to 51,985; musicians, from 16,000 to 129,456; actors, from 2000 to 11,692. In the field of teaching the increase was from 127,000 to 1,030,001, of whom more than 775,000 were women. Clergymen increased from 44,000 to 136,597. If to the more than three million persons of this group are added the leaders in industry, finance, agriculture, labor, and government, together they comprise the greater part of those responsible for the guidance of our social institutions and their operation. It is plain that the diversity of interests and the high individualism of this group preclude its acting as a unit politically, but leadership it furnishes for every sort of political cause. Its nearly sixty thousand editors and reporters, in their vocation of transmitting throughout the land both news and views, stand in the front rank of the molders of public opinion.

THE PUBLIC SERVICE · The census figures make no pretense of covering all persons employed either full time or part time in the public service. A great portion of the employees of government are included in the twelve groups described in the foregoing pages. However, in the decades after 1870, government employees not otherwise enumerated were counted, beginning with 73,000 in that year and increasing to 1,753,487. The census report of all full-time civil employees of the Federal, State, and local governments in 1944 was somewhat in excess of 4,800,000.

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## CHAPTER III

# *American Fundamental Law: The National Constitution*

FUNDAMENTAL LAW · The American national and State constitutions are the most stable features of our political structure. Together they make up a body of law of the first rank to which the enactments of Congress, the State legislatures, and the city councils must give way. Constitutions are bundles of laws which characteristically arise out of the conditions of a distant past and bid fair to retain their validity into an indefinite future. In a broad sense they are the legalistic expression of the nation's way of life. For these reasons, and because they deal chiefly with matters which go to the basis of society, constitutions are often referred to as "fundamental law." The distinction between ordinary and fundamental law is a very old one, but as an American idea it is traceable clearly to the early English state. Even the royal Norman conquerors of England at coronation time took an oath to support the ancient laws of the kingdom, which was an acknowledgment that there was a superior body of law binding on them in their own lawmaking and administration. In 1215 one of their successors, King John, was forced by the nobles to sign an elaborate document, Magna Charta, which bristled with limitations on the royal power. The laws which it contained actually amounted to a written constitution, but that term was not known at the time. Although ambitious kings at times set it aside in whole or in part, the English people never allowed them to forget its existence. Magna Charta became solidly established in their esteem as a body of superior and fundamental law. Moreover, throughout centuries the contests between kings, parliaments, and courts established many practices and customs which served to define their respective powers and limitations. Combined with other documentary grants of power, such as the Petition of Right, the Bill of Rights, and the Act of Succession, these together had given England by the time of the colonization of North America a full-fledged constitution. Leaders of the American Revolution not only were familiar with the distinction between ordinary and fundamental law and with the outlines of the English unwritten constitution, but had seen the idea made concrete in the colonial charters which had been granted by king or proprietor. That the English government regarded these charters as law superior to the enactments of the colonial legislatures American leaders only too vividly understood.[1]

THE WRITTEN AND THE INFORMAL CONSTITUTION · The Constitution of the United States is referred to as "written," and the British constitution,

[1] C. H. McIlwain, *The American Revolution* (1923), chap. iii.

in contrast, as "unwritten." What is meant is that we have a formal document labeled "constitution," which has a preamble and other parts purporting to comprise the basic principles, organization, and powers of the American state. The British, on the other hand, can point only to scattered acts of Parliament, fragments of documents, judicial decisions, and unwritten customs and practices which embody their working constitution. As a matter of fact, the full American constitution is not all written and the full British constitution not all unwritten. A better distinction for the American student is between the formal, or written, constitution on the one hand and the informal constitution on the other, which is the one by which we live. In the latter are included the written constitution, except such parts as are no longer given effect; certain decisions of the United States Supreme Court interpreting and elaborating the written constitution; certain customs and practices of the President, of his subordinates, and of Congress; and some old acts of Congress which deal with basic institutions. When one speaks of the "constitution of the United States," he may refer either to the written or to the informal constitution.[2]

THE FUNCTIONS OF CONSTITUTIONS · Constitutions in general perform at least four essential functions. While they may contain a few or many detailed provisions, most of their provisions may be gathered within these categories. The most noticeable are usually those establishing the great offices and departments of the government and defining their powers. The first three articles of the United States Constitution, dealing with Congress, the President, and the courts, and their respective powers, absorbed more than 90 per cent of the text of the original constitution.

Secondly, a constitution locates the supreme power of the state, either by a simple statement or by the provisions for elections and appointments. Our national constitution, by establishing Congress as a representative body, assumed a popular basis for the government, but left to the individual States the question of the qualifications for voting. Not until the Fifteenth Amendment, in 1870, forbidding discriminations on the basis of race, color, or previous condition of servitude, followed by the Nineteenth, in 1920, forbidding discriminations on the basis of sex, did the Federal Constitution limit the freedom of the States to establish the standards for voting. The Tenth Amendment, in 1791, further emphasized the institution of popular sovereignty by stating that all powers not delegated to the Federal government nor prohibited to the States were reserved to the States or "to the people." The State constitutions are much more explicit on the question of popular sovereignty. Not only do they generally provide for universal suffrage but they include some such declaration as that of Maine that "All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit."[3]

[2]James Bryce, *The American Commonwealth* (2d ed., 1891), Vol. I, pp. 351–354.
[3]*Constitution of the State of Maine*, Art. I, sect. 2.

The third great function of the American Constitution is a definition of the civil rights of the citizen and the establishment of means for their vindication. These consist of a series of pledges against interference by government with enumerated liberties of the citizen, such as speech and religion, and provision for unbiased and free tribunals and a fair procedure, such as trial by jury.

The fourth is the establishment of an orderly and free method of constitutional change, usually called amendment. The provision of a clear method of amendment in Article V made the Constitution, which he considered faulty in several respects, acceptable to George Washington. "I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us,"[4] he said. All State constitutions set up a procedure for their own amendment.

## *REVOLUTIONARY CONSTITUTION AND GOVERNMENT, 1776–1781*

The legal independence of the United States dates from July 4, 1776, at which time the colonies became States; but for more than a year previous they had acted as though independent. Nearly thirteen years elapsed before the present constitution of the United States was constructed and in operation. National government in this period passed through two phases, heading ever toward greater strength and stability. In the first, 1776 to 1781, the central government was impromptu and unplanned; in the second, 1781 to 1789, it operated under a written instrument, the Articles of Confederation.

Not only was there no written constitution during the five years of the first period but only the scantiest unwritten one. "United States" was the name not of one nation but of a league of States; for the resolution of the Congress had declared, "That these United Colonies are, and of Right ought to be, Free and Independent States . . ."[5] What we have called a national government for this period was, more correctly speaking, an international government conducted by an assembly of deputies. Nevertheless, it had no choice but to perform many of the functions common to national governments: an army was raised and equipped, funds were borrowed, a currency was established, and diplomatic relations were carried on with foreign nations.

THE SECOND CONTINENTAL CONGRESS · The machinery of national government in this period was never planned as a whole but was improvised from time to time to meet the needs as they arose. The supreme governing body was the Second Continental Congress, soon to be known simply as "the Congress." What was the basis of the authority of this body, which

[4] H. C. Hockett, *The Constitutional History of the United States, 1776–1826* (1939), p. 222; C. Warren, *The Making of the Constitution* (1928), p. 736.

[5] *Journals of the Continental Congress*, Vol. V, p. 425, June 7, 1776.

had the temerity to declare the independence of the colonies from Great Britain? It was composed of delegates from all the thirteen colonies. With their governments in turmoil after the departure of British officials, no uniform method of election obtained. In seven colonies revolutionary delegate conventions, chosen for the whole colony or from a few counties, did the work; in six election was by the lower house of the colonial assembly. No delegation was instructed in its credentials to vote for independence. Typical were the instructions of the New York delegates, "to meet the delegates from the other Colonies, and to concert and determine upon such measures, as shall be judged most effectual for the preservation and re-establishment of American rights and privileges and for the restoration of harmony between Great Britain and the Colonies."[6] It is evident that both the conventions which elected the delegates and the Congress itself were extralegal or revolutionary bodies. The Congress continued to sit throughout the period; but its personnel, now chosen by the legislatures of the new State governments for short terms, constantly shifted. Each sent from two to seven members, but the States, large and small, had only one vote each.

The Congress exercised a curious mixture of legislative and executive, or administrative, powers, as a glance at its "journals" will quickly show. It appointed and received foreign ministers, authorized the formation of armed forces and appointed their officers, carried on diplomatic relations with foreign countries, established rules and regulations for the army and navy, authorized the establishment of a national currency, gave orders for the purchase of military supplies, and passed on the payment of bills even in trivial amounts, to mention only a few items. It acted also as a constituent, or constitution-making, body. The adoption of the Declaration of Independence was in the highest degree an example of the making of fundamental law. The framing of the Articles of Confederation and their submission to the States was of the same character. Throughout this period the Congress was in the last resort the judge of the extent of its own powers. There was no constitution to follow, with its enumeration of powers belonging to the central and the State governments, respectively. The Congress was, in a sense, a continuous constitutional convention, engaged in creating an unwritten constitution, which is not to say, however, that the States were bound to agree with Congress's conceptions of its own powers. The degree of their obedience to its acts was determined in each case chiefly by considerations of expediency or necessity. The Congress was primarily the meeting place of ambassadors from the free States of a league, or confederacy.

ADMINISTRATION OF THE LAWS · Congress itself was an example of a plural executive. In the beginning there was no thought of creating executive officers to carry out its policies. Fear of one-man government

[6]Ibid. Vol. II, p. 28.

even kept its president in the capacity of a mere presiding officer. For some months its orders were executed by special committees appointed for each separate piece of business. There was a committee on prisoners of war, a committee on spies, a committee on saltpeter, a committee on cannon, and a committee on beef, to mention only a few. The more capable members of Congress served on so many that they found little time for its general deliberations. After a few months' trial it became plain that the executive business of the central government could not be left to the agency of rapidly shifting and inexperienced *ad hoc* committees. In their place came the standing committee system, with a more stable membership. Among these committees were the Committee for Foreign Affairs, the Board of War, the Board of Treasury, the Marine Committee, the Secret Committee, and the Committee of Secret Correspondence. These acted in much the same capacity as the present-day executive departments of War, the Navy, and the Treasury.

The next step in the construction of a national administration was the establishment of executive departments whose membership was drawn entirely or chiefly from outside Congress.[7] That body retained its distinctively mixed legislative and administrative character. It still gave direct orders, often on petty matters, but inclined more to the statement of policy whose execution was delegated to the department. In October, 1777, a Board of War was established consisting of three members chosen from outside Congress; but it was made immediately subject to the old standing committee of Congress known as the Board of War and Ordnance. A year later its membership was raised to five, two of whom were to be members of Congress. The commissions of army officers were now to be signed by its secretary as well as by the president of Congress. Naval administration at first was vested in a Naval Committee and a Marine Committee, later exclusively in the latter. Two Navy Boards were then created (one at Boston and one at Philadelphia) as administrative bodies, with a membership outside of Congress, performing many of the duties typical of the present Navy Department in the procuring of vessels and supplies and in the payment of the sailors and officers. In June, 1779, Congress established a Board of Admiralty consisting of three commissioners not members of Congress, "to superintend the naval and marine affairs of these United States."

The management of finances Congress found one of its most difficult problems, as might well be for a body which could ask for free-will contributions and attempt to borrow money but could not tax. The development of financial administration from the usual scattered committees

[7]This and the succeeding paragraphs on the organization of the administrative services from 1776 to 1789 have closely followed the study by J. B. Sanders, *Executive Departments of the Continental Congress, 1774–1789*, as well as the *Journals of the Continental Congress*. Cf. also E. C. Burnett, *The Continental Congress* (1941), and M. Jensen, *The Articles of Confederation* (1940).

through intermediate boards need not be given in detail; but in 1779 a thoroughgoing reorganization was carried out. At the head of a Treasury Department was a Board of Treasury, composed of three outsiders and two members of Congress. Under this board were an Auditor-General, a Treasurer, two Chambers of Accounts, and six auditors of the army.

The Congress, like most of the presidents of the United States who were to follow it, kept much of the management of foreign affairs to itself. In November, 1775, the Committee of Secret Correspondence, of five members, was created to carry on correspondence with friends in Great Britain, Ireland, and other parts of the world. This precursor of our present highly organized State Department sent Silas Deane as its representative to Paris, whence he wrote back that if he had a good saddle horse or even "a few barrels of apples, of walnuts, of butternuts, etc. to make as a present to a certain high personage it might aid his mission.[8] The infant republic learned the ways of diplomacy early, and made still more rapid progress after Franklin arrived on the scene. In April, 1777, the name of the committee was changed to "the Committee for Foreign Affairs." As the years passed, the burden of work fell more heavily on its chairman; but it remained a true committee of Congress, without ever adding outside persons to its membership. Matters of commerce were handled in the beginning by various special committees, but soon became centered in the important Secret Committee. In July, 1777, a new Committee of Commerce was created and given the care of the "commercial concerns of the United States." Its tasks of purchasing, business management, dealing with claims, and protecting United States property were of extreme difficulty, and it remained a storm center to the end. It continued essentially as a committee of Congress, although attorneys and agents were employed to prosecute its work.

## *CONSTITUTION AND GOVERNMENT OF THE CONFEDERATION, 1781–1789*

The resolution introduced by Richard Henry Lee, June 7, 1776, declaring the independence of the colonies, included a clause "that a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approval."[9] A committee for this purpose was appointed June 12, with John Dickinson of Delaware as chairman. On July 12 the committee reported out a draft based on one which had been presented to Congress by Benjamin Franklin a year before; but not until November 17, 1777, was it adopted in modified form and sent to the States for approval. The delegates of Maryland, the thirteenth State, affixed their signatures in Congress March 1, 1781, thereby putting into effect our first written constitution.

[8] J. B. Sanders, op. cit. p. 40.

[9] *Journals of the Continental Congress*, Vol. V, p. 425.

THE ARTICLES OF CONFEDERATION · The "Articles of Confederation and Perpetual Union," as the new constitution was called, did not radically alter the unwritten constitution of the preceding five years in principles or in practice. The name of the union was fixed as "the United States of America"; but it was called a "confederacy," and each State was declared to retain its "sovereignty, freedom and independence."[10] Each was pledged to abide by the determinations of Congress in those matters where jurisdiction had been transferred to it, and the union was declared "perpetual."[11] But since a sovereign state is master in its own household, what was to prevent any State from repudiating the union or disobeying its mandates? It was provided that no amendments to the Articles could be made unless proposed by Congress and agreed to by every State.

THE POSITION OF CONGRESS · The composition of Congress remained about the same. Each State could elect from two to seven delegates for one-year terms, but subject to recall or reappointment within that time; and no person could serve more than three terms in any period of six years. There were to be annual sessions beginning the first Monday in November. Each State delegation was given one vote. Congress remained a body of mixed legislative and executive powers to which were now annexed some judicial powers. No provision was made for separate executive and judicial departments, but Congress was empowered to appoint such "committees and civil officers as may be necessary for managing the general affairs of the United States."[12]

Congress was now specifically empowered to raise and equip armies and a navy, calling upon each State for numbers in proportion to its population; to determine the annual expenditures for the service of the United States and to appropriate funds; to borrow money and emit bills of credit; to make war and peace, send and receive ambassadors, negotiate and make treaties, grant letters of marque and reprisal, and make rules governing captures at sea. For most of these functions, however, including the declaration of war, setting the size of the military and naval establishments, and appointing their commander in chief, the assent of nine States was necessary.[13] In order that the government might always have a visible head, a Committee of the States, consisting of one delegate from each State, was authorized to sit during a recess of Congress and to perform such duties as might be delegated to it exclusive of those powers for which the consent of nine States was requisite, provided that all its acts had the consent of nine members.

ADMINISTRATION OF FOREIGN AFFAIRS · It was noted how in the years following 1776 the tendency was away from administration by committees of Congress and in the direction of boards or commissions chosen from

[10]On July 12, 1776, Congress had voted that the name of the Confederation should be "The United States of America." Cf. *Journals*, Vol. V, p. 546; also *Articles of Confederation and Perpetual Union*, Arts. I and II.

[11]Ibid. Art. XIII. [12]Ibid. Art. I, sect. 8. [13]J. B. Sanders, op. cit. pp. 109–111.

outside Congress. The Articles of Confederation did not of necessity involve any change in the methods of administration, although changes did take place. On January 10, 1781, Congress had legislated to establish a Department of Foreign Affairs headed by a Secretary of Foreign Affairs, but it was not until the October following that the department was fully staffed and in operation.[14] The Secretary was authorized to attend and report in Congress and was not made subject to supervision by a committee. The first Foreign Office of the United States started out in a small three-story building with two undersecretaries, two clerks, and one translator, besides the Secretary. In February of the next year Congress changed the title to "Secretary of the United States of America, for the department of foreign affairs." Robert R. Livingston, chancellor of the State of New York, was its first incumbent, followed by John Jay, who served from 1784 until the opening of the new government under the Constitution. Under him its personnel remained small (though several more translators were added), but its prestige was established. Congress by law discontinued its practice of communicating directly with foreign nations and required that all communications should be through the Department of Foreign Affairs.

DEPARTMENT OF WAR · Created by act of Congress in the same month as the foregoing was a Department of War headed by a Secretary of War. Succeeding to the old Board of War, he performed numerous duties covering generally the same field as those of the War Department today. General Benjamin Lincoln was the first incumbent, succeeded by General Henry Knox, who remained on with the Washington administration.

THE DEPARTMENT OF FINANCE · Another innovation of the month of February, 1781, was a Department of Finance. In the following May, Robert Morris entered upon his duties as Superintendent. He was given the power of appointment for all members of his department and of dismissal for all persons connected with the expenditure of public funds. By the reorganization act of September 11, 1781, there now appeared the offices of Comptroller and Treasury Register, with the duties usual to such offices, the incumbents all appointed by Congress. The office of Superintendent was burdensome, its duties were numerous, and it included such problems as how to get funds from reluctant States upon which requisition had been made by Congress, and loans from foreign states and financiers who had received neither principal nor interest on loans previously made. Morris, in despair, concluded that "Congress cannot borrow and the States will not pay."[15] After his resignation in November, 1784, the position was abolished, and his department became the Board of Treasury, with a radical reorganization of its internal machinery. Three commissioners, appointed by Congress, were placed in charge. Their sharply increasing difficulties were a barometer of the decline in the prestige of the whole Confederation government.

[14]Ibid. p. 142. [15]Ibid. pp. 152–165.

NAVAL AFFAIRS · In February, 1781, Congress legislated to establish a Department of Marine, with a Secretary as its head. When the person first chosen to fill it refused the offer, the office of Agent of Marine was created, which was filled by the Superintendent of Finance. Upon the resignation of Morris the position of Agent was left unfilled, since the navy had nearly ceased to exist. When the new administration under the Constitution began, naval affairs were entrusted to the Department of War, where they remained until the Department of the Navy was created.

THE POST-OFFICE DEPARTMENT · Established in July, 1775, this was the first of all the departments. Benjamin Franklin, who had been the King's Deputy Postmaster-General in the American colonies, was placed at its head. From the beginning he was given the power to appoint his subordinates. The national government, without criminal jurisdiction, was without adequate power to protect the mails from robbery. In 1788 there were sixty-six deputy postmasters and postal stations strung all the way along from Maine to Georgia. Deficits, accelerated by a too generous franking system, marked these first years of the Post Office as they have ever since. The Articles of Confederation gave Congress the sole right to establish a mail system, but Maryland at least maintained a competing system.[16]

JUDICIAL MATTERS · The administration of justice remained, of course, with the States during the period 1776–1781, although Congress sporadically attempted to act as adviser or arbiter in disputes involving the States as parties. The Articles now declared that "the United States in Congress assembled" should be the last resort on appeal in all disputes and differences arising between two or more States concerning questions of boundary jurisdiction "or any cause whatsoever."[17] Congress, however, was not itself to hear the case but to establish the judicial machinery and set it in motion. A State might begin action by filing a complaint and a request for a hearing with Congress, whose duty it then was to appoint a panel of thirty-nine names, three from each State. Next the parties to the suit alternately struck one name from the list until it was reduced to thirteen; and from these seven or nine names were drawn by lot to constitute the court. This method was to be used only in case the two parties were unable to agree upon the personnel of the court. Judgments of the courts were declared to be "final and decisive," although no means for their enforcement was provided. The other judicial authority given to Congress was the appointing of courts for the trial of piracies and felonies committed at sea and the hearing of appeals from State courts in all cases of capture of vessels at sea.

THE POSITION OF THE STATES · Because Great Britain never had established a continental organization in America but had left the job of govern-

[16] *Articles of Confederation and Perpetual Union*, Art. IX.
[17] *Journals of the Continental Congress*, Vol. IV, p. 342.

ing to the individual colonies, it was natural that the colonies should take over when the British power collapsed. Revolutionary colonial governments began to be set up in 1774, and the movement proceeded rapidly. In May, 1775, the provincial congress of Massachusetts asked the advice of the Continental Congress "respecting the taking up and exercising the powers of civil government," and received the recommendation to proceed under its old charter of 1691, whose operation had been suspended by the British in 1774. On May 10, 1776, Congress recommended to the conventions and assemblies in general, "where no governments sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and the safety of their constituents and America in general."[18]

The preamble adopted five days later declared that it was now "absolutely irreconcilable to reason and good conscience" for the people any longer to take the oaths for the support of the royal government. By the early part of 1777 ten of the States had adopted new constitutions, Massachusetts falling into line in 1780, and Connecticut and Rhode Island remaining content with their old charters.[19]

The States individually regarded themselves as the heirs of the defunct British power and exercised all functions except such items as it was expedient or necessary to allow to Congress. The making and administration of the civil and criminal laws, the regulation of trade and commerce, the care of the poor, the maintenance of peace and order, in fact, domestic matters in general, fell to them. The Articles, however, enumerated a considerable list of fields in which they were forbidden to act without the consent of Congress. Chief among these were the sending and receiving of embassies and the making of treaties or alliances with foreign powers; the granting of titles of nobility; the keeping of vessels of war in time of peace or of armed forces except militia; and the levying of any taxes or duties which would interfere with the terms of treaties made by Congress. The fixing of the standard of weights and measures, and the regulation of trade with the Indians and of the value of coins, were left solely to Congress; but the power of coinage was shared by the two.

WEAKNESSES OF THE CONFEDERATION GOVERNMENT · The division of the powers of government between the States and the Congress was not a markedly inadequate one considering the needs of the time. The fundamental difficulty was that the States were bound only by a written pledge to perform their constitutional duties as members of the Confederation and to abstain from acts forbidden. The Confederation government had no direct access to individual persons but had to deal with the separate States. Of these it could make requests but could not compel obedience.

[18]H. C. Hockett, op. cit. Vol. I, pp. 113–120.

[19]*Articles of Confederation and Perpetual Union*, Art. VII.

Confederation expenses were to be defrayed out of a common treasury supplied by the several States in proportion to the value of all individually owned land within each.[20] Congress could not levy the tax or collect it. Suppose a State legislature refused to act? In 1781 Congress requested the sum of $8,000,000, allotting it among the States. About one fifth of it had been paid three years later. No State paid in full, and three paid nothing at all. By February 1, 1786, four such requisitions had been made, totaling $16,670,987, of which $2,450,803 had been paid.[21] As an excuse some States claimed that the assessments had not been equitably apportioned. Any of the other powers of Congress might be flouted with equal ease. Soldiers might be refused; treaties of Congress with foreign nations disregarded; its coinage rejected as legal tender; the mail service left without protection. The greatest single mistake in the allocation of powers, even on paper, was the denial to the Confederation of the regulation of foreign and interstate commerce, which meant that such regulation remained with the States. Individually and collectively they were at the mercy of England or any other commercial nation. States vied with each other to reduce tariffs in order to attract ships to their ports. The New York tariff on imports was lucrative because it bore on goods destined for Connecticut and New Jersey. Spain closed the navigation of the lower Mississippi to American vessels, and the Confederation government was without the means of commercial retaliation.[22] Great Britain struck a hard blow at a flourishing industry by forbidding the importation of American whale oils. Congress could not retaliate by closing American ports to British vessels. Its diplomats were kept waiting in the antechambers of the Foreign Offices. Money could no longer be borrowed abroad. The Revolutionary army had to be discharged at the conclusion of peace without pay, and only the dominant personality of Washington averted a disastrous mutiny. With the immediate danger from foreign nations removed by the treaty of peace, the motives for maintaining a common government were considerably lessened. The prestige of Congress fell to a low point; attendance at its sessions was small; its acts brought only a feeble response from the States.

## *BUILDING THE NATIONAL CONSTITUTION*

THE CALL FOR THE CONSTITUTIONAL CONVENTION · Not the dearth of funds, serious as it was, but the need for commercial regulation was the stimulus which set off the train of events leading to the adoption of a stronger national constitution. In March, 1785, commissioners from Virginia and Maryland met at Alexandria and Mount Vernon to attempt to

[20] A. S. Bolles, *Financial History of the United States, 1774–1789*, pp. 322, 348.
[21] H. C. Hockett, op. cit. p. 165.
[22] Ibid. pp. 196, 197.

reach an agreement on various commercial matters, including the navigation of the Potomac.[23] In considering the report of the commissioners the Maryland legislature proposed that Pennsylvania and Delaware be asked to join in the agreement. The Virginia legislature, realizing the weakness of any trade agreement of only regional extent, proposed, at the instigation of James Madison, that a convention, to which all the States should be invited, be held at Annapolis, Maryland, in September, 1786. Nine States responded by choosing delegates, but those from only five were on hand on the opening day. After waiting in vain for other representatives to appear the convention adjourned September 14, having adopted a report, penned by Alexander Hamilton, which characterized the situation of the States as "delicate and critical." It recommended to the States that they appoint commissioners to meet at Philadelphia the second Monday of May, 1787, "to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."[24] This was a cautious way of suggesting that the convention should propose amendments to the Articles of Confederation, a duty which under its Article XIII belonged to Congress. After seven States had already accepted the suggestion and elected delegates, this somnolent body on February 21, 1787, gave a cast of legality to the whole proceedings by passing the resolution:

> That in the opinion of Congress, it is expedient, that on the second Monday in May next, a Convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole purpose of revising the articles of confederation, and reporting to Congress and the several Legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the federal constitution adequate to the exigencies of Government, and the preservation of the Union.[25]

The convention was to be restricted to framing proposals to be sent to Congress for initial approval, but it was called for the same place and date as that suggested by the Annapolis convention.

COMPOSITION OF THE PHILADELPHIA CONVENTION · All the States but Rhode Island chose delegates to the convention, jointly by the two houses of the legislature except in Georgia and Pennsylvania, where the legislatures were unicameral. The suffrage in all States was restricted to property-owners or taxpayers, while in a majority additional property qualifications were required for membership in the legislature.[26] Nevertheless, in most of them the suffrage was on a reasonably broad basis because of the wide distribution of landownership.

[23]C. Warren, *The Making of the Constitution*, p. 23.
[24]Ibid. p. 42.
[25]*Journals of the American Congress for 1774–1788*, Vol. IV, p. 724.
[26]Max Farrand, *The Framing of the Constitution* (1913), chap. ii.

How well fitted was this group of fifty-five men for the great task of constructing a national constitution? Their first asset was political experience, for nearly all had held positions of importance in the government or in the politics of their respective States. A negative advantage was the absence of the extremists and no-compromisers, such as Thomas Paine and Patrick Henry, who had performed well their missions as torchbearers in the early days of the Revolution. While not an "assembly of demi-gods," as Jefferson impulsively asserted at the time, it did possess a leadership abundant and well-balanced in legal ability, practical wisdom, and a knowledge of the problems of government. At least six of its members should be rated as men of high distinction. The first, of course, was George Washington, without whose support probably no Constitution could have been agreed to in the convention or accepted by the States. Next came Benjamin Franklin, then eighty-two years of age and feeble, who contributed little to the letter of the Constitution but much to its spirit, and exerted throughout an influence for harmony and moderation. James Madison, of Virginia, must be ranked above all others in the amount and value of technical information furnished from his ample knowledge of history and political science. Major William Pierce, a delegate from Georgia, who amused himself by writing sketches of leading members, stated of Madison that "every person seems to acknowledge his greatness. He blends together the profound politician with the scholar. In the Management of every great question he evidently took the lead in the Convention, and tho' he cannot be called an orator, he is a most agreeable, eloquent and convincing speaker."[27] Madison's efforts in all the phases of the calling of the convention, the conduct of its proceedings, and the struggle for the adoption of its work have very justly earned him the title of "the Father of the Constitution." Two Pennsylvanians ranked next to Madison in the value of technical skill contributed. James Wilson, the convention's ablest lawyer, possessed a fine knowledge of the English common law and of constitutional principles. Gouverneur Morris, brilliant and well-informed, was a valuable contributor at every stage of the Constitution's construction, but particularly at the last in the task of drafting and phraseology. Alexander Hamilton, of New York, because of his intellectual ability and the prominent part he had played in the political and military affairs of the Revolution, enjoyed a high prestige in spite of his youth. Unfortunately his bias for aristocracy and a strongly centralized national government put him out of step with the general sentiment of the convention. On June 28, after a long, dull speech on a hot day by an advocate of States' rights, Luther Martin of Maryland, Hamilton left for New York and returned only twice thereafter for a few days, the last time to sign the Constitution. His two colleagues, Yates and Lansing, repre-

[27]Max Farrand (Ed.), *Records of the Federal Convention*, Vol. II, p. 473.

senting an extreme States'-rights viewpoint, abandoned their places in the convention on July 11, two weeks later. What may be called the secondary group of the convention comprised some men whose services were in certain respects of first importance. Here were George Mason, of Virginia, strongly attached to the principle of civil liberty; William Paterson of New Jersey, who presented the small-State plan; and Roger Sherman of Connecticut, who was chiefly instrumental in reaching the compromise between the small and the large States which made agreement on the Constitution possible. Influential in various matters were Rufus King, Elbridge Gerry, and Nathaniel Gorham of Massachusetts, John Dickinson of Delaware, Luther Martin of Maryland, Charles C. Pinckney and John Rutledge of South Carolina, and the two other Connecticut delegates, Dr. William Johnson and Oliver Ellsworth.

Two estimates of the character of the convention's membership, one from within the body, the other from a present-day scholar, are worthy of the student's attention. James Madison, writing toward the close of his life, said:

> But whatever may be the judgment pronounced on the competency of the architects of the Constitution, or whatever may be the destiny of the edifice prepared by them, I feel it a duty to express my profound and solemn conviction . . . that there never was an assembly of men, charged with a great and arduous task, who were more pure in their motives or more exclusively and anxiously devoted to the object committed to them, than were the members of the Federal Convention of 1787. . . .[28]

The estimate of Charles A. Beard, a meticulous student of the work of the convention, is in these words:

> It is not merely patriotic pride that compels one to assert that never in the history of assemblies has there been a convention of men richer in political experience and in practical knowledge, or endowed with a profounder insight into the springs of human action and the intimate essence of government. It is indeed an astonishing fact that at one time so many men skilled in statecraft could be found on the very frontiers of civilization among a population numbering about four millions.[29]

ORGANIZATION OF THE CONVENTION · How an assemblage of fifty-five men representing many and divergent interests succeeded in the space of three months in fashioning the medley of ideas and principles which they individually had brought with them to Philadelphia into a compact national charter of government is a matter of technical interest to the political

[28]James Madison, *Writings*, Vol. II, pp. 411, 412.
[29]C. A. Beard, *The Supreme Court and the Constitution* (1912), pp. 86, 87.

scientist. The chief features of the organization, procedure, and plan of work which they employed will be briefly examined.[30]

The convention had been called to meet at Philadelphia on the second Monday in May, which fell on the fourteenth. Some delegates met at that time and adjourned from day to day until the twenty-fifth, when a quorum of seven States appeared. George Washington was unanimously elected president and William Jackson secretary. On the twenty-ninth the standing rules were adopted which included provisions that the vote should be taken by States, that a quorum should consist of deputies from not fewer than seven States, and that all proceedings of the convention should be secret. The records kept by the official secretary were sketchy and incomplete, but future generations were to benefit from fragmentary notes taken by several members and the full notes by Madison. Madison told how he took a seat immediately in front of the president in the front row, missed no session for more than a few minutes, and with the aid of a homemade shorthand, wrote out the motions, votes, and speeches made by members. After his death (in 1836) the notes were purchased by Congress and published. They afford by all odds our most important source of information regarding the convention. The parliamentary device of the committee of the whole was sometimes used as a means of facilitating action by speed and informality in debate; on these occasions Washington left the chair, and his place was taken by Nathaniel Gorham as chairman of the committee. Special committees were several times used, in all cases being chosen by balloting of the State delegations.

STAGES IN CONSTITUTION-MAKING · The actual work of constitution-making by the convention may be marked out in five stages: (1) the choice of *agenda*, or a program of work, from May 29 to June 19; (2) the adoption of the basic features and principles of the Constitution, June 19 to July 26; (3) the formulation and adoption of detailed parts and the arrangement and grouping of the various clauses of the text, July 26 to September 11; (4) redrafting and reconsideration from the standpoint of style and form, September 12 to September 16; (5) the vote on the adoption of the completed document and its signing by the members of the convention, September 17.

THE CHOICE OF AGENDA · The Virginia delegates, while awaiting the gathering of a quorum, used their time in preparing the outline of a plan of government for presentation to the convention. This has been known as the Randolph Resolutions, because presented by Governor Randolph, or the Virginia Plan or Resolutions, but might perhaps have been named

[30] Madison's notes and the official *Journal* have been followed, in Max Farrand's *Records of the Federal Convention*. The best account of the convention's organization and procedure is Max Farrand's *Framing of the Constitution*. Cf. also C. Warren, *The Making of the Constitution* (1928); H. Lyon, *The Constitution and the Men Who Made It: the Story of the Constitutional Convention of 1787* (1936); R. L. Schuyler, *The Constitution of the United States; An Historical Survey of Its Formation* (1923); and H. C. Hockett, op. cit.

more properly for Madison, of whose hand it was chiefly the product. The plan consisted of fifteen resolves, which stated general propositions without details or any attempt at logical arrangement. For instance, the third read: "Resd. that the National Legislature ought to consist of two branches." They were intended to serve as a program or at least as points of departure for the discussions and deliberations of the convention. In fact, they did serve this purpose from May 30 to June 13, during which time they were deleted or added to in the committee of the whole, and on the latter date they were reported back to the convention as nineteen resolutions.[31] But meanwhile the small-States people had taken alarm and asked for time out in order to prepare a plan of their own. This was introduced by Paterson of New Jersey on June 15 and was generally referred to as the New Jersey Plan. During the next three days the two plans were debated in committee of the whole; and on the nineteenth, by a vote of seven States to three, with one divided, the Virginia Plan was voted out in preference to that of New Jersey, which meant only that it became the program of work. Meanwhile, on May 30, Charles Pinckney had presented a plan which was referred to the committee of the whole and never considered; and Alexander Hamilton, on June 18, in the course of a long speech presented a plan embodying a highly centralized government, giving Congress supreme legislative power and placing the appointment of all State governors in the hands of the President of the United States. His plan was meant only as a criticism of the others presented and was never considered.

THE ADOPTION OF THE BASIC PRINCIPLES AND FEATURES, JUNE 19 TO JULY 26 · In this period deliberations were in the formal convention instead of the committee of the whole, and the task was to adopt various propositions necessary to the construction of a constitution. This was the critical stage in which it was to be decided whether the varying interests could agree upon general principles. By all odds the most important matter to be settled was whether the thirteen states were to remain sovereign, bound together only by their own good will in a confederation, or whether, while retaining many of their powers, they should be merged in one general sovereignty of the people of all the States. Between the two there seemed to be no middle ground. The question was so delicate that no clear statement adopting one or the other theory was to be expected in any plan presented to the convention. Rather the theory was left to be implied or gathered from the sum total of the propositions of each plan.

THE VIRGINIA PLAN · The Virginia Plan, as amended and reported out by the committee of the whole to the convention June 13, implied an acceptance of the latter theory, one indication of which was the frequent use of the word *national* in referring to the central government.[32] With this plan the resolutions were generally consistent, such as the first, namely,

[31]Max Farrand, *Records*, Vol. I, pp. 235–237.
[32]Ibid. Vol. I, pp. 235–236.

"that a National Government ought to be established, consisting of a *supreme* Legislative, Executive & Judiciary." The National Legislature should consist of two houses, the lower chosen by the people of the several States, and the upper by the individual legislatures, the number of representatives in each to be divided among the States in proportion to population. Placing the emphasis upon numbers of the people rather than upon State equality was a pivotal matter, for it would be difficult for thirteen sovereignties to exist upon such a basis. Furthermore, the National Executive was to consist of a single person, to be chosen by the National Legislature for a term of seven years "with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for . . ." All this seemed to imply that the national government would operate directly on the individual citizens and not indirectly through the States. The National Legislature was to be given the powers of the Congress of the Confederation, which were extensive on paper, and, moreover, to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the U. S. may be interrupted by the exercise of individual legislation." It was also given the power to negative all laws passed by the several states contrary to the Constitution and treaties. All its acts were subject to an executive veto, which, however, might be overridden by a two-thirds vote. The National Judiciary was to be appointed for life or good behavior by the upper branch of the National Legislature. The inclusion of provisions that all State legislative, executive, and judicial officers be bound by oath to support the Constitution and that the central government guarantee the States a republican form of government was unmistakable further evidence of the nationalizing character of the Virginia Plan.

THE NEW JERSEY PLAN · The New Jersey Plan was in form and substance only a proposition for amending the Articles of Confederation. A one-house Congress was to remain, presumably with an equal representation of the States. In addition to the old powers, it was now to regulate foreign and interstate commerce, including the levying of import taxes, and to make requisitions for money on the States in proportion to their population. If a requisition was not honored, the money might be collected directly by the central government. There was to be an Executive of several persons, chosen for a fixed term by Congress and removable upon the request of a majority of the State governors. This Executive was to have an appointing power and general authority to "execute the federal acts" and to direct all military operations.[33] A Supreme Court, appointed for life or good behavior by the Executive, constituted the whole judiciary. All acts of Congress and treaties were declared to be the supreme law in the respective States and binding on their courts. If opposed by any State or individual, the Federal Executive was authorized to call forth the power of

[33]Max Farrand, *Records*, Vol. I, pp. 252–256; Vol. III, pp. 611–616.

the confederated States to compel obedience. The New Jersey Plan obviously represented a considerable strengthening of the central government on paper; but that these powers could be made good by a government depending upon a Congress of delegates from thirteen State governments of equal rank seems unlikely. In spite of substantial delegations of power to the Confederation government, the centers of political authority remained in the individual States.

THE GREAT COMPROMISE · Rejection of the New Jersey Plan and the adoption of the Virginia Plan as the agenda of the convention did not mean that the contest between those wishing a confederation and those wishing a federal union had been settled. The contest was only postponed until resolutions of the Virginia Plan bearing on that issue should come up for decision. On June 21 the States voted Ayes 7, Noes 3, divided 1, "that the Legislature ought to consist of two Branches"; and after further discussion the vote was Ayes 9, Noes 1, divided 1, that the lower branch should be elected by the people. Both votes were victories for the proponents of a strong central government. On June 27, with both the weather and men's tempers growing warmer, Luther Martin of Maryland, for the States party, delivered a three-hour speech, the chief point of which was that the "General Govt. was meant merely to preserve the State Governments, not to govern individuals: that its powers ought to be kept within narrow limits"; and the next day continued, as Madison reported, "with much diffuseness & considerable vehemence." It was at this point that the aged Franklin, fearing the break-up of the convention, proposed that henceforth the meetings be opened each morning with prayer. The next day, June 29, Madison sounded an appeal to the opposition to give way. They were representing a principle, he believed, which "was confessedly unjust, which cd. never be admitted, and if admitted must infuse mortality into a Constitution which we wished to last forever."

The answer of the small-States delegates was a repledging not to give way on the issue. Perhaps this had a sobering effect on several delegates; for when on Monday, July 2, the question was up for giving all States an equality of votes in the upper house, the vote was Ayes 5, Nays 5, divided 1. This was stalemate: the large-States party had lost its majority. General Pinckney, who was personally opposed to the small States' demand for equal representation, but nevertheless anxious to avert a failure for the convention, moved that the whole matter be referred to a grand committee composed of one person from each State. Election by ballot, for some reason or other, resulted in loading this committee with leaders of the small-States group. Its first report on July 5 recommended that in the second branch of the Legislature each State should have one vote, and, as a consolation to the losers, that all bills for raising revenue or appropriating money should originate in the lower house, where the large States had dominance. Madison was quick to point out that this was no real conces-

sion; and there was still much talk about refusing to accept a union based on unjust principles.

On July 16 the report of the special committee, including the equality of votes in the upper house, carried Ayes 5, Nays 4, divided 1, after which Randolph, in behalf of the large-States group, hastily asked for an adjournment in order that they "might consider the steps proper to be taken in the present solemn crisis of the business." The adjournment was voted and the conference held, and the next morning the convention passed on smoothly to the next item on the agenda. This was the "bloody angle" of the convention. The die had been cast in favor of a union which might in time become one sovereignty instead of thirteen. All other matters thereafter to be considered by the convention were of small moment compared with this.[34]

DETAILS AND ARRANGEMENT · By July 26 the convention had again worked through the revamped Virginia Plan, striking out certain provisions and adding others until it amounted to twenty-six resolutions. These were now a medley of propositions, uncoördinated and covering the field incompletely. What was needed to convert them into a constitution was the supplying of details and the symmetrical arrangement of the whole in articles and sections. Three days earlier the convention had elected a Committee of Detail to perform this task and to report back on August 6.[35] Composed of Rutledge of South Carolina, chairman, Gorham of Massachusetts, Ellsworth of Connecticut, Wilson of Pennsylvania, and Randolph of Virginia, it was a very able one and destined to perform a distinguished service. The full notes of its proceedings which have come down to us show clearly the stages through which the Constitution slowly took form. The old Articles of Confederation were freely drawn upon, and considerable was taken from the New Jersey and Pinckney plans, which the convention at the last moment had referred to them. When their report was made, it was found that the twenty-six resolutions referred to them, the equivalent of five and a half printed pages, had been expanded into a document of thirteen pages, as compared with the fourteen of the Constitution as adopted. It now had the form of a constitution, with a preamble and twenty-three articles, seven of which were subdivided into numbered sections.

Much of the new text embodied details which flowed naturally from propositions already adopted, although a few clauses went considerably beyond that point. Among the portions of the present Constitution whose form and content are due chiefly to the Committee of Detail are these: the list of eighteen powers of Congress, including the famous clauses on taxation, borrowing, commerce, and that to make "all necessary and proper" laws to carry into execution those enumerated; the definition of the jurisdiction of the Federal courts; the clause prohibiting the States from coining

[34]Max Farrand, *Records*, Vol. II, pp. 15–19.
[35]Ibid. Vol. II, p. 95, July 23, 1787.

money, emitting bills of credit, and making them legal tender; Article IV, on interstate relations; and the definition of treason against the United States.

The present-day office of President owes much to the draftsmanship of the Committee of Detail.[36] The adopted resolutions had simply stated that he should have "power to carry into execution the national laws" and to veto acts of Congress, subject to reversal by a two-thirds vote of both houses. The draft prepared by the Committee of Detail began with the statement that "the Executive Power shall be vested in a single person," which courts have since held to confine all executive power to the President and his subordinates. Then were added the powers to "take care that the laws of the United States be duly and faithfully executed; to receive ambassadors; to grant reprieves and pardons; to be commander-in-chief of the army and navy; to appoint and commission officers; to convene Congress, give it information and make recommendations for legislation." For the President the title of "His Highness" was proposed. The committee inserted among the powers of Congress a new one, "to emit bills on the credit of the United States," which was stricken out by the convention but later assumed by Congress in a time of dire need and approved by the Supreme Court.

On August 6 the convention took up the report of the Committee of Detail and worked on it point by point, approving, modifying, adding or striking out. On the last day of the month those portions of the Constitution which had been postponed or not acted upon were referred to a committee consisting of one member from each State, from which piecemeal reports were made to the convention from day to day. Its most important proposition was the plan for the choice of the President by an Electoral College, which was brought in on September 4.[37] The original Virginia resolutions had called for his election by Congress, and the matter had been up and down the convention and the Committee of Detail ever since, with no satisfactory solution in sight. Many distrusted such a union of legislative and executive powers, and still more feared an election directly by the people. Choice by an independent body of electors would avoid the evils of both plans. It was thought that the system in practice would strike a nice balance between the viewpoints of the small and the large States. Since the electors were required to vote separately in their respective States, no person would be likely to secure a majority of the votes cast; and the choice would then be made in the House of Representatives, where the vote was to be by States. The vote of the electors would amount to a nomination, and here the large States would have the numerical advantage; choice in the House would be from among the five receiving the highest number of electoral votes, with the small States

[36]For the report of the Committee of Detail, cf. Ibid. Vol. II, pp. 177–189.
[37]Ibid. Vol. II, pp. 497, 498.

having equal weight. In the matter of the term of the President the modified Virginia resolutions, referred to the Committee of Detail on July 28, had set six years, without eligibility for re-election, and the convention had raised this to seven years. The committee of the States now recommended four years, with no mention of ineligibility for future terms; the recommendation was accepted by the convention without discussion.

STYLE AND FORM · On September 8 nearly all the recommendations of the two committees had been disposed of, and the Constitution was turned over to a committee of five "to revise the style of and arrange the articles agreed to by the House."[38] This Committee of Style, as it was called, was all-American in ability, with Gouverneur Morris as chairman, and James Madison, Alexander Hamilton, Rufus King, and Dr. William Johnson as his colleagues. To Morris alone, however, seems to belong the credit for a task so well performed that the Constitution has since stood unrivaled among similar documents in the simplicity, clarity, and accuracy of its language. While literary style and form and not content was the sole duty of the committee, that limitation seems to have been violated in a few instances. The most important one was with respect to the taxing power of Congress. The Committee of Detail had drafted it to read that Congress should have power "to lay and collect taxes, duties, imposts and excises." Some doubt having arisen as to whether this included the power to pay for the debts of the States and of the United States incurred in the prosecution of the Revolution, the convention tacked to the clause the words specifying three objects for which taxes could be levied: "to pay the debts and provide for the common defense & general welfare of the U. S."[39] The Committee of Detail left the text unchanged, but inserted a semicolon between "excises" and "to," so that it read: "to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense & general welfare of the United States." Had the change not been detected in the convention, Congress would have been vested with practically unlimited power of legislation over the whole field supposedly otherwise reserved to the States. The preamble was another instance. As it had come from the convention it read: "We, the people of the States of New-Hampshire, Massachusetts [the other names follow], do ordain and establish the following Constitution for the Government of Ourselves and our Posterity." Morris's redraft was the famous one as known today. Its opening phrase, "We, the People of the United States," was subsequently accepted by the Supreme Court as an argument in favor of national sovereignty and power as against States' rights.[40] The Committee of Style reported the redrafted Constitution back to the convention on September 13, where for three days it was rechecked and a few minor textual

[38]Max Farrand, *Records*, Vol. II, p. 553, September 8, 1787.
[39]Ibid. Vol. II, pp. 181, 569, 594; Vol. III, Appendix CCCLXXII.
[40]Ibid. Vol. II, pp. 565, 590; *McCulloch* v. *Maryland*, 4 Wheaton 316 (1919).

changes made. A last-minute plea by George Mason for a new convention to propose amendments including a bill of rights was turned down.

ADOPTION BY THE CONVENTION · On Monday, the 17th of September, the engrossed Constitution was read, after which Wilson read a speech written out by Franklin pleading for unanimity among the delegates in approval. His motion that the members sign under the form "done in Convention, by the unanimous consent of the States present the 17th of September, etc." was carried.[41] A last-minute change was made in the ratio of representation in the House of Representatives from 40,000 to 30,000, on which Washington made his first and only speech of the convention. The votes of the States on the question to agree to the Constitution as enrolled was unanimous. Members proceeded to affix their signatures, State by State, until they numbered thirty-eight (that of John Dickinson, who was absent, by a colleague as proxy). Three onlooking members, Randolph and Mason of Virginia and Gerry of Massachusetts, viewing certain features of the Constitution with alarm, refused to sign.

## *RATIFICATION OF THE CONSTITUTION*

ADOPTION OF A METHOD · Was the document written by the convention a proposal for an amendment to the Articles of Confederation, or was it an independent proposition for a peaceful revolution?[42] If the former, the steps necessary to its legal adoption were clear: approval by Congress, confirmation by all thirteen State legislatures, and signing by the various State delegations in Congress. The Philadelphia convention, in truth, had met in response to a double call: one from the Annapolis convention and one from the Congress of the Confederation. Its legal position was only that of an unofficial meeting of State delegates to recommend amendments to Congress for its approval and submission to the State legislatures. However, there was little pretense of legality from the beginning on the part of the large-State party; for the Virginia Plan proposed ratification by popularly elected conventions in the States after the approbation of Congress had been received. The report of the committee of the whole recommended submission to State conventions, but left Congress entirely out of the picture. Congress was back again in the Committee of Detail report and finally out in the Committee of Style redraft, which was condensed to read: "The Ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the Same."

There was strong sentiment among the small-States delegations for ratification by the State legislatures, which, of course, was the method prescribed by the Articles of Confederation and consistent with the theory

[41]Max Farrand, *Records*, Vol. II, pp. 641–643, 646.

[42]A. C. McLaughlin, *A Constitutional History of the United States* (1935), pp. 165–168.

of State sovereignty. A motion to that effect received the votes only of Connecticut, Delaware, and Maryland. George Mason backed the plan of ratification by popularly elected conventions, on the grounds that the legislatures were mere creatures of the State governments and that properly resort should be taken "to the people with whom all power remains that has not been given up in the Constitutions derived from them."[43] Randolph rounded out the argument by suggesting that the use of conventions would circumvent the local demagogues who were strongest in the State legislatures.

The method of ratification specified by the convention violated the constitutional mode in three respects: (1) the consent of Congress was not required, (2) nine instead of thirteen States were made sufficient, and (3) popularly elected conventions were substituted for the State legislatures. Adoption of the new Constitution was to be a revolutionary break with the political past instead of the repair of an existing structure. James Wilson, when so reminded, remarked, "The house on fire must be extinguished without a scrupulous regard for ordinary rights."

RATIFICATION BY THE STATES · On September 13 the convention had adopted a resolution for transmitting the Constitution and setting in motion the machinery of the new government should the decision of the States be favorable. The conventions were to be called under the authority of the respective State legislatures, and their decisions reported to the old Congress. Upon receiving the ninth favorable report that body was expected to fix a day for the appointment of the electors by the States, and another on which they should assemble to cast their votes for President, and to designate a time and place for starting the new government. Senators and Representatives, who meanwhile had been elected, should meet on the day appointed by Congress to open and count the electoral votes.

The campaign for the ratification of the Constitution was a heated one.[44] Men who had opposed in the convention some of its basic features now carried the fight to the people and into the conventions. Numerous trivial weaknesses of the Constitution were brought forward and exaggerated, but opposition crystallized about a few important ones. There was the general objection felt in all sections that a too highly centralized government had been built up at the expense of the States. Getting down to details, people found the omission of a bill of rights the source of the greatest dissatisfaction. The viewpoint of the framers was that since Congress could legislate on only a few enumerated matters, not including, for instance, the press, speech, and religion, there was no need for guarantees

[43]Max Farrand, *Records*, Vol. II, pp. 88, 89.

[44]J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (ed. 1854); H. C. Hockett, op. cit. pp. 255–260; S. B. Harding, *The Contest over the Ratification of the Federal Constitution in the State of Massachusetts* (1896); C. E. Miner, *The Ratification of the Constitution by the State of New York* (1921); C. Warren, op. cit. pp. 733–782, Appendix D.

of their freedom. Jefferson, writing from Europe, pointed out this omission as a great weakness, and Madison later acknowledged that a great mistake had been made.[45] Some States ratified with the understanding that such amendments should be offered at the earliest opportunity.

The second most serious criticism was the failure to make the President ineligible for a second term.[46] The Virginia resolutions and their subsequent restatements had all provided for one term of six or seven years and a ban against re-election. However, when the proposition for his choice by electors was adopted, which supposedly removed him from the domination of Congress, the shorter term and re-eligibility were adopted. Jefferson was adamant on the point.

> Reason and experience tell us that the first magistrate will *always* be re-elected, if he *may* be re-elected. He is then an officer for life. . . . The power of removing, every fourth year, by the vote of the people, is a power which they will not exercise; and, if they were disposed to exercise, they would not be permitted.[47]

Objections to the commerce power of Congress were particularly strong in the South, where there was fear of discriminating regulations and tariffs. The powers concentrated in the Senate, it was argued, were an encouragement to that body to connive with the President for the seizure of supreme power.

The ratification campaign in New York was the occasion for the ablest exposition of the Constitution that has appeared to this day. This was first published as a series of letters to New York newspapers signed *Publius*, arguing for the affirmative, which were later gathered together in one volume entitled *The Federalist*.[48] Of its eighty-five numbers Alexander Hamilton was the author of sixty-three, Madison of fourteen, Jay of five, and Hamilton and Madison jointly of three others. While the letters were too lofty in tone for the masses, they must have exerted a considerable influence among the more highly placed members of the community.

The ninth State, New Hampshire, ratified the Constitution on June 21, 1788, about nine months after it had been submitted. Strangely enough, Delaware, the first to ratify was one of the chief trouble-makers of the convention; and two of its abettors, New Jersey and Connecticut, were third and fifth in order, respectively. Virginia, which had furnished a wealth of leadership, was number eight, with a vote of eighty-nine to seventy-nine; while New York, which lay athwart the line of States between Canada and the Atlantic, was tenth in line, with a close vote of thirty to twenty-

[45] C. Warren, op. cit. pp. 509, 510, 768, 769.

[46] C. Warren, op. cit. pp. 769 ff.

[47] Thomas Jefferson, *Writings* (Library Edition, 1903), Vol. VI, pp. 389, 390; also "Letter to John Adams," November 13, 1787, p. 370.

[48] *The Federalist* has been published in several editions: H. C. Lodge (1895); P. L. Ford (1898); Goldwin Smith (Introd.) (Willey Book Co., New York, 1901).

seven. North Carolina and Rhode Island entered the Union in November, 1789, and March, 1790, respectively, when the new government was already in operation.

Meanwhile James Madison lost little time in attempting to realize the understanding that a bill of rights should speedily be proposed. Using as a basis the more than one hundred proposals which came from the various State conventions, he drafted articles of amendment and introduced them in the House of Representatives in June, 1789. Of the seventeen which passed that body, twelve were approved by the Senate. Ten were eventually ratified by the States, the action of Virginia, December 15, 1791, completing the process. The first nine had to do with the civil rights of individuals; the tenth reasserted the reserved powers of the States.[49] They should be considered as an integral part of the original Constitution.

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[49] H. V. A. Ames, *Proposed Amendments to the Constitution*, pp. 307–310.

On August 20, 1787, Charles Pinckney had submitted several propositions for reference to the Committee of Detail, embodying guarantees of liberty of the press, the benefit of the writ of habeas corpus, guarantees against the quartering of troops in private homes, and provision for the subordination of the military to the civil authorities. The committee made no recommendations on the resolution. On September 12 George Mason noted the absence of a bill of rights and remarked that one would "give great quiet to the people." Gerry's motion for a committee to draw up such a bill received no affirmative vote. Cf. Max Farrand, *Records*, Vol. II, pp. 341, 587, 588.

CHAPTER IV

# *The National Constitution: Characteristics and Methods of Change*

It has been pointed out that the term *American Constitution* has two meanings, a broad and a narrow one. The first refers to the whole body of our Federal fundamental law; the second, to the written Constitution. The first is to be found in the written Constitution, including its amendments, in decisions of the Federal courts, in certain customs and usages of our public officers and people, and in some statutes of Congress which are of a basic character. Because of its rigidity the written part gives form to the whole mass; but the spirit and dynamic qualities of the Constitution cannot be appreciated without a knowledge of its supplementary parts. The written form of the Fathers mostly remains, but buried deep under the colorful incrustations of time and usage. The characteristics of the Constitution can be gathered only by a consideration of all its parts. The methods of constitutional growth and change are various: the written part is modified by formal amendments; judicial rulings are modified by later judicial decisions; customs and usages, by newer ones made in response to the pressure of conditions and events; and organic statutes, by subsequent action of Congress.

## *CHIEF CHARACTERISTICS OF THE CONSTITUTION*

THE CONSTITUTION AS A DOCUMENT · The written Constitution of the United States is a model of brevity. Its text, including amendments, covers only about fifteen pages of ordinary size and can be read through in less than half an hour. Its language, thanks to several masters of legal English (Gouverneur Morris, James Madison, James Wilson, and others), is clear, concise, and in general understandable to the ordinary layman. The work of the Philadelphia convention was arranged in seven articles. The first three deal with the legislative, executive, and judicial departments, respectively; the fourth, with inter-State and State-Federal relations; the fifth, with the methods of amendment; the sixth, with guarantees of Federal supremacy and the matter of Revolutionary debts; and the seventh, now obsolete, with the method of ratification. Appended to the original document are twenty-one articles of amendment. While several great historic controversies have arisen over the application of the Constitution to certain social and economic questions, the disagreements centered more

on omissions than on concrete clauses. The framers prudently forbore to legislate on matters which would have wrecked the convention, and wisely kept silent on questions which fluctuate from generation to generation. So Webster, Hayne, Calhoun, and others were free to debate warmly in the 1830's on whether sovereignty rested in the nation or in the States, the answer to which could only be inferred from the text of the Constitution. Likewise the disagreements on the power of Congress to charter banks, govern the territories, and establish a paper currency arose from what was left unsaid rather than from obscure phraseology.

FEDERALISM · The most striking feature of the Constitution is its adoption of the federal form for the American state. In every area of the American home territory, except the District of Columbia, the powers of government are divided between two agencies, the national and State governments. Every citizen owes allegiance to both. He is subject to two sets of laws, pays taxes to both, and, as an elector, participates in molding the government of both. He may commit an act which is criminal as respects one but not the other, or which may fall under the jurisdiction of both. To the national government was given a list of enumerated powers; to the States were reserved all others. The Tenth Amendment, which was adopted to make this principle of distribution clear beyond any doubt, states that "all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The intention of the framers was made reasonably clear. The States were to remain the chief centers of legislation and administration.[1] With the enumerated exceptions, the general run of governmental powers was left to them. They, and not the national government, were the heirs of the general legislative supremacy which Parliament had wielded, and of the common law and the subjects which it embodied. Personal and property rights, civil and criminal offenses in general, thus were matters of state jurisdiction. The great subjects of manufacturing, mining, agriculture, labor, commerce (except interstate and foreign commerce), and internal police were so reserved and thus beyond national action. To the new national government were given the control of military affairs, the conduct of foreign relations, the establishment of a national currency, the regulation

[1]Several of the *Federalist* papers were devoted to a refutation of the charge that the new national government had been made too strong. Madison, in No. XLIV, thus summarized the division of powers: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State." (*The Federalist* (Rev. Ed.; the Colonial Press, 1901), p. 256)

of interstate and foreign commerce, the adjudication of certain classes of cases at law where, because of the national or interstate character of the parties, the courts of the States would be inadequate, and legislative power with respect to patents, copyrights, bankruptcy, and naturalization. While these are mostly of vital importance, they are few in number as compared with the potential powers of the States.

The federal principle was adopted by the Fathers because a unified and centralized state was not attainable at the time; but the scheme had merits of its own apart from the pressure of necessity. The division of the country into forty-eight territorial units permits the people of each to establish such a government as best suits its needs. Differences of climate, of topography, of economic resources, and of the character of the population call for institutions of government and laws corresponding to these needs. Florida and southern California are subtropical in climate, while the northern tier of States has the short summers and severe winters characteristic of that latitude. The Dakotas are almost entirely agricultural in occupation and about 90 per cent rural in population, while Massachusetts is primarily industrial and commercial and its population over 90 per cent urban. Governmental problems in the two naturally are very different. The former is interested in legislation peculiar to the needs of an agrarian population, while Massachusetts must deal with the difficult problems involved in the struggle between labor and capital and with the problems of urban life such as housing, police, adequate water supplies, health and sanitation. Colorado, a mountain State, found parts of the Spanish code of laws better fitted to the needs of its mining industry than those of the common law of England, and adopted them. California did the same with respect to some rules relating to irrigation and water rights. Louisiana, a State with a large element of French descent in its population, adopted a set of laws based on the Code Napoléon rather than on the English common law.

The federal form also avoids the necessity of a top-heavy bureaucratic organization at Washington. If the matters now under the jurisdiction of the States were all governed by one set of laws and centrally administered, it would necessitate a body of national civil servants perhaps double that of the present; would involve the annoyances and delays incidental to a system which calls for the reference of local and regional matters to a government several thousand miles distant; and, unless carefully safeguarded, would make for a spoils system on a scale beyond any yet known.

The existence of the States is, furthermore, an encouragement to the principle of self-government. The duty of their citizens to see that public officials are elected, policies of legislation developed, and administration honestly and effectively conducted is a training school in democratic government. Justice Holmes of the United States Supreme Court spoke of the States as "insulated chambers" in which experiments in government

may be safely carried out.[2] Our political history bears ample testimony to the progress in ideas of government which has come about through trial and error in the individual States. The budgetary system for the handling of public finances, labor laws, and public health measures are only a few of the things developed through the initiative of the people of some of the States and later adopted into the machinery of the national government.

The weaknesses of the federal system are found chiefly in the tardiness with which necessary redistributions of power between the central and the State governments are carried out. As the people of the country become more interdependent economically, there is a corresponding need for an extension of the jurisdiction of the national government. Matters which, a half century ago, were merely of local concern now are of national significance and call for uniformity of action throughout the land. Some of these are found in the fields of manufacturing and agriculture. Much as the strength of a chain is measured by its weakest link, so the utility of the country's child-labor, corporation, and divorce laws is measured by those of the most backward State. The federal form may well be a handicap in emergencies where unity of action is necessary, as during the War of 1812, when some States refused to permit their militia to leave their borders, and during the great economic depression following 1929, when a broader federal jurisdiction was needed.[3] Some students of government regard federalism as an unstable form of organization, transitional between a regime of independent confederated units on one hand and a unified state on the other. Recent tendencies in the United States, and in such few other federal states as remain, point to such a conclusion.

THE SEPARATION OF POWERS · The second of the major features of the Constitution is its plan for the separation of powers. The powers of government are divided among three great co-ordinate departments: the legislative, the executive, and the judicial. This scheme is based upon a cynical view of human nature. Thomas Hobbes, the philosopher, expressed it in his treatise on government, the *Leviathan*, where he said, "I put for a generall inclination of all mankind a perpetuall and restlesse desire of Power after Power, that ceaseth onely in Death."[4] The Fathers believed that human beings, on the average, if given places of power, would tend to aggrandize that power, and that this tendency could best be combated by setting up several major divisions of government, each endowed with means to hold the others in check when they sought to grasp for more. The French philosopher Montesquieu, in his treatise *The Spirit of the Laws*, had expounded this idea in the period preceding the American Revolution, and

[2] *Truax* v. *Corrigan*, 257 U.S. 312 (1921). "There is nothing I deprecate more than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States."

[3] K. C. Babcock, *The Rise of American Nationality* (1906), p. 155.

[4] *Hobbes's Leviathan* (Oxford, 1909), chap. xi, p. 75.

it had received general acceptance by the leaders in the Philadelphia convention. Strangely enough, Montesquieu's dogma was founded on an imperfect observation of the working of the British government. While outwardly the government of Queen Anne was based on the principle of the separation of powers, in actual operation it was not, since Parliament already had made itself supreme over the crown. Had Montesquieu looked backward into seventeenth-century England, he would have found a practical application of his theory, for both the executive and the legislative department—Stuart king and Parliament—claimed independence; but he would not have expected to find in that century of turmoil the magic formula for good government.

The Constitution makes no formal avowal of the principle of the separation of powers, but this principle is implicit in the provision for the three departments, respectively, in the first three articles. The courts recognize its existence there. The Supreme Court, in 1880, said:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government . . . are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department and no other.[5]

That there is considerable of value in the concept of the separation of powers is not to be denied. For one thing, the separation of powers may be efficacious in preventing a department dominated by bad motives or bad judgment from carrying out its policy. A President determined to make a hostile move against a foreign nation would find his hands bound if Congress failed to appropriate funds. A Congress controlled by a majority bent on a radical program might have awaiting it the veto of the President, or the threat of a hostile use of his patronage power or of unfriendly pronouncements to the people of the nation from the unrivaled platform of the White House. Its legislative acts, if unconstitutional, would meet annulment in the Federal courts. The Supreme Court, itself, if derelict in its duties, might find itself enlarged through an act of Congress or appointments by the President to the point where a new majority was created. Safety, therefore, in so far as inaction gives safety, is ensured by the separation of powers. The struggle between the executive and the legislative department in the turbulent years following the Civil War gave the sepa-

[5] *Kilbourn* v. *Thompson*, 103 U.S. 190, 191 (1880).

ration-of-powers principle its most severe test.[6] Strong and willful men headed each: Andrew Johnson as President, and Charles Sumner in the Senate and Thaddeus Stevens in the House of Representatives, backed by a faithful two-thirds majority in each House. The President, purporting to act under the authority of his constitutional powers as commander in chief of the army, formulated a program for the reconstruction of the Southern states. Congress proceeded with one of its own and reversed that of the President in so far as it had been put in execution. A complete alienation between the two departments resulted. Congress, fortified with a strong two-thirds majority, proceeded to legislate to deprive the President of the more significant powers which his office previously had been given by statute and to attenuate so far as possible those conferred on him by the Constitution. Finally the so-called "Tenure of Office Act" set a four-year term for the heads of the executive departments, and the consent of the Senate was required for their dismissal. This, naturally, struck at the heart of his control over the national administration. The President, believing it unconstitutional, proceeded to remove Edwin Stanton from his position as Secretary of War and to appoint General Grant in his place. This led soon to the impeachment of the President by the House and his trial before the Senate. The plan was to bring about his removal and the succession of Senator Benjamin F. Wade, president pro tempore of the Senate, a leader of the anti-Johnson party in Congress, and so the complete triumph of the legislative branch. Success seemed assured; but at this point one of the checks of the Constitution began to operate: the requirement that in such trials the Chief Justice of the Supreme Court should preside. Chief Justice Salmon P. Chase performed this duty with impartiality and dignity and succeeded in large measure in giving a judicial atmosphere to the trial, whereas leading Senators had insisted that the usual safeguards of judicial procedure were not required in such a proceeding. When the roll call was taken on the question of guilt, the Senate fell short of conviction by one vote, and the most ambitious effort in the history of this government to reduce the executive to subserviency to the legislative department failed.

No President has served out a four-year term without encountering, in at least a few conspicuous instances, the checking power of Congress or of the courts. President Grant's determination to bring about the annexation of the island of Haiti was thwarted in the Senate by leadership from within his own party. In later years the earnest efforts of President Wilson to attach the United States to a world-wide League of Nations led to a struggle second only to that between Johnson and Congress, and defeat for the President. The action of the United States Supreme Court in declaring invalid acts of Congress which overstep its constitutional authority is one of the most familiar examples of the operation of this scheme. In the second

[6] W. A. Dunning, *Reconstruction, Political and Economic* (1907), chaps. iv–vi.

F. D. Roosevelt administration two members of the dangerous triangle, the executive and the legislative, were combined for a time against the third, the Supreme Court, which was rescued from great impairment by the action of the Senate.[7]

The principle of the separation of powers, distrusting human ambition, sets up one department to watch another. A high value is placed on safeguards, even to the extent at times of sacrificing leadership and positive action. Great Britain brought unity to its political departments over two hundred years ago by the establishment of legislative supremacy.[8] The powers of the crown were placed in the hands of a prime minister, a member of Parliament and consequently responsible to that body. This adjustment was based on the idea that effective government demands unity in legislation and administration, and carries out the democratic principle that the will of a popular majority on a given public question should be carried through the stages of legislation and execution under a unified leadership. The American system, in the degree that the popular will is thwarted by conflicts and bargaining between executive and legislature, falls short of that objective. The plan of the Fathers, however, was saved by something which they evidently did not foresee. The political party brought unity where separation had been expected. By its capture of the Presidency and control of the two Houses of Congress it is able to write the campaign issues into the law of the land. The national government has operated best in those administrations where strong party leadership has brought unity between the executive and legislative departments, as under Jefferson, Lincoln, Wilson, and the two Roosevelts. The most salutary checking and balancing is in the opposition party rather than between the departments.

JUDICIAL REVIEW · Another basic feature of the Constitution is the device of judicial review. By this is meant the right of the Federal courts, on the occasion of a suit at law, to declare a legislative act invalid if found contrary to the Constitution. The power was first assumed by the Supreme Court in 1803 in the case of *Marbury* v. *Madison*, wherein was involved a section of the National Judiciary Act of 1789.[9] The Court found the basis of its power in Article VI of the Constitution, which declares the Constitution to be the supreme law of the land. Since that supremacy might conceivably be challenged by State statutes and city ordinances as well as acts of administrative officials, Federal and State, all have been made subject to judicial review. Down to the October term of 1941 the Supreme Court had in seventy-seven instances held acts of

[7]Cf. Chapter XXIII. The compromise act (50 Stat. 752) of August 24, 1937, regulating the Supreme Court fell considerably short of the President's demands.

[8]Walter Bagehot, *The English Constitution* (2d ed., 1903), chap. vi. A. L. Lowell, *The Government of England* (new edition, 1912), Vol. I, chap. i.

[9]1 Cranch, 137 (1803). Cf. Chapter XXIII, infra, for a detailed discussion of the problems of judicial review.

Congress unconstitutional.[10] While these decisions represent only a relatively small part of the Court's output, the influence exerted has been out of all relation to the number of cases. The total of State statutes declared invalid has, of course, been much greater. Undoubtedly the precedents in these cases have been a constant and tempering influence on the legislation of Congress; and they have set standards for State legislation of compelling force, especially in the fields of social regulation.

The review of legislation has enabled the Supreme Court to act as the guardian of the Constitution and of the form of government which it embodies.[11] There are forty-eight States, each dealing with matters which might concern one or more of the others. Two coequal political departments are established for the national government, and the powers of each are defined. What more natural than that uncertainties as to the respective fields of authority should arise and cause conflicts? The device of judicial review through more than a hundred and forty years served to restrain the legislative and executive departments from destroying each other's vitality. It deterred the States in the early days of the republic from undermining the powers of the weak national government, and later it prevented the latter from destroying the legislative and administrative independence of the former. It restrained government from violating the boundaries of the freedom which the Constitution had marked out for the individual. A by-product of these specific services is an interpretation of the Constitution giving it a uniformity of meaning throughout all the States and territories of the nation.

DEMOCRACY · There is no dogmatic assertion of the principle of popular sovereignty in either the written or the supplementary part of the Constitution. None was necessary, for it is implicit in both.[12] In its preamble the people of the United States are named as ordaining and establishing the Constitution. The Tenth Amendment declares that the repository of the reserved powers is the States or the people. The elaborate safeguards

[10]From the tabulation in L. E. Evans, *Cases on American Constitutional Law* (C. G. Fenwick, Ed., 1942), pp. 61, 62. Only two of these occurred before the Civil War. Twenty-four were between 1865 and 1899; thirty-eight, between 1901 and 1932; and thirteen between 1933 and 1936. Since then no act of Congress has been declared unconstitutional. For an analysis of the cases since 1933 cf. S. J. Shearn, "Split Decisions in the Supreme Court Invalidating Federal and State Enactments and Attempted Exercises of Power, 1933–1937," *American Bar Association Journal* (May, 1937), Vol. XXIII, pp. 329–334.

[11]C. Warren, *Congress, the Constitution, and the Supreme Court*, chaps. i, ii.

[12]*United States Constitution*, Art. I, sect. 4; Art. II, sect. 1; Amendments XV and XIX. James Wilson, one of the chief architects of the Constitution, made the following statement to the Pennsylvania convention called to consider ratification: "I have no idea, that a safe system of power in the government sufficient to manage the general interest of the United States, could be drawn from any other source, or vested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand. . . . My position is that in this country the supreme, absolute, and uncontrollable power resides in the people at large." (J. Elliot, *The Debates, Resolutions, and other Proceedings in Convention on the Adoption of the Federal Constitution* (1830), pp. 244, 255)

thrown about the liberty of the individual, found in the original Constitution and in its amendments, are consistent only with that sort of state in which the political power rests with the people. The choice of members of the House of Representatives was given to "the people," but the framers turned over to the respective States the whole responsibility for establishing the qualifications for voting. States were free to adopt for themselves a liberal or democratic policy in this matter or a middle-of-the-road, an aristocratic, or a conservative policy. The only original limitation was that the voters in each State should have the same qualifications as those required to vote for members of the lower house of its legislature, a rule which was made applicable to the United States Senate in 1917 when the choice of its members was taken from the State legislatures. Subsequent constitutional amendments forbade the States from restricting suffrage on the grounds of race, color, previous condition of servitude, or sex, but otherwise left their power over the suffrage unimpaired.[13] One must therefore go to the State constitutions or laws to discover the extent of the popular control of government in the United States.

SUPREMACY OF THE CIVIL OVER THE MILITARY AUTHORITIES · England's fortunate geographical situation had enabled political institutions to develop in which the military authorities were kept in a position subordinate to the civil. The twenty-mile strip of water separating her from the Continent made a large standing professional army unnecessary for purposes of defense and placed the chief reliance upon a slightly trained local militia. The tradition of civil supremacy was deeply imbedded in her constitution and common law, and was accepted as a matter of course by the architects of our Constitution. Command of the armed forces was placed in the hands of the President, a civilian.[14] The better to keep the army within bounds, Congress was forbidden to appropriate funds for its maintenance for a longer period than two years. The continued existence of a State militia was recognized, the command of which, except when it was called into the service of the United States, would belong logically to the respective State governors.[15] The second article of the Bill of Rights reaffirmed the right of the people to keep and bear arms. The guarantee of such judicial rights as indictment by a grand jury and trial by a petit jury, and the stringent restrictions on the suspension of the privilege of the writ of habeas corpus, stand as bars against the oppression of civilians by the military authorities.[16] The unwritten rule that the heads of the Navy and the War Department shall be civilians completes the picture.

[13] *United States Constitution*, Amendments XV, XIX.

[14] "The President shall be Commander-in-Chief of the Army and the Navy of the United States, and of the militia of the several States when called into the actual service of the United States."—*Art. II, sect. 2*

[15] *United States Constitution*, Art. I, sect. 8; Amendment II.

[16] Ibid. Amendments III, V, VI.

## *THE METHODS OF CONSTITUTIONAL CHANGE*

It would have been most surprising if a frame of government designed immediately for a population of four million, mostly rural, had remained unchanged into a day when that number had increased thirtyfold, with the balance heavily in favor of the industrial and urban element. The fact is that the frame of government has had a steady growth from the beginning, step by step with the development of the country in territory, wealth, numbers, and social ideals. Only a part of the growth in our fundamental law, however, has been reflected in formal amendments. Greater changes in the aggregate have been brought about by three other means. Congress has passed laws of a permanent nature which are, in fact, supplementary to the Constitution. Some customs and usages of Congress, of the courts, and of the President and his subordinates going to the basis of our form of government have hardened into rules which have all the force of law. The Supreme Court of the United States, in the course of its normal duty of interpreting the laws, has made rulings extending the Constitution and breathing life into its original text. The total of the changes resulting from these three means comprise the supplemental, or unwritten, parts of the Constitution. Their method of operation, as well as the process of formal amendment, is the subject of the ensuing paragraphs.

AMENDING THE WRITTEN CONSTITUTION · The text of the written Constitution may be altered, added to, or deleted only by the means provided in its Article V. There are two distinct steps in the amending process: (1) the formulation and proposal of the amendment and (2) its adoption. Two methods for each are provided. An amendment may be proposed by a joint resolution of the two houses of Congress, two thirds of each concurring. In 1920 the validity of the Eighteenth Amendment was contested on the ground that it had not been proposed by two thirds of the full membership of both houses of Congress; but the Supreme Court ruled that "two-thirds of both Houses" meant two thirds of those present, if a quorum.[17] Furthermore, such a joint resolution by Congress does not require the signature of the President, in spite of the wording of Article I, sect. 7, that every resolution upon which both houses are required to act shall be presented to the President for his approval. Only in one case, and that inadvertent, was a proposed amendment presented to the President—the case of the Thirteenth Amendment presented to President Lincoln.

The second method of proposal is by a national delegate convention. Congress is obligated to call such a convention if requested to do so by the legislatures of two thirds of the States. This method was probably inspired by the fact that the original Constitution itself was framed in this way.

[17] *National Prohibition Cases*, 253 U.S. 350 (1920). For an able and detailed exposition of the procedure and problems of amending the Constitution cf. L. B. Orfield, *The Amending of the Federal Constitution* (1942).

Although none has ever been called, it does not follow that this method was vainly conceived. Proposal by Congress works piecemeal, and is satisfactory only when no change altering the general structure of the Constitution is contemplated. But should vital shifts in the social and economic structure of American society make a far-reaching revision necessary, a national convention chosen for that very purpose would be better adapted to that purpose. Moreover, if amendments are offered and adopted in the years ahead as fast as in the period since the First World War, the Constitution will become unwieldy, difficult of judicial interpretation, and lacking in logical unity. A convention for the purpose of rearranging its subject matter and for making necessary changes in the text would be desirable. To Congress would presumably fall the authority for determining the details of the election of such a convention. Naturally the basis of representation for the convention and the integrity of the elections would be a matter jealously viewed. Since the proposal of amendments by Congress involves the two principles of equal representation of the States in the Senate and of proportionate popular representation of the States in the House of Representatives, it would seem proper to combine the two in the convention, giving each State the representation which it has in the Electoral College—as many delegates as it has Congressmen and Senators.

The method of ratification is, in accord with the federal principle, by State action. The consent of three fourths of the States is required; and two ways are specified in which this may be given: the one, by a majority vote of the legislature; the other, by a popularly elected convention. The first twenty amendments were ratified by the former method, only the Twenty-first by the latter. Congress is expressly authorized to designate which is to be used. Although the Secretary of State is required by law to proclaim the fulfillment of ratification, an amendment becomes "valid to all intents and purposes, as a part of the Constitution" as soon as the last State needed for the three-fourths majority has voted.

LIMITATIONS ON THE AMENDING POWER · Are there any limits to the right of the people to alter their fundamental law? John C. Calhoun, and his school of States'-rights thinkers, held the Constitution to be a compact entered into by sovereign states. The amending power, they argued, was limited to changes in detail of those powers that had been given to the Federal government. Such changes three fourths of the States make. But any alteration in the basic features of the compact of union would require the consent of all the parties to it. The rule applicable was the same as in the case of independent nations which had entered into a treaty: any alteration of terms must be agreed to by all parties; otherwise each is released from the treaty and free to go its own way.

Whether or not this view of the Constitution was valid at the time is now only a historical question. The efflux of time developed a contrary one which received general recognition by popular acclaim as well as by

judicial decision. Soon after the Civil War, Chief Justice Chase held, in the *Texas* v. *White*[18] case, that the Constitution "looks to an indestructible Union, composed of indestructible States." If the Constitution is an instrument deriving its validity from the consent of the people of the United States, it follows naturally that the people have the legal authority, acting under the limitations of the amending article, to change it in such ways as seem to them necessary and proper. By this means they may redistribute the powers of government as between the nation and the States and among the three departments of the Federal government. That the former has been done in some degree will appear from the review of the amendments given below.

Only on the occasions of the proposal of the Civil War amendments and of the Eighteenth Amendment was adoption opposed on the ground of their being beyond amending power. The question was thoroughly discussed with respect to the former, the Democratic opposition generally voicing the Calhoun doctrine. During the discussion of the terms of the revolutionary Fourteenth Amendment, Thaddeus Stevens interrupted one of the members of Congress, Rogers of Delaware, to ask, "Will the gentleman state what is the use of the power of amending the Constitution unless that gives the power to change the condition of the States as well as the laws of the nation?" To which he replied:

> The use of it is this: the framers of the Constitution gave to Congress and three-fourths of the States the right to amend the Constitution in everything that comes within the spirit of the Constitution, in everything that lay at its foundation. They have no right to change the whole Government by an amendment of the Constitution.[19]

When the validity of the Eighteenth Amendment was attacked before the Supreme Court, the argument was used that it violated the Ninth and the Tenth Amendment, which specifically reserve to the States all powers not enumerated for Federal use, and that this reservation was one of the fundamental and permanent features of the Constitution and so not subject to alteration by amendment. This contention the Court ruled out without bothering to write an opinion.[20]

Two matters, however, were specified by Article V as not subject to amendment.[21] Until 1808 the importation of slaves into any State desiring them could not be prohibited, although Congress might levy on them an import tax not to exceed ten dollars each. This limitation, naturally, is

[18] 7 Wall. 700 (1869).

[19] *Congressional Globe*, 37th Cong., 1st Sess., p. 77.

[20] *National Prohibition Cases*, 253 U.S. 350 (1920).

[21] Article V makes the Constitution generally amendable, except "that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article [regarding the slave trade]; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

now obsolete. Secondly, the equal representation of the States in the Senate was never to be disturbed by amendment. Does this guarantee a perpetual equality of such a State as Nevada, for instance, with its 110,250 people, and the populous States of the Union, such as New York, with its thirteen million? In the heyday of the States'-rights theory, this undoubtedly would have been considered a basic agreement whose violation would have been just cause for the dissolution of the Union. But that its legal binding force, after the passage of so many years, is still absolute, is difficult to believe. Constitutional provisions have generally been interpreted and reviewed in the light of broad and basic principles of public policy. The Civil War amendments altered parts of the Constitution which the Southern States had regarded as untouchable. If, in the judgment of the voters, the needs of the time require an unequal representation of the States in the Senate, this could be brought about by an amendment striking out the equality clause, followed by another making the desired change. To reach an opposite conclusion would leave open only the violent and admittedly unconstitutional means of forcible revolution. There is little cause to doubt that any amendment, adopted according to one of the plans laid down in Article V, would be accepted as a valid part of the Constitution.

CRITICISMS OF THE AMENDING PROCESS · What are the merits of the system of constitutional amendment devised by the framers? Is it adequate in view of the great changes which have occurred since? It is plain that the Constitution as constructed was a compromise between the two principles of State sovereignty and popular control. The method of proposing amendments by Congress gave weight to population as exemplified in the House and to the States as such in the Senate; and the same rule would probably be followed in constituting a national proposal convention. Ratification, on the other hand, is based entirely on the principle of State equality, for which little justification can be offered today outside its service as a bulwark of our federal system and the attendant advantages of decentralization and local self-government. An objection often voiced is that the ratification system denies due weight to the wishes of popular majorities. The combination of a sufficient number of small States, for instance, representing a negligible portion of the nation's population, could defeat any amendment whatsoever. The 6,142,209 people of the thirteen smallest States, amounting to less than half of the population of New York, hold an absolute veto.[22] This contention, however, loses much of its force when the motives which impel voting are considered. Upon no conceivable issue, unless it were directed at the small States as such, should one expect them to be lined up on one side. Economic, occupational, racial, and sectional interests are

[22]The thirteen smallest States, in the ascending order of their population, are as follows: Nevada (with 110,247), Wyoming, Delaware, Vermont, New Hampshire, Arizona, Idaho, New Mexico, Utah, Montana, North Dakota, South Dakota, and Rhode Island (with 713,346). Cf. *Bureau of the Census, Statistical Abstract of the United States, 1942*, p. 5.

stronger motives than that of State loyalty. Delaware would not normally be found with the Dakotas but most probably with New York. Voting by States, unless the issue is exceptional, probably gives a fair approximation of the wishes of the national majority.

The dissatisfaction with the method of State consent through its legislature, however, has a more substantial basis. The alteration of the nation's fundamental law is an exertion of sovereign power, the only example of that type of action provided for in our polity. Is the legislature an agency qualified to speak for the State in that matter? The average legislature is elected on the basis of a wide variety of considerations: loyalty to the national political parties; questions of State finance; the management of its educational, correctional, and penal institutions; the interests of the various municipalities; and labor and social reform. Rarely would it have a conscious mandate from the voters on the proposed constitutional amendment. The adoption of amendments to the State constitutions by popular referendum has come to be almost universal. Might this not properly be applied to the national constitution? Ohio made the attempt in 1918, when a rule was incorporated in its constitution reserving to the people the right to pass upon the action of the legislature in ratifying an amendment to the national constitution.[23] The legality of a referendum on the ratification of the proposed Eighteenth Amendment came to the United States Supreme Court for final decision. The question was whether the people of the State, voting in a referendum, might be interpreted as the "legislature" required in Article V, since this alternative method of making laws was established in Ohio. The Court held that the ratification of a constitutional amendment is not an act of legislation but only an expression of the assent of the State. The framers had designated the State's representative body, the "legislature," and none other, to perform this duty.[24]

RATIFICATION OF THE TWENTY-FIRST AMENDMENT · American ingenuity was able to find in the language of 1787 a legal and satisfactory way for a referendum.[25] Congress, it is to be recalled, was empowered to designate legislature or convention as the instrument of ratification; and when, on February 20, 1933, a joint resolution proposing an amendment to repeal the Eighteenth Amendment was adopted, it included a section choosing the latter. Congress, doubtful of its power to conduct the elections for the conventions or to regulate their composition and proceedings, left these matters entirely to the individual States. Indeed, New Mexico declared that any such attempt by Congress would be null and void and required all its officers to resist any such attempt at Congressional dictation and

[23] *Constitution of the State of Ohio*, Art. II, sect. 1 (adopted November 5, 1918). 1936 ed.

[24] *Hawke* v. *Smith*, 253 U.S. 221 (1920).

[25] E. S. Brown, in his *Ratification of the Twenty-first Amendment to the Constitution of the United States* (Ann Arbor, 1938), has made a detailed study of the steps in the ratification of the Twenty-first Amendment and published the pertinent documents.

usurpation. Forty-three States passed laws making provision for conventions, sixteen making them applicable to all proposed amendments which Congress might submit in the future. In nearly all, the laws made provision for separate lists of candidates designated on the ballot as for or against ratification; a few made provision for unpledged candidates. In twenty-five States the delegates were elected at large on a State-wide ticket; in fourteen, by districts; and in four, by a combination of the two methods. A few of the laws specifically bound the delegates to vote in accordance with the result of the ballot. Oregon, the happy hunting ground of the initiative and referendum, employed a ballot providing for a Yes and No vote on the question of ratification as well as on the choice of delegates pledged to obey the popular mandate. Arizona went so far as to make it a misdemeanor for a delegate to violate his nomination pledge. In general the slates of delegates served much the same purpose as the State electoral colleges in the Presidential elections. What the action of the conventions on the proposed amendment would be was known the same day in each of the States. There was little for the conventions to do when they assembled except to organize, vote as had been foreordained, and send the results to the United States Secretary of State. This was not the kind of convention which the framers had contemplated, but it was strictly within the letter of the law. A good method of popular referendum had been attained without changing a word in the amending article of the Constitution.[26] It is safe to conclude that this is the method which will be employed for such amendments as may be proposed to the States in the years immediately ahead.

FLEXIBILITY OF THE CONSTITUTION · The generally accepted idea of a constitution is that it should change gradually as one era gives way to another, but not with the popular opinions and temper of every day. This was what John Marshall meant by the statement that the making of a constitution was "a very great exertion; nor can it, nor ought it, to be frequently repeated."[27] Is our constitutional change in accord with that pace? In the early years of the century it was commonly believed that the method of amendment was much too difficult; that it placed government in a strait jacket and did not yield readily enough to the needs of a new day. It was pointed out that, in the space of over a hundred years, only three amendments had been adopted, and these as the outcome of a civil

[26]Ratification in Pennsylvania furnished a good illustration of how a popular referendum on an amendment to the Constitution might be obtained. The convention was to have a membership of fifteen, chosen from the State at large. Two lists of fifteen candidates headed, respectively, "Favor Ratification" and "Oppose Ratification" were placed on the ballot by petition. As with the traditional ballot for Presidential electors, a cross in the circle meant a vote for fifteen pledged delegates, which was equivalent to a referendum on the issue. Since the "Favor Ratification" slate was elected, the vote in the so-called convention was fifteen in the affirmative. Cf. J. B. Brown, op.cit. p. 648.

[27]*Marbury* v. *Madison*, 1 Cranch, 137 (1803).

war. Then, in rapid succession within the space of twenty years, six more were adopted, and the criticism was no longer widely voiced. The explanation is not hard to find. The nineteenth century witnessed only one controversy or social change which struck at the roots of our fabric of government, that of slavery and its attendant issue of States' rights; and the Constitution was changed accordingly. Then the Industrial Revolution hit the United States with full force, and for several decades the processes of urbanization, industrialization, and a redistribution of wealth went on. Shortly after the turn of the century the necessity for corresponding constitutional changes became generally apparent, and public opinion responded by supporting the needed amendments. Whether, in 1933, it would have similarly supported an extension of Federal legislative power to business, manufacturing, agriculture, and mining must remain unanswered; for no such amendments were submitted to the States. The most that can be said is that on those occasions when there was general recognition of the need for important changes in our fundamental law, the existing machinery was adequate to bring it about. Perhaps the amending method devised by the framers was not far off the line of balance between the two extremes of instability and stagnation.

THE AMENDMENTS · The twenty-one articles of amendment fall, by reason of their origin, into four groups. The first ten constitute the Bill of Rights; the eleventh and twelfth remedied defects which were evident from the begining; the next three represented the settlement of constitutional issues arising out of the Civil War; and the last six are reflections of social and economic changes of the period following.

The origin and purpose of the first ten, and how they are properly to be regarded as an integral part of the original Constitution, were explained at an earlier point. The Eleventh Amendment arose out of the action of the Supreme Court in accepting jurisdiction of a suit in 1792 of one Chisholm, a citizen of the State of South Carolina, against the State of Georgia.[28] The latter held that a State, as a sovereign being, was not subject to suit by an individual without its consent; but the Supreme Court followed the letter of the Constitution, which extends its jurisdiction to cases "between a State and citizens of another State" irrespective of which party is plaintiff. The State of Georgia refused to appear in the case, and, upon hearing of the Supreme Court's action, passed a law punishing any person who might attempt within its jurisdiction to enforce the judgment of the Court. One of its Congressmen immediately introduced a resolution embodying the present Eleventh Amendment, and it was quickly ratified by the States.

The Twelfth Amendment was adopted to remedy an unforeseen outcome of the electoral system, which required each elector to cast two votes, not specifying which was intended for President and which for Vice-President. This led to a tie in the Electoral College in 1800 between Jefferson and

[28] *Chisholm* v. *Georgia*, 2 Dallas, 419 (1793).

Burr and brought about a dangerous stalemate in the House of Representatives owing to the attempt of some of those opposed to Jefferson to install Burr in the President's office. At the ensuing session of Congress a resolution was introduced requiring each elector to designate one vote for President and one for Vice-President; this was reshaped in the succeeding Congress, sent to the States, and ratified in time for the election of 1804. In the third group the Thirteenth Amendment prohibits slavery and involuntary servitude within the United States and all places subject to its jurisdiction. President Lincoln, in the Emancipation Proclamation, issued under his authority as commander in chief of the army and navy, had freed the slaves. The validity of his action, with the coming of peace, was in doubt; besides, the work was incomplete in that it applied only to the seceded States and territories occupied by the Confederate armies. Congress was given power in the second section of the amendment to enforce it by "appropriate legislation." This, in the minds of some leaders, extended ample power to legislate for the civil rights of the Negroes, who, they argued, had been made citizens by the act of emancipation. But the Republican leaders of Congress announced their intention of sending to the States further proposals of amendment, which would guarantee an equality of freedom and rights to all citizens. Their program was embodied in the five sections of the Fourteenth and in the Fifteenth Amendment. The first section of the former, the author of which was John F. Bingham of Ohio, was an attempt to guarantee the citizens of the States against infringement of their liberties by hostile State legislation. States were forbidden to abridge the privileges or immunities of citizens of the United States, deprive them of life, liberty, or property without due process of law, or deny them the equal protection of the law. It was asserted by those opposing that the amendment struck a deadly blow at the principle of federalism and affected the fabric of our government in a more revolutionary way than any amendment ever seriously considered to that time. No categorical denial was made by its sponsors. Thaddeus Stevens, the Republican House leader, admitted on the floor that he had hoped to remake the government from top to bottom and purify it, but had been thwarted through the influence of President Johnson.[29] The first sentence

[29]Fourteenth Amendment. A. J. Rogers, of New Jersey (Democrat), argued: "It [the Fourteenth Amendment] saps the foundations of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all of the rights which lie at the foundation of the Union of States." (*Congressional Globe*, 38th Cong., 1st Sess., p. 2538, May 5, 1866.) Thaddeus Stevens, Republican House leader, in proposing the Fourteenth Amendment said: "It cannot be denied this terrific struggle [the Civil War] sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now. . . . In rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and sound the repaired edifice upon the firm foundation of eternal justice." (Ibid. p. 2549, April 30, 1866)

of Section 1 was written by Senator Howard of Michigan and adopted seemingly as an afterthought. It read that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States in which they reside," which was a reversal of the Dred Scott decision. Section 2 provided for a decrease in the representation of States in the House of Representatives corresponding to the amount of their denial of the vote to males twenty-one years of age and over. Section 3, now obsolete, barred from Federal and State office-holding those who, previously having taken an oath to support the Constitution, had participated in the Rebellion. Section 4 stated that the validity of the United States debt might not be questioned, and forbade both the United States and the States from assuming or paying any of the debts incurred in aid of the Rebellion, or any claim for the loss of emancipated slaves. Amendment XV forbade the denial or abridgment of the right to vote on the grounds of race, color, or previous condition of servitude.

The six remaining amendments, constituting the fourth group, grew out of the social changes which the country had been experiencing in the decades since the Civil War. The Sixteenth Amendment confers on Congress the power to levy income taxes without distributing them among the States in proportion to population. Income taxes had been levied during the Civil War, and their validity had been upheld by the Supreme Court. But a new income tax levied in 1894 was declared invalid by that tribunal the following year on the ground that it was a direct tax and therefore required apportionment among the several States on the basis of their population, like all other direct taxes.[30] The Sixteenth Amendment, like the Eleventh, was in the nature of the recall of a judicial decision.

The Seventeenth Amendment took from the State legislatures the choice of United States Senators and handed it over to the respective State electorates. It signified both a decline in the States'-rights feeling and an intolerance for any method of election which might mar the democratic landscape. The desire for this change was sharpened by the success of the great business corporations in controlling the policies of the State legislatures and, through them, the choice of United States Senators. Several instances, at the turn of the century, of the improper use of money in securing seats in the Senate added to the popular disfavor of this method of choice.

The Eighteenth Amendment wrote into the Constitution a law prohibiting the manufacture, sale, or transportation of intoxicating liquors for beverage purposes in the United States and the territories subject to its jurisdiction, as well as their exportation or importation. The resolution passed Congress on December 17, 1917, and was ratified by Utah, the thirty-sixth State, on January 16, 1919. It was the culmination of an anti-liquor crusade which had burned with varying intensity for a century.[31]

[30] *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895).
[31] D. L. Colvin, *Prohibition in the United States* (1926).

The Nineteenth Amendment provides that neither the United States nor any State may deprive any citizen of the right to vote on account of sex. It is like the Fifteenth Amendment in that it does not of itself enfranchise women but renders invalid all suffrage laws restricting the right to vote on that basis. Educational, taxpaying, or residential qualifications or others besides those laid down in these two amendments may still be required. Like the Eighteenth it was the culmination of years of struggle. The amendment adopted is in the exact words of the one which had been drawn by Susan B. Anthony, the first great leader in this movement, in 1878. Machine industry had drawn thousands of women into the ranks of the wage-earners by the end of the century; schools, colleges, and professional schools had been opened to them, and they were steadily entering into competition with men in the educational and professional life of the nation. Their debarment from the political life of the country came to be as anomalous as the condition which had lately been corrected by the adoption of the Seventeenth Amendment. President Wilson, in spite of his declaration in 1912 that the question of woman suffrage was a State problem, in 1918 asked Congress to submit the proposal to the States. Ratification was completed in time for the Presidential election of 1920.[32]

The Twentieth Amendment, made up of six sections, deals with several matters. It first sets the beginning of the term of President back from March 4 to January 20, and that of members of Congress to January 3. There had been considerable sentiment for some such change for two decades, and Senator George Norris of Nebraska, the text of whose resolution was finally adopted, had actively championed it in Congress for over ten years. This section was designed to end the condition which had permitted members of Congress who had been defeated at the November elections to continue to legislate. With the regular sessions of Congress beginning the first week of each December, a Congress elected in November did not begin its work until thirteen months after election, by which time the issues of the campaign had become dim in the minds of the people. Now there would be an interval of only two months, which would be ample to settle cases of disputed elections and to permit members to adjust their private affairs and move to Washington. Again, in the case of a Presidential election going to the House of Representatives that choice would now be made by a House chosen at the same time as the Presidential electors, instead of devolving on men who had been chosen in a campaign two years and three months before. The interval between January 3 and 20 was provided to give time for the counting of the electoral votes and, in case of there being no majority for any Presidential candidate, time for the House to make the choice. The amendment had the effect of shortening somewhat the terms of President Roosevelt and Vice-President Garner and of the members of the Seventy-third Congress. The second object was

[32]Kirk H. Porter, *A History of Suffrage in the United States* (1918), chaps. vi, ix.

to provide two sessions of Congress of equal length, and, by the elimination of the short, crowded, second session, to render filibustering in the two houses more difficult. The third section, by stating that in case of the death of the President-elect the Vice-President-elect should become President, or that in case of the death of both Congress should declare who should act as President, cleared up some dangerous ambiguities of the succession clauses of the Constitution. Section 4 permits Congress to provide by law "for the case of the death of any of the persons" from whom the House and the Senate, respectively, must choose the President and the Vice-President, namely, the three and the two, respectively, receiving the highest number of electoral votes but not a majority.

The Twenty-first Amendment went through all the required stages with unprecedented speed. Both political parties in their 1932 platforms had pledged support to the repeal of the Eighteenth Amendment, the Republicans qualifying their support with a stand for an alternative amendment, probably one, like the "commerce clause," leaving Congress jurisdiction over the liquor traffic but eliminating the inflexible substantive provision.

Immediately upon the assembling of Congress following the election there was a rush to introduce proposals for the repeal of the Eighteenth Amendment, and on February 20, 1933, in the closing days of the Hoover administration, a compromise one received the necessary two-thirds vote of Congress. It was immediately sent to the States, which, with a few exceptions, took measures to submit it to conventions for their adoption or approval. By midsummer twenty States had thus given their ratification, and at the November elections enough more had chosen delegates favorable to the proposal to carry it. On December 5, 1933, conventions in Ohio and Utah, the thirty-fifth and thirty-sixth States respectively, completed the ratification.[33]

NATIONALIZING CHARACTER OF THE AMENDMENTS · There is one easily traceable trend found in the constitutional amendments adopted in the course of nearly a century and a half: with a few exceptions they involve a readjustment in the relations between the national and State governments. The first ten, afterthoughts of the original Constitution, are all directed against the power of the national government and in a sense toward strengthening the States: the first eight, as direct prohibitions on Congressional legislation; the Ninth and the Tenth, respectively, as reaffirmations of the reserved powers of the people and of the States. But with the Twelfth there begins an almost uninterrupted process of the aggrandizement of national power at the expense of the States. As stated above, this amendment was concerned with a repairing of the electoral system, but in practice it went deeper. The amendment was a tacit recognition of the existence of the national party system and its control of the Presidential elections, and it rendered highly improbable the throwing of the elections into the House,

[33]E. S. Brown, op. cit. pp. 330–336, 394–421.

where the voting would be by States, an outcome which seems to have been planned by the framers. The Thirteenth Amendment invalidated the slave codes of all States having them. The Fourteenth was planned as a blow at State independence and to this time stands as the single greatest alteration in Federal-State relations. The Fifteenth and the Nineteenth restricted in important respects the power of the individual States to make their own suffrage laws. The income tax always had been available to the States as a source of revenue, although it had been little used; the Sixteenth Amendment now forced them to share it with the national government. In the years before the Civil War, Senators were accustomed to refer to themselves as "representatives" or "ambassadors" of the States, and to the Senate as the great "council of the States." When the Seventeenth Amendment removed the Senatorial elections from the legislatures, they ceased to be primarily representatives of State governments, and the States became in effect electoral districts. The Eighteenth Amendment transferred to the national government from the States, which had been its exclusive holders, a controlling share in the police power over the traffic in intoxicating liquors. Its straight repeal by the Twenty-first Amendment is the only increase in State authority at the expense of the national in over a century and a quarter. The Twentieth Amendment does not bear directly on the question of Federal-State relations, but its primary purpose, to enable a popular majority to legislate promptly, gives added strength to the national government.

CHANGES BY MEANS OF FUNDAMENTAL STATUTES · Congress cannot alter a syllable of the text of the Constitution by an act of legislation, but that doesn't tell the whole story. There are some matters upon which that instrument preserved a discreet or inadvertent silence but which are as fundamental and permanent in character as some of those that received proper attention. Congress may legislate to fill these gaps and later amend or repeal such legislation. In doing all this it is actually engaged in extending the operative Constitution of the United States. The process of constitution-making by acts of Congress began in the first weeks of the Washington administration and has been resorted to as conditions demanded to the present day. The Judiciary Act of 1789, which organized the Federal courts and laid down the essential elements of their procedure, remained with a few changes until 1926, but even then the new act embodied the chief features of the old. The acts establishing the departments of State, Treasury, and War date from the same year and have never been repealed.[34] In fact, the basic portions of all the acts establishing the ten executive departments might reasonably be classed as parts of the Constitution, to which might be added the Administrative Reorganization Act

[34]Judiciary Act of September 24, 1789, 1 Stat. 76; Department of State, 1 Stat. 28, July 27, 1789; Department of War, 1 Stat. 49, August 7, 1789; Department of Treasury, 1 Stat. 65, September 2, 1789.

of 1939, which authorized the President to regroup and reshuffle the various bureaus and services as he thinks proper. Englishmen rightly regard the Act of Succession of 1689, by which the crown is vested in the House of Hanover (or Windsor), as a basic law of the kingdom. Of similar importance is our Presidential Succession Act of 1886, which names, in the order of the establishment of their offices, the heads of the ten executive departments as heirs of the President's powers in case both he and the Vice-President die or are incapacitated. Among others that might be mentioned are the Electoral Commission Act of 1876, the Electoral Count Act of 1887, and the Pure Food and Drug Act of 1906, which established a general national police power over those subjects under the guise of a regulation of interstate and foreign commerce.[35]

CHANGES BY CUSTOM AND USAGE · Custom and usage are similarly incapable of rewriting any of the text of the Constitution, but that is not to say they are powerless to bring about constitutional change.[36] The Constitution is a lifeless thing, a sketchy blueprint of a scheme of government. Those chosen to serve under it have the task of translating its lines into action. There is a task of interpretation and of choice of the means of accomplishment. Practices which brought satisfaction hardened into custom, and custom in time came to have the force of law. In this way the Constitution has been greatly expanded: omissions have been supplied, ill-conceived parts made workable, and life breathed into the whole. Naturally, constitutional law which has been made by custom and usage may subsequently be changed by the same means.

Instances of this method of constitutional change are not difficult to find. The Senate was intended by the framers to be associated with the President as an executive council. President Washington attempted faithfully to follow the plan but found it impracticable, and his abandonment of it has been followed by all subsequent Presidents. From the beginning of our government the clause of the Constitution devolving the powers and duties of the President, in case of his death, resignation, removal from office, or disability, upon the Vice-President had been interpreted to include his absence from the country. Washington, in a trip to New England in 1790, had scrupulously refrained from entering Rhode Island, which at that time was outside the Union. Presidents visiting El Paso, to greet the Mexican president, had been careful not to step beyond the middle of the

[35]Presidential Succession Act, 24 Stat. 1, January 19, 1886; Electoral Count Act, 24 Stat. 373, February 3, 1887; Pure Food and Drug Act, 34 Stat. 763, June 30, 1906.

[36]Cf. W. B. Munro, *The Makers of the Unwritten Constitution* (1930); H. W. Horwill, *The Usages of the American Constitution* (1925); C. E. Merriam, *The Written Constitution and the Unwritten Attitude* (1931); B. F. Wright, *The Growth of American Constitutional Law* (1942); H. L. McBain, *The Living Constitution* (1927). Jefferson, writing in his later years of the third-term rule, said, "The example of 4 Presidents voluntarily retiring at the end of their 8th year, and the progress of public opinion that this principle is salutary, have given it in practice the force of precedent & usage." T. Jefferson, *Works* (P. L. Ford, Ed.), Vol. V (1904), p. 120.

international bridge. Much was made of the incident at the time when President Cleveland, on a fishing trip off the Atlantic Coast, inadvertently went beyond the three-mile limit. President Wilson threw the precedents of more than a century and a quarter to the wind when in 1918 he went to the Paris Peace Conference as an American delegate and from there for several months administered the duties of his office. No President has since felt bound by the old rule. F. D. Roosevelt's election for a third term in 1940 is the latest conspicuous example of an amendment to the unwritten Constitution by custom. The transformation of the Electoral College from a powerful discretionary body into a rubber stamp for the electorate; the existence of political parties and their indispensable part in the functioning of the government; the rule that members of the House of Representatives must be residents of the districts from which they are elected; and the marked development of the ordinance power of the President are only a few more of the important constitutional changes wrought by custom and usage.

CHANGES BY JUDICIAL INTERPRETATION · When a person brings a suit in a court, he asserts a right or rights which, it is held, have been or are about to be violated. The court, in order to give a judgment, must know what rights exist; but since rights are the creations of law, it must say what the law means. Thus the interpretation of the laws is a necessary by-product of the courts' duty in the administration of justice. On every workday the Federal courts are engaged in interpreting acts of Congress, and clauses or sections of the Constitution itself. Year by year these interpretations or rulings pile up, amounting in time to a great expansion of the laws and of the Constitution. Since judicial lawmaking is the subject of a more detailed consideration later on in this text, only a few illustrations of this method of constitutional change will be given here.

While the power of the courts to declare acts of Congress and of State legislatures void was probably intended by the framers, it was not expressly so declared, and it was denied by a few leaders of the early days of the Republic. John Marshall assumed the power in the case of *Marbury* v. *Madison*,[37] since when it has remained one of the marked features of the Constitution. The compact theory of the Union and States'-rights aspirations was given a body blow in the case of *McCulloch* v. *Maryland*,[38] wherein Marshall, with an exposition of Federal implied powers, breathed into the Constitution the spirit of nationalism. Chief Justice Taney, in the case of *The Genessee Chief* v. *Fitzhugh*,[39] in 1840, repudiated the ancient English rule that admiralty and maritime jurisdiction was applicable only to the seas and tidewater. Thus, at the expense of the State power, he extended Federal jurisdiction over the great inland fresh waters of the United States.

[37] 1 Cranch, 137 (1803).
[38] 4 Wheaton, 316 (1819).
[39] 12 Howard, 443 (1852).

The Constitution confers on the national government the power to coin money and fix the value thereof.[40] During the Civil War, Congress authorized the Lincoln government to issue quantities of irredeemable paper money, which was to be legal tender in the payment of debts. No such power is enumerated in the Constitution, and the right was contested in the courts. In the *Legal Tender Cases*[41] the Supreme Court held that the right to coin and to borrow money, and the prohibitions on the States with respect to coinage and the emission of bills of credit, in effect amounted to the conferring of a power on Congress to create a national currency. The right to make it legal tender naturally followed. A few years before, a Federal tax which obliterated the circulating notes of State banks had been upheld in the case of *Veazie-State Bank* v. *Fenno*.[42] Thus, through these Supreme Court pronouncements, the national government secured adequate power to provide a national currency, whether of metals or of paper, and was rid of State interference.

In 1898 the United States fell heir to the greater part of the Spanish colonial empire. William Jennings Bryan, Democratic candidate for the Presidency, and his associates in 1900 argued against the retention of these territories on grounds both of morality and of constitutionality. It was asserted that our republican Constitution would require for these people of non-Anglo-Saxon culture a system of laws and institutions for which they were entirely unfitted. The President and Congress, however, proceeded to set up a government for the newly acquired territories, adapted to their needs and omitting the right to a jury trial and other privileges inherent in Anglo-American polity. The issue of whether the Constitution necessarily "follows the flag" came up in the so-called "Insular Cases."[43] It was plain that here was a hiatus in the Constitution: the framers had never dreamed that someday the United States would be called upon to rule non-American peoples in distant and detached lands. The Court's answer was that the Spanish possessions had ceased to be "foreign" territories but were parts of the United States in the sense of an "American Empire." They were territories "appurtenant and belonging to" the United States, but not a part of it in the original and constitutional meaning of that term. Consequently the Constitution in its full force did not extend to them through their transfer to the American flag, and Congress could provide a government suited to their needs, unhampered by Constitutional restrictions. These decisions of the Court were as effective in expanding the Constitution as amendments duly adopted to effect the same purpose.

In recent years the Interstate Commerce Clause has been the means for a

[40] *Constitution of the United States*, Art. I, sect. 8.
[41] 12 Wall. 457 (1871).
[42] 8 Wall. 533 (1869).
[43] *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903).

most spectacular expansion of the Constitution by judicial interpretation. The Supreme Court laid broad the base of Congressional power in its first decision involving this clause in 1824, the case of *Gibbons* v. *Ogden*.[44] In holding void a grant by New York of monopoly of the navigation of the Hudson River to the assignees of Robert Livingstone, the Court defined commerce among the several States as including all intercourse among them. Decisions since 1900 progressively extended the term *commerce* to include transportation by railway, motor bus, airplane, and pipe lines, and communication by telegraph, telephone, and radio. Even transportation wholly within a State, and the incidents of business, manufacturing, and mining, have been held to come within the jurisdiction of Congress as aspects of interstate commerce. These decisions are the constitutional bases for the major portion of the New Deal legislative program, including the Wages and Hours, Federal Securities, Social Security, and National Labor Relations Acts. After the decisions in the *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* case (1937) and the *Steward Machine Co.* v. *Davis* (1937)[45] case it is hardly to be doubted that future attempts of Congress to legislate on economic matters of national scope will be upheld as a part of its power "to regulate commerce among the several States."

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[44] *Gibbons* v. *Ogden*, 9 Wheaton, 1 (1824). [45] 301 U.S. 1 (1937); 301 U.S. 546 (1937).

CHAPTER V

# *The State Constitutions and Local Government Charters*

THE PLACE OF THE STATE CONSTITUTIONS · No other nation today is so lavishly supplied with written constitutions as the United States with its forty-nine: one national and forty-eight State constitutions. Are the latter superfluous in view of the former's excellence and of its dominant character? Are the affairs of the respective States of such weight as to warrant the attachment to each of a body of fundamental law? For answers, one must look to our constitutional history and to the allocation of powers between nation and States made by the national constitution.

Legally, each of the forty-eight States is a community of people possessing the powers of self-government commonly held by the several nations of the world, except as limited by the terms of the national constitution. Upon the attainment of independence as the outcome of the Revolutionary War the States became individually sovereign. Their governments succeeded in general to the supreme legislative power which Parliament heretofore had wielded and to the administrative powers of the crown. As members of the Confederation, which existed from 1781 to 1789, their essential character was unchanged because of the sparing delegation of powers to the central government. The formation of the Union under the Philadelphia constitution, however, was based on an irrevocable surrender to a national government of powers few in number but vital in importance.[1] Nevertheless, with all other powers reserved to themselves, the States were left with a governmental jurisdiction touching a vastly greater number of subjects than had been given up. To the States fell the task of creating or adopting the great body of domestic law which governs the everyday relations of life. They, not the Federal government, were the heirs of the English common law. Theirs was the power to legislate on economic matters in general and in the interests of the health, welfare, safety, and order of the community.[2]

This statement of the extent of the State's authority explains in general the place to be filled by its constitution. There is the same need as with an independent state for a body of fundamental law to establish a stable gov-

[1] *Texas* v. *White*, 7 Wall. 700 (1869). Chief Justice Chase, speaking for the Court, said, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

[2] The Supreme Court, in the case of *County of Lane* v. *Oregon* (7 Wall. 76), stated, "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."

ernment, provide a settled means by which the people may control it, and set up self-denying rules or pledges on the part of the majority to respect the liberties of the minority. Bills of rights would indeed seem to be of relatively greater importance in a State than in the national constitution, because of the greater legislative scope of the former. Furthermore, unless the State's territory is to be arbitrarily subdivided for purposes of local government by each succeeding legislature, law of a permanent character should make provision for the chief territorial units and allocate to each its sphere of authority. Finally, means by which the people of the State may change their basic institutions in an orderly and legal manner should be established. All these needs are met in some manner by the constitutions of the various States.

FEDERAL STANDARDS FOR STATE CONSTITUTIONS · The States have a wide freedom with respect to the style of the constitution or the kind of political institutions which they may adopt. They might conceivably choose a commission or manager form instead of one headed by a governor and legislature; adopt a mild form of state socialism, as was tried in North Dakota with publicly owned banks and grain elevators; or institute a highly centralized administration, supplanting the city and other local governments with a bureaucracy centering in the State capital. The striking similarities found among all forty-eight constitutions is due less to outward compulsion than to imitation and the like-mindedness of the people of the nation as a whole.

The national constitution does act as a standardizing agency for the State constitutions, but this is accomplished chiefly by establishing general principles which each State may work out in detail as it pleases. Like the master key of a building, which will turn the lock of every door even though their individual keys are greatly dissimilar in shape, it has points which mesh with the mechanism of every State constitution. The standardizing features of the national constitution fall naturally into three classes: the requirement of a republican form of government, the establishment of a regime of justice and individual freedom, and the safeguards of national power.

1. The State's constitution must establish a "republican form of government."[3] What that is depends upon what the President and Congress say it is; the Supreme Court years ago declared its own incompetence to pass on the question. While no official definition has ever been made, a pretty fair understanding of its meaning may be gathered from various sources. Madison's definition in the *Federalist*, No. XXXVIII, is as representative of present-day thought as any: "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited

[3] *United States Constitution*, Art. IV, sect. 4.

period, or during good behavior." A hereditary executive, a dictatorship, a government without a representative legislative body, or one based on a narrowly limited suffrage would doubtless fall afoul of this requirement. Congress and the President doubtless have power under this clause to refuse recognition to State constitutions and governments which they adjudge not to be republican, and to take measures for their downfall and the institution of new ones in their place. Happily no such drastic action has ever been required.[4] The reconstruction acts of the post-Civil War period, which compelled the adoption of new constitutions in some of the States, were based on other grounds than the requirement of republican government.

2. The establishment of a reign of justice and individual freedom in the States is the objective of half a dozen or more clauses of the national constitution which must be given due honor in the respective State constitutions. Forbidden are bills of attainder, the imposition of criminal sentences by legislative act, the passage of ex post facto laws (making something a crime and punishable which was not a crime at the time it was committed), and the enactment of laws releasing persons from the terms of contracts already made or changing their terms. Titles of nobility, the most blatant symbol of class distinctions, may not be granted.[5] Here fall also the prohibitions against slavery and involuntary servitude and the restriction of suffrage on account of race, color, previous condition of servitude, or sex.[6] The most sweeping limitations on the States are those of the Fourteenth Amendment respecting the privileges and immunities of citizens, due process of law, and the equal protection of the laws. The general effect of these has been to make illegal all arbitrary and oppressive distinctions based on race or class and to make the Federal Bill of Rights binding on the States in their treatment of their citizens.

3. The third class of restrictions imposed on the State constitutions and governments has the purpose of safeguarding the Federal government against State interference in its work. States are debarred from the field of foreign affairs, in that they cannot enter into any treaty, alliance, or confederation, or grant letters of marque and reprisal. They may not interfere with the national tariff laws, for they are forbidden to lay any imposts or duties on imports or exports (except what may be necessary for executing their inspection laws) without the consent and control of Congress; nor may they, without the consent of Congress, keep troops or ships of war in time of peace, or enter upon or engage in war, unless actually invaded. The national currency is protected by the ban on the States'

[4] In the case of *Pacific States Telephone & Telegraph Co.* v. *Oregon* (223 U.S. 118, 1912) the Supreme Court held that a State which uses the initiative and the referendum for lawmaking does not cease to be republican in form.

[5] *United States Constitution*, Art. I, sect. 10.

[6] Ibid. Amendments XIII and XV.

coinage of money, their emission of bills of credit, or their making anything but gold or silver a legal tender in the payment of debts. Federal control over the State militia is a guaranty against disunity in wartime.[7]

THE INTERLOCKING OF CONSTITUTIONS · There is a greater harmony and unity among the various constitutions and local government charters than their large number and diversity would seem to imply. The standardizing clauses described above account for it in part, but there are others which aid in the synchronization. The national constitution provides the means for setting the number of members of the House of Representatives and of Presidential electors, but the conduct of the elections is left to the States. The co-operation of the governor and the secretary of state is necessary to the completion of the work of the Electoral College. The national constitution recognizes the existence of a State militia, leaving the appointment of its officers and its training to the States according to plans and rules prescribed by the United States, and reserving the right to call it into the active service of the United States. With the consent of Congress two or more States may enter into compacts with each other for governmental purposes, provided their constitutions and laws permit it. A person charged with a crime in one State and fleeing to another is required to be delivered up on demand of the executive authority of the State from which he fled. The authorities in each State are required to give full faith and credit to the public acts, records, and proceedings of every other State, and Congress is authorized to legislate to expedite the process.[8] The Federal courts, acting under an implied power, hear appeals from State courts provided they involve in some way the Federal constitution or laws, which is an effective means of bringing harmony to the vast complex of constitutions, charters, laws, and ordinances of all grades.[9] City and county charters are the creatures of the State constitution and must in no way conflict with it. Enveloping in a grand way all these scattered commands of co-operation is the text of the Constitution's Article VI, which declares the Constitution, and the laws and treaties made under it, to be the "supreme law of the land," by which the judges in every State are to be bound, "anything in the Constitution or laws of the State to the contrary notwithstanding."

## *FEATURES OF THE STATE CONSTITUTIONS*

In spite of sharp variations in length, style, and details, the forty-eight State constitutions agree in establishing five basic features of government. These are (1) the separation of powers, or a check-and-balance system, (2) democratic control, (3) a wide field of individual liberty, (4) the uni-

[7]Ibid. Art. I, sect. 10.
[8]Ibid. Art. II, sect, 1; Art. I, sect. 10; Art. IV, sects. 1 and 2.
[9]*Martin (Fairfax's Devisee)* v. *Hunter's Lessee*, 1 Wheaton, 304 (1816).

tary character of the State, and (5) a decentralized system of administration. The first three are held in common with the national Constitution, and deserve only a passing notice at this point. Madison's statement in the *Federalist*, No. XLVII, that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny," was representative of constitution-makers of his day and generally on down to the present. Every State constitution establishes these three great departments and endows each with means to check the other two, the sharpest variations from the Federal being the weak executive, with only a scant claim to the designation *chief executive*. The unvarying presence of provisions for universal suffrage and of bills of rights is the basis of the characteristics of democracy and civil liberty. It is in the fourth and the fifth characteristics that the national and the State constitutions part company.

The State is unitary in that there are not within it two governments or classes of governments, each operating over the same people and territory and supreme within its own field. Supreme power rests in the people of the entire State as a unit. To the people of the respective cities and counties are delegated all the powers of self-government which they exercise. In some communities home rule is considerable, but it never approaches the point where any State may be regarded as a federation of local governments. The courts habitually interpret strictly the powers which statutes and charters purport to confer on local government authorities, resolving all doubts in favor of the central State government or the reserved powers of the people of the State.

With seeming inconsistency the unitary States have all embodied in their constitutions the principle of governmental decentralization. Their territories are studded with an amazing number of units enjoying varying degrees of self-government. The chief executives of the cities and counties are not responsible to the governor, nor sheriffs and county prosecutors to a State department of justice. While cities, villages, and some other local units have certain powers of legislation, the State legislative power is much less decentralized than the administrative.

GENERAL FORM AND CONTENTS · The constitutions of the forty-eight States vary widely in form, length, and content.[10] These variations, however, are conditioned primarily by the period in which they were written. Only two, those of Massachusetts and New Hampshire, antedate that of the nation, and the former has been so greatly amended that only by courtesy may it be regarded as the original document of 1780. Thirteen others

[10] J. Q. Dealey's *Growth of American State Constitutions* (1915) and the various texts on State government by W. B. Graves, A. N. Holcombe, W. F. Dodd, and others, referred to in the reading lists at the end of Chapter XXVII, infra, have adequate accounts of the structure, contents, and development of State constitutions.

were adopted in the period before the Civil War, and twenty-five in the remaining thirty-five years of the century. Eight are products of the period since 1900. Nineteen of the forty-eight States have had but one constitution each, including four New England States (Massachusetts, New Hampshire, Vermont, and Maine), three admitted immediately before the Civil War (Oregon, Kansas, and Minnesota), and twelve added since 1865. The large number of constitutions adopted between the close of the Civil War and the end of the century was due primarily to two causes: the outcome of the war, which made necessary the revision of the constitutions of every one of the seceded States, and the admission of new States to the Union. The constitutions vary in length from the twenty-six pages of the New Hampshire constitution of 1784 to the one hundred and thirty of that of Louisiana in 1921. The early constitutions, of which that of New Hampshire is an example, devoted themselves to the barest outlines of a frame of government. Those adopted since 1900 are filled with detailed material, much of it relating to current economic matters and not of constitutional importance. All have their text organized under "articles," each subdivided into "clauses" much after the style of the national constitution. All are headed by enacting clauses, usually enunciating the popular basis of the constitution and government, and expressing thanks to the Deity for his favor.

Although generalization is difficult, the content of the State constitutions may be said to fall into six parts: a bill, or declaration, of rights; an outline of the chief organs of the government and of the powers belonging to each; matters of taxation and finance; the organization and powers of the local governing units; provisions respecting certain important economic questions, including the organization of corporations; a miscellaneous group of unrelated provisions, mostly of a statutory nature, which are placed in the fundamental law of the State by their sponsors in the hope that they will remain unmolested; and the methods of altering the constitution or of adopting an entirely new one.

THE BILL OF RIGHTS · Every State of the Union has a bill, or declaration, of rights which, to emphasize its importance, is placed at the head of the constitution.[11] This is a proper part of a frame of government, because it amounts to a series of limitations imposed upon the work of the legislative and executive officers of the government. To make this perfectly certain, about a fourth of the States use some such expression as that of Alabama: "To guard against any encroachment on the rights herein retained, we declare that everything herein contained in this Declaration of Rights is excepted out of the general powers of Government, and shall remain forever inviolate."

It was inevitable that the builders of the first State constitutions should

[11]For the State constitutions and bills of rights cf. C. Kettelborough, *State Constitutions* (1918); also the pamphlet editions, issued by the various State governments.

have been alert on the question of individual liberty. The struggle with England had brought vividly before their eyes the value of some of the historic "rights of Englishmen." George Mason, inspired by Jefferson, drafted the famous "Declaration of Rights" for the Virginia constitution of 1778, and John Adams performed a similar service for the Massachusetts constitution of 1780. These two, largely inspired as to content and spirit by English experience, became directly or indirectly the model for the constitutions of some forty other States, as well as for the nation's. In 1912, for instance, we find the constitution of faraway New Mexico repeating some of the phrases which originally had been used by Massachusetts over a hundred and thirty years before.

The most noticeable thing about the State bills of rights is their striking sameness. All written since 1789 have embodied the content and often the wording of the first eight amendments of the national constitution: freedom of speech, the press, and religion; the right peaceably to assemble and petition for redress of grievances; a prohibition against the quartering of troops in private dwellings in time of peace, and against unreasonable searches and seizures; the right to bear arms; immunity from the deprivation of life, liberty, or property without due process of law; the right to just compensation for property taken for governmental purposes. They generally guarantee the historic common-law rights with respect to judicial procedure: indictment by a grand jury; freedom from compulsory self-incrimination and from being twice placed in jeopardy of life or limb for the same offense; a speedy trial in criminal prosecutions by a jury of the district in which the crime was committed; the right of the accused to legal counsel for his defense; notification of the nature and cause of the accusation; and the right to be confronted with the accusing witnesses. Nearly half the States now permit a bringing to trial either upon indictment by a grand jury or upon the lodging of information by the State's attorney; about the same number permit the trial of cases in justices' or magistrates' courts by juries of fewer than twelve persons, and in civil cases the waiving of a jury altogether or the giving of decisions by less than a unanimous verdict of the jury.

Aside from these universal provisions the peculiar experiences of various States have inspired the statement of new rights. Eight provide that no citizen may be deported from the State or they declare the right of emigration and immigration. Three or four state that all criminal laws shall be founded upon the theory of reformation and not upon that of the vindication of justice. A half-dozen or so retain the rule from the original Virginia bill that all lands are held by alodial tenure and that agricultural lands may not be leased for longer periods than from fifteen to twenty-four years. About a third forbid monopolies and perpetuities as contrary to good public policy. The new State of New Mexico declares that its people are entitled to all the "rights, privileges and immunities, civil, political, and religious,

guaranteed to the people of New Mexico by the Treaty of Guadelupe Hidalgo"; and this State and California and Montana forbid the holding of real estate by persons not eligible to naturalization under the Federal laws. North Dakota declares that every citizen "shall be free to obtain employment wherever possible." Oregon goes a step further and declares that the legislature has the right to "restrain and regulate the immigration to this state of persons not qualified to become citizens of the United States." Rhode Island guarantees to its people the enjoyment and free exercise of all "rights of fishery, and the privileges of the shore" to which they had been entitled under their original charter and the customs of the State. Tennessee declares that an equal participation in the navigation of the Mississippi River is one of the "inherent rights of the citizens of this State." Wyoming, one of the semiarid States, proclaims the value of water and guarantees that in providing for its use the interests of all shall be equally guarded.

All bills of rights adopt the principles of the Declaration of Independence with respect to the equality of men, their inalienable rights, and the popular basis of government. All assert decisively the full right of the people of the State to govern themselves. Texas, for instance, declares, "Texas is a free and independent State, subject only to the Constitution of the United States." Missouri uses the same language, and goes further in attempting to bind the legislature in the ratification of amendments to the national constitution. It is not authorized to adopt "nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may, in any wise, impair the right of local self-government belonging to the people of this State." In spite of this rule, however, its legislature ratified the Eighteenth and the Nineteenth Amendment, both of which diminished its right of self-government.

Considering the revolution in social life since the framing of the first bills of rights, it is surprising that so few modifications have been made in the original and so few fundamentals added. All but a few of the States modify the provisions for the freedom of speech and of the press by the reservation "being responsible for the abuse of such privilege." Arizona leads with three or four innovations. The right to bear arms is not to be construed to permit individuals or corporations to maintain an armed body of men; no law may be passed limiting the amount of damages which a court may award for a personal injury; no one having knowledge of facts to establish the guilt of anyone charged with bribery or illegal rebating shall be excused from giving testimony or producing evidence on the ground that it might tend to incriminate him; lastly, the State and any municipality reserve the right to engage in industrial pursuits. But with the exception of a few scattering new ones appearing here and there, the judgment as to what constitutes fundamental human rights appears to be only slightly different from that of the founding Fathers. Even the

constitution of Oklahoma, which at the time of its adoption in 1907 was regarded as radical, follows the orthodox line in its bill with only a few exceptions. There is a pledge that no person may be transported outside the State; a rule that the books of corporations shall always be open to the State for evidence; and the provision that drunkenness and the excessive use of intoxicating liquors shall constitute a ground for the impeachment of public officers. The bill of rights of New Mexico, one of the last States admitted to the Union, might well have been written in 1789.

THE FRAME OF GOVERNMENT · The plan of governmental organization in all the States without exception conforms to one model. Every constitution embodies the principle of the separation of powers into three great departments; and each is given the usual means of checking the other two: the veto, approval of executive appointments by the State senate, origination of taxation bills in the lower house, and judicial review of legislative and administrative acts. Massachusetts leaves no doubt as to its adoption of the principle by the formal statement:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Maryland, Virginia, and Alabama use about the same formula. In all other States the principle is established in the setup of the government rather than by formal expression. All the States except Nebraska have the bicameral legislature, the upper house being the smaller and based more on territorial units than on population. All carry the popular election of officials for relatively short terms to a pronounced degree. Two, Virginia and Maryland, announce it as a doctrine, the former stating that officials should "at fixed periods be reduced to a private station, [and] return into that body from which they were originally taken"; the latter, that a "rotation" in the executive departments "is one of the best guarantees of permanent freedom."

FINANCE AND BANKING · The older State constitutions deal very sparingly with finance and banking, but all adopted since the first third of the last century enter into considerable detail. Provisions requiring uniformity in tax laws and the assessment of property according to its true value, as well as that all tax levies shall be made by the legislature and that there shall be no spending without its appropriation of the funds, are general. Then there are numerous safeguards against abuses. The State is forbidden to lend its credit to any private individual or corporation, to surrender its power to tax, to become a shareholder in any private undertaking, to undertake internal improvements, or to levy a tax without a specific object to which its proceeds shall be applied. Public officers are forbidden

to make any personal profit out of the handling of State funds. With only a few exceptions, either the State is forbidden to incur a debt or the objects for which it incurs one are enumerated. A limit is set on State indebtedness, by naming either an absolute sum or a percentage of the assessed value of all property within the State. Arizona, for instance, limits the State debt to $350,000; Florida, to $500,000; and Texas, to $200,000. Colorado limits its debts to a sum not in excess of three fourths of one mill on each dollar of valuation of the property within the State; Nevada, to ten mills. States generally are forbidden to assume the debts of any of their subdivisions. A few constitutions set up regulations relating to the organization and conduct of banking institutions with something approaching the details of a code of laws. Most of them, however, content themselves with a provision forbidding the chartering of banks except by general statute, and state participation in banking enterprises. A half dozen or so forbid all poll taxes, while about the same number require them.

LOCAL GOVERNMENT · The constitutions of most of the New England States assume the existence of units of local government, namely, the town, municipality, and county, and leave their powers and organization largely to local custom or to acts of the legislature. The constitutions of the States of the West usually begin their sections on local government by adopting the county units already set up by the territorial governments. Legislative authority is almost without exception conferred to create new counties or change the lines of existing ones with the consent of the voters residing in the affected districts. In more than two thirds of the States a rigidity of county government is made necessary by the creation of certain county officers or by the requirement of uniformity of State legislation on the subject. Four States (California, Ohio, Maryland, and Texas) empower the people of the counties to frame and adopt their own charters. About one half of the State constitutions recognize the existence of township units; a few leave their creation to the discretion of the legislature. Legislatures in general are vested with power to create other units of local government, including cities and villages, and to delegate to them such powers of local government as they may deem best. Twenty States permit municipalities to frame their own charters, subject to such limitations as the constitution and the legislature may prescribe. There are many instances of limitations on the local governments to be created, such as the length of the terms of office of the various officers, debt and tax limitations, and the extent of powers conferred.

ECONOMIC MATTERS · The general rule is that the more recent the date of the constitution the greater the proportion of its text which is devoted to economic matters. Much of this material is more properly of a statutory than of a constitutional nature. There are two chief reasons why it found its way into the State constitution. The first is that, because of its controversial character, the support of the electorate had been won only after

a struggle. The sponsors, then, desiring to give their work a position of semipermanency, sought to place it in the constitution, where it would not be subject to attack in the next legislative session. Secondly, it was placed there to avoid a possible hostile decision from the State courts, or to overrule the effect of such decisions previously given. For instance, the Arizona constitution specifically takes away the three defenses which the common law permitted an employer to make when sued by an employee for injuries incurred in his service, namely, the fellow-servant, contributory-negligence, and assumption-of-risk rules. Again, after its courts had declared unconstitutional a workmen's compensation law, the people of the State of New York amended their constitution, specifically giving the legislature such power.[12] For the same reason the constitution of Washington asserts the State's title to the beds of all navigable streams and to all lands between the high-water and low-water marks of navigable waters.

Detailed provisions regarding railroads and corporations in general lead all other economic matters in the space devoted to them. Three fourths of the constitutions have articles devoted to these questions. In a dozen instances they amount to codes of law on the subject. The States of the semiarid West generally assert their ownership of the waters of the streams, and adopt the rule of prior possession rather than the common-law rule of the rights of riparian owners. Some supplement this with a general right of eminent domain in favor of those who desire to carry the waters from the streams through sluices over the lands of riparian owners. Provisions encouraging immigration, agriculture, mining, and industry in general, forbidding child labor, or setting the hours of labor on public works appear in a few. The States of Mississippi and Louisiana create drainage and levee districts, and authorize the financing of such works through taxation and special assessments. Others declare the public lands of the State to be held in trust for their people and regulate strictly their alienation. The constitutions of the New England and a few other of the original States are generally silent on economic questions, leaving them to be settled by legislative enactment.

MISCELLANEOUS MATTERS · The constitutions generally contain a variety of provisions not properly classifiable under any of the above headings. Legislatures often are empowered to create free public-school systems and institutions of higher learning. In some instances the latter are created and located by the constitution itself. The qualifications required for voting are generally made constitutional, while a minority set up in broad outlines the electoral machinery. In thirteen of the States there is provision for the initiative and the referendum. In a few the State's benevolent and penal institutions are named and located. Louisiana's constitution establishes county fairs; Colorado's creates the "County and City of

[12] *Ives* v. *South Buffalo Ry. Co.*, 201 N.Y. 271 (1911); *Constitution of the State of New York*, Art. I, sect. 19, adopted November 4, 1913.

Denver"; while those of Massachusetts and Connecticut perpetuate the charters of Harvard College and Yale College respectively.

## *AMENDING THE STATE CONSTITUTIONS*

THE RIGHT TO MAKE CONSTITUTIONAL CHANGES · The celebrated Virginia Declaration of Rights states that that government is best "which is capable of producing the greatest degree of happiness and safety for its people, and is most effectually secured against the danger of maladministration . . ."[13] But suppose a government is found to be inadequate or contrary to these purposes. Then "a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." Unquestionably this is a clean-cut assertion of the right of the people to change their fundamental law by the legal means provided. Suppose, further, that the amending process is so hedged with restrictions that a defective frame of government cannot in fact be changed. Are the extra-legal means of direct action and force ruled out? The wording does not exclude them, nor does that of the Declaration of Independence, which proclaims the right of the people "to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." The Maryland constitution repeats the Virginia formula in the words "in such manner as they may deem expedient," suggesting force "if all other means of redress are ineffectual," and adding that "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."[14] The inspiration for these radical sentiments is to be found in the historic struggle between Parliament and King James II, in the period from 1685 to 1689, in the course of which the king's followers accepted the doctrine of nonresistance even to his unlawful acts, while the philosopher John Locke justified revolution as an "appeal to heaven." While only a few of the State constitutions go so far as those quoted, all agree in the fundamental, that the people have the right to change their basic laws, and provide means for so doing. These differ from State to State in method and detail.

THE FRAMING AND PROPOSAL OF AMENDMENTS · The impulse for a constitutional change naturally comes from some place within the body of voters. In times of stress or emergency there may be an all but unanimous demand for a change to remedy a glaring weakness. In most cases, however, the movement originates in the desire of some special interest, geographical, political, or economic, for a readjustment which will inure to its advantage. It is consequently of importance that methods of proposal

[13]*Constitution of the State of Virginia* (1928 ed.), Art. I, sect. 3.
[14]*Constitution of the State of Maryland, Declaration of Rights*, Art. VI.

should exist which will give every legitimate minority interest a hearing but ensure that the proposal be worded to accomplish no more and no less than the desired result. The more than a century and a half of State history has evolved three methods of proposing amendments: (1) by the legislature, (2) by representative convention, and (3) by initiative petition. All the States except New Hampshire specifically provide the first method; thirty-six, the second; and thirteen, the last-named.[15]

1. *By the Legislature.* Proposal by the legislature is the oldest of the three, and is hedged about by details varying in the respective States.[16] Thirty states require an extraordinary majority; twenty-three, a two-thirds majority; and seven, a three-fifths majority. The others permit a bare majority of the members elected to make a proposal. While thirty-one constitutions require the action of only one legislature, fourteen require that of two successive ones. Indiana, for instance, requires that the proposal pass a legislature by a two-thirds vote, specifying that if it secures a majority vote in the legislature elected at the next general election, it may then be submitted to the people for ratification. Connecticut permits the lower house by a majority vote to propose an amendment in one session; this vote must be followed by a two-thirds vote in both houses of the next legislature. The purpose, obviously, is to force careful consideration by making the proposal an issue before the voters in the election of the next legislature. Since only five States have annual legislatures, this restriction means a delay of from two to four years in the adoption of an amendment. About a third of the States place further restrictions on legislative action. The Illinois legislature may not propose amendments to more than one article of the constitution in one session, nor to the same article oftener than once in four years. Indiana has the further restriction that while a proposal of one legislature is awaiting the action of the next or of the electors, no other amendments may be proposed. Kansas permits a maximum of three propositions to be submitted at any one election. Kentucky, Tennessee, and Indiana have somewhat similar restrictions.

2. *By Constitutional Convention.* Much may validly be urged against the legislatures as agencies of constitutional revision. Of particular force is the contention that, chosen on the bases of party allegiance and of current issues, legislatures seldom possess a mandate from the people to act on constitutional change. On the other side are the items of convenience and the position of the legislature as that part of the regular government best fitted to speak for the people of the State. An assembly chosen for the specific purpose is the better means if a general revision of the constitution

[15] W. F. Dodd, *The Revision and Amendment of State Constitutions* (1922), pp. 118–120. Cf. also contemporary issues of State constitutions (1887); J. A. Jameson, *Constitutional Conventions* (4th ed.), pp. 550–551; and J. Q. Dealey, op. cit. chap. xi.

[16] W. F. Dodd, op. cit. pp. 134–136.

is contemplated rather than a repair of defective parts or the addition of a few clauses.[17] Massachusetts, in 1779, was the first to employ the special convention; today thirty-six States specifically provide for it, and in New Hampshire it is the only method that may be employed. In eleven others the right of the legislature to call special constitutional conventions is a part of their unwritten constitutional law, a right easily inferred from the recognized doctrine of the residual power of the people of the States and of their legislative bodies. Only in Rhode Island has there been a judicial denial of this right, when constitutional revision was attempted in 1883.[18]

Jefferson once advanced the proposition that a constitution ceased to have binding force after a span of twenty years unless specifically readopted, since according to the mortality tables a majority of those upon whose consent it had been based had passed from the scene.[19] An argument more fitting to the practical statesman is that within twenty years a constitution as a whole or in part will normally have become outmoded by the passage of time and that therefore the people should be called upon to express an opinion as to whether a general review of it should be made by a representative convention. Seven States today follow that principle: Ohio, Oklahoma, New York, and Maryland adopt the Jeffersonian span of twenty years; Michigan prescribes sixteen; Iowa, ten; and New Hampshire, seven. In all but nine of the States providing for a legislative call, no convention may be held unless consented to by a majority of those voting on the question at a referendum election.[20]

As stated above, the convention as a means of constitutional change was added to that of the legislature because it seemed to possess a superior advantage if a general revision rather than a specific repair of the constitution was to be attempted. Several questions respecting the relation between these two bodies have arisen from time to time.[21] The most usual provision is that the legislature shall call a convention upon the approval of such a proposition by a popular referendum. Since the legislature is by nature a discretionary body, no legal machinery exists which may compel it to perform that duty should it refuse. The difficulty, however, is largely a theoretical one, since the same public opinion which voted for the convention is reflected normally in the legislature and so far has always been obeyed. The nearest to a refusal was in New York, where, in 1886, the people had voted for a convention and, owing to differences between the governor and the legislature, the convention did not actually assemble until eight years later. Three State constitutions now provide for the as-

[17]Ibid. pp. 10, 25.

[18]Ibid. p. 45. *In re the Constitutional Convention*, 14 R.I. 649.

[19]Letter to Samuel Kercheval, July 12, 1816. T. Jefferson, *Writings* (Library Ed., 1903), Vol. XV, p. 42.

[20]W. F. Dodd, op. cit. pp. 50–52; also current constitutions.

[21]W. F. Dodd, op. cit. pp. 55–57.

sembling of conventions without the intervention of the legislature—those of Missouri, New York, and Michigan. The first-named, for instance, declares that after the affirmative vote of the electorate the governor shall issue writs for an election, to be held between three and six months after the popular referendum, in which he shall specify the number of delegates and the districts from which they shall be elected, and all other matters necessary to bring the process to completion.

All the other States require legislative action of some kind. Ten regulate the number of delegates, their apportionment, and their method of election. In most cases the cue is taken from the legislative setup.[22] California, for instance, requires that the convention shall consist of as many members as there are members of the two houses of the legislature; Minnesota, South Dakota, and Ohio, the same number as there are in the lower house of the legislature. Maryland specifies that each county shall have the same number of delegates as it has in both houses of the legislature.

Occasionally questions have arisen as to the respective places of these two bodies in the polity of the State. Conventions have acted in some cases as though they were legally empowered to supplant the legislature while in existence. Three different Virginia conventions, for instance, enfranchised new classes of the people in their proposed new constitutions and then submitted their work to the new electorate for their approval.[23] The legal basis for this attitude is that the convention, for the moment, is a supreme lawmaking body, having been so made by its authorization by the sovereign people. Legislatures, on the other hand, have often attempted to bind the convention to the proposing of amendments on certain specified subjects, regulated their procedure and organization, set a time limit to their existence, and in general treated them as subordinate bodies. Perhaps no definite rule may be stated with respect to this question. Reason would seem to dictate that a convention, once in existence, might well ignore such limitations, particularly in so far as they limit its power to propose needed amendments, but that it should not attempt to interfere with the ordinary duties of the legislature.

3. *By Initiative Petition* · The third method of proposal is by initiative petition. Thirteen States now authorize it, all but four of which lie west of the Mississippi River, Massachusetts being the only one of the original thirteen States.[24] The device is not a native American one but an importation from Switzerland. Oregon, in 1902, was the first to adopt it, and the movement stopped with the adoption of the device by Massachusetts, in 1918. The plan used in general provides that the desired amendment

[22] W. F. Dodd, op. cit. p. 56.

[23] A. N. Holcombe, *State Government in the United States* (ed. 1931), p. 133.

[24] W. F. Dodd, *State Government* (1922), p. 121. The thirteen States are Arizona, California, Colorado, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon.

be printed on petition blanks and circulated among the electors, and that signatures be secured of those who favor it. These petitions are then deposited with the secretary of state, and, upon his certification of their conformity with the law, the measure is legally proposed. A certain minimum of signatures is set in the various States. Ten make it a percentage of the qualified electors. Three of these set it at 8 per cent, and two at 10, while North Dakota and Oklahoma require 15 and 25 per cent respectively. Missouri requires 8 per cent of the legal voters in at least two thirds of the Congressional districts of the State; North Dakota, 25 per cent in each of not fewer than one half of its counties. Arizona and California, on the other hand, set the minimum at a percentage of the total voting for candidates for governor at the last election, namely, 15 and 8 per cent respectively. Massachusetts requires a flat minimum of 25,000 signatures.[25]

THE RATIFICATION OF CONSTITUTIONAL AMENDMENTS · Ratification by popular vote has now come to be the all but universal method. This has resulted from a combination of constitutional requirement and unwritten rule.[26] Only in a few instances has a proposing body recently exerted the right to declare its work in force without submission to the electorate. When the legislature is the proposing organ (which is allowed in all the States except New Hampshire), all but Delaware require that the measure be submitted to the electors for their action. Thirty-two States provide that a majority of the electors voting on the proposal are sufficient for its adoption. The State of Rhode Island requires a three-fifths majority of those voting, and ten of the States require a majority of all the votes cast in the election, most of these prescribing that the vote shall be taken during a general election. This makes ratification difficult, since the largest votes polled are always those for candidates, those for issues such as constitutional amendments seldom running more than two-thirds as high. It sometimes happens, therefore, that an amendment may carry by a substantial majority which at the same time is not a majority of the votes cast for a high-polling candidate. Three States (Idaho, Indiana, and Wyoming) have the still more impossible condition, namely, that the amendment must be approved by a majority of all the qualified electors of the State, whether they have participated in any part of the election or not. The rigor of the requirement has been somewhat softened in Indiana by a judicial ruling that "a majority of said electors" refers to those registered to vote in the election rather than all legally qualified in the State.[27]

[25]Illinois Constitutional Convention, Bulletin No. 2, *The Amending Article of the Constitution.*

[26]W. F. Dodd, *The Revision and Amendment of State Constitutions*, chap. v.

[27]Ibid. pp. 185–187. This was a reversal of the opinion of the court in the case of *State* v. *Swift*, 69 Ind. 505 (1880), which held invalid a proposed amendment that had received a vote of 169,483 to 152,251 on the ground that the total vote did not represent a majority of those eligible to vote in the State.

In the thirty-six States in which conventions are specifically set up as proposing bodies, nineteen require that their work shall be submitted to the electors, thirteen requiring a majority of those voting on the proposal; one (New Hampshire), a majority of two thirds; and five, that it be "adopted by the people," which presumably means by a majority vote. There remain the seventeen States which are specifically authorized to make use of conventions, and eleven others which may use the convention by the unwritten law of their constitutions. Of all these it may be said that the rule is the submission of the proposals of the conventions to the people, with the exception of Mississippi and Delaware; and even Mississippi did so in 1869, acting under the mandate of the Reconstruction Act of Congress. The fact that in five States, namely, New York in 1894, South Carolina in 1895, Delaware in 1897, Louisiana in 1898, and Virginia in 1902, the convention failed to submit the new or revised constitutions to the electorate should not be taken to indicate a tendency toward a different rule, since three of them, New York, Louisiana, and Virginia, have since followed the opposite practice.[28] In view of the silence of the constitution in this respect, submission would seem to be left to the discretion of the convention. The tendency toward democracy of the last few decades indicates that cases of nonsubmission in the future will be rare.

When proposal is by initiative petition, as it may be in thirteen States, ratification is everywhere by vote of the electors. Nine provide that an amendment is adopted if it receives the affirmative vote of a majority of the qualified electors "voting thereon." Massachusetts has a like rule, except that the majority must be equal to at least 30 per cent of all the votes cast at the election. The requirement is more severe in Nevada, North Dakota, and Oklahoma, where the measure must receive a majority of all the votes cast. In Oklahoma, November 3, 1914, four such proposals were approved by majorities running from 22,894 to 60,555, one of them by an almost two-to-one vote; and yet all failed of adoption because in no case had they received a majority equal to that of the aggregate vote for governor.[29]

APPRAISAL OF THE AMENDING PROCESS · Have the methods of constitutional change described above proved satisfactory? Have the constitutions yielded consistently to meet the needs of the changing social conditions of the respective State communities? The varied facts in forty-eight different States do not lend themselves to exact generalizations, but some conclusions may safely be drawn. To begin with, it must be remembered that the various State constitutions, like that of the nation, have grown in other ways than by formal amendment—by custom, by judicial decision, and by organic statutes. These changes, however, are somewhat less significant than in the case of the national constitution, because the more poorly

[28] W. F. Dodd, *The Revision and Amendment of State Constitutions*, pp. 68–71.

[29] Commonwealth of Massachusetts, *Bulletins of the Constitutional Convention, 1917–1918*, Vol. I, pp. 195, 196.

drafted and more detailed State documents are not so well adapted to the consistent growth of unwritten constitutional law.

In some States the mechanism of constitutional amendment unquestionably was made too difficult of operation. Of this Rhode Island is a good example. Its original frame of government was altered in 1842 only after an armed rebellion; and the same difficulty of change in the present one led to acts illegal and bordering on violence in the legislative session of 1927. Tennessee's seventy-five-year-old constitution has never been amended,[30] while Illinois has amended only seven times, and Kentucky eight times. Indiana was able to meet the legal requirements for the amendment of its constitution of 1851 only three times down to 1935, in spite of persistent efforts as shown by more than 400 proposals. The legislature of 1911 drafted a complete constitutional revision, but was prevented from submitting it to the people by the Supreme Court, which held that the proposal power of the legislature was restricted to the offering of minor alterations. An attempt five years later to assemble a constitutional convention was enjoined on the ground that, although there was no forbidding constitutional clause, no such body might be called without a previous authorization of the electors.[31] In 1935 the Supreme Court broke down the barriers to amendment by holding an amendment validly ratified if it received more affirmative than negative votes.[32] In general the experience of the two States which require a majority of all the electors voting at an election for the adoption of an amendment suggests that this is an unjustified safeguard. Idaho, a State with a small and homogeneous population, succeeded in amending its constitution twenty-four times between 1890 and 1917 in spite of this handicap; but Wyoming, in the same period, with the same rule, had adopted but four amendments.[33]

At the other extreme are those States which permit the people to change their fundamental laws without the intervention of legislature or conven-

[30]W. H. Combs, "An Unamended State Constitution: The Tennessee Constitution of 1870," *American Political Science Review* (June, 1938), Vol. XXXII, pp. 514–524.

[31]W. F. Dodd, *The Revision and Amendment of State Constitutions*, pp. 119, 120.

[32]Between 1851 and 1940 a total of 420 proposals to amend the Indiana constitution had been made in the legislature, of which only thirty-four were submitted to the people. Since 1900, twenty-eight amendments have been submitted to the people, of which thirteen failed to be approved by a majority of those voting on the proposals; thirteen received more affirmative than negative votes but did not meet the constitutional requirement of a majority of all persons voting in the election; and only two received the constitutional majority. However, the state supreme court, in the case of *In re Todd* (208 Ind. 104), ruled that if a proposal received more affirmative than negative votes it was ratified, a ruling which has been held to validate some of the lost amendments back to 1900. One of the most curious contests involved the attempt to amend the section which gave to "every person of good moral character, being a voter," the right to practice law (Art. VII, sect. 21). Such proposals received more affirmative than negative votes in 1900, 1906, 1910, 1912, and 1932, but not the constitutional majority; but the last proposal was declared legally ratified by the court in the above-mentioned case. Cf. *Constitution of the State of Indiana* (1940), pp. 22, 23, 32, 33.

[33]W. F. Dodd, *State Government*, pp. 125–126.

tion—by the device of the initiative. The chief theoretical objections to this amending process are that it gives no opportunity for a view of the question as a whole, either by the electors assembled or by a body representing all; that the result is necessarily a piece of patchwork; and that it lends itself to the purpose of organized minorities, who are interested primarily in accomplishing a certain textual change in their immediate interest, irrespective of how it affects the context of the constitution. A further objection is that it subjects the fundamental law of the State to change by passing impulses, thus destroying the real distinction between statutory and constitutional law.

Experience has demonstrated a considerable validity to these contentions, although it is not clear that the defects of the plan exceed its merits. About two hundred and fifty proposals for constitutional amendments have been initiated in the States since the first use of the initiative in Oregon in 1902, by far the greater number of them being primarily statutory in nature.[34] Approximately eighty of these were adopted. Although the fear that the popular amending power would be used to oppress minorities has proved unfounded, the fear that it would lead to the adoption of ill-considered changes has in part been realized. At its November election in 1933 the Ohio electorate ratified an initiated amendment placing a ten-mill limitation on real-estate taxation, and on the same ballot ordered an increase in public expenditures by enacting a statute providing for a system of old-age pensions. On the other hand, an initiated amendment was approved authorizing county home rule, which had received scant consideration in the two preceding legislatures. California and Oregon have used the constitutional initiative excessively. Fifty-one amendments were initiated in the former in a period of eight years, and fifty in the latter. The Massachusetts constitution, prohibiting the use of the initiative for an enumerated list of subjects chiefly taken from its bill of rights, recognizes that certain parts of the fundamental law, should not be subject to change except upon consideration by a deliberative body.

Theoretically, constitutional revision by a convention has more to commend it than any other method, even for single amendments, except for the impracticability of summoning conventions frequently. So long as the constitutions are burdened with a large amount of statutory material, less cumbersome means are necessary. Conventions are in most cases elected by a nonpartisan ballot for the performance of one task. They are deliberative in character, and, with the entire constitution before them, they are able to see the significance of any given change for the instrument as a whole.

Generally speaking, the conventions have performed well, although as

[34] Commonwealth of Massachusetts, *Bulletins for the Constitutional Convention, 1917–1918*, Vol. I, No. 6 (1918); G. H. Hallett, Jr., "The Constitutional Initiative Starts a New Advance," *Nat. Mun. Rev.*, Vol. XXIV (1935), pp. 254–257.

competent a student of their work as W. F. Dodd observes that they have "ordinarily been content to follow rather than to lead, and little of constructive statesmanship has developed in constitutional conventions."[35] Since 1900, twenty-three conventions have been assembled in as many States. Those of New York of 1915 and Illinois of 1920–1922 had unusually competent leadership; but they attempted too much, and alienated sufficient of the interests affected to bring about their rejection by the electorate. A like fate awaited the work of the Arkansas convention of 1918. Conventions in Ohio, Missouri, Nebraska, and Massachusetts, however, in 1912, 1922, 1920, and 1917–1919, respectively, brought forward revisions which were submitted to the people in the form of separate articles of amendment; and these met with greater success. The Ohio convention submitted forty-one, of which only eight failed of adoption. Fifteen out of twenty-one were rejected in Missouri. In Nebraska all forty-one of the proposals were carried, as were all twenty-two in Massachusetts.[36]

Judgment on the existing methods of amending the State constitutions cannot be sweepingly favorable or unfavorable. In about half a dozen States inadequate methods have resulted in positive harm by preventing the modernization of the machinery of government and the enactment of needed social legislation. At the other extreme are about the same number of States where ease of amendment has permitted changes which had never received due consideration from the people of the community. The initiative, if safeguarded, is a valuable means of forcing action where the legislatures and conventions are too greatly influenced by officeholders and special interests desiring to preserve the status quo. Generally speaking, the failure of State constitutions to keep pace with social change is due more to the lack of good leadership and of popular interest than to defects in the mechanics of constitution-making.

## *LOCAL GOVERNMENT CHARTERS*

CHARACTERISTICS · A city charter bears a close resemblance to the national and State constitutions in form, purpose, and general content. It specifies the boundaries of the city; establishes the form of government, defining and limiting the powers of the chief officers; provides for the election and appointment of officials; and contains the usual miscellaneous collection of clauses respecting the conduct of the administration. Yet it is hardly correct to think of the city charter as fundamental law. The city is a subdivision of the State for purposes of government and possesses only such powers as are delegated to it. Its legal status is that of a corporation, with the usual powers to acquire, hold, and sell property, to make contracts, and to sue and be sued. All its acts are subject to the applicable restrictions laid down in both the national and State constitutions.

[35]W. F. Dodd, *State Government*, p. 114. [36]Ibid. pp. 125, 126.

Apart from a few counties in fewer than half a dozen States, no other unit of local government has an organic law which can be called a charter. Park, sanitary, school, library, and all other types of special districts owe their existence and powers to acts of the legislature—rarely to the State constitution—and may be dissolved by the power which created them.

METHODS OF CHANGE · The methods of granting and amending the charter of a city are consistent with its position of subordination.[37] In pre-Civil War days the city was incorporated and its charter constructed by a special act of the legislature. Any amendment thereafter needed could be made only by the same means. In the next stage of development the general-charter plan was substituted for the special. The State legislature enacted a municipal code, which included several charters applicable respectively to all cities within stated limits of population. Since special legislation for individual cities was then generally prohibited, the charter of one could not be amended without amending all in that class. Fifteen States have taken a step beyond the general-charter system in authorizing municipal home rule. The city elects a citizen commission which, subject to the restrictions of the State constitution and laws, draws a charter to be submitted to the voters for their approval. Amendments to home-rule charters may in most cases be proposed by any of the three means analogous to those used for State constitutions: the city council, a commission (which is a little convention), and initiative petition. These charters of minor units of government represent the most extreme extension in the United States of the principle of popular constitution-making.

## *SUMMARY OF AMERICAN CONSTITUTIONS*

The foregoing chapters have dealt at some length with written constitutions and charters, and their accessory customs, statutes, and judge-made rulings. Together they form a fairly well-harmonized whole, which may correctly be referred to as the fundamental law of the United States. The chief features of this fundamental law have been set forth, its content summarized, and methods of growth described. It has been found to be distinguished by qualities of permanence and superiority. What the rule book is to a game, such as football, this fundamental law is to the whole range of our political activities. The organization of political parties, the election of officials, the making of laws and their execution, the administration of justice, all must be played out according to the book. Just as, in sports, the rules cannot be changed during the game, so the acts of government must be performed according to the laws previously agreed upon.

Another analogy may be made. Like the network of a river system, the

[37] A. F. Macdonald, *American City Government and Administration* (1941), chap. v; W. B. Munro, *The Government of American Cities* (Rev. Ed., 1917), chap. iii; W. Anderson, *American City Government* (1925), chap. iii.

constitutions lay out the channels through which the currents of political activity must flow. When political ferment is at flood tide, landmarks may be submerged and old channels reshaped or new ones made. Something like this happened in the six or seven years of the Civil War period. But normally the old courses are adequate. A surge of popular sentiment involving, for instance, the question of agricultural relief, flows through the political parties, electoral machinery, legislatures, and executives, all of which belong to the established channels. No matter what the issue or how intense the popular feeling which may be aroused, the constitutions provide paths to ultimate governmental action.

Finally, it became evident that the provisions of the constitutions, excluding certain extraneous parts, are counsels of wisdom and prudence crystallized out of the experience of mankind, maxims of a highly developed civilization. Preponderantly they were drawn from the thousand-year-old struggle of the English for self-government. Some concern particular liberties of the individual which had been found indispensable if a free or, indeed, a progressive society was to exist. Others embody mechanisms of government, like the separation of powers or the independent judiciary; or mere procedures, like the requirement that tax bills shall originate in the lower house of the legislature or the requirement that a person be indicted by a grand jury before he may be brought to trial for a crime. Together they constitute a monitor for citizen and official alike, and are preeminent evidence of man's ability to profit by the experience of the past.

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# II

*The chapters of this section describe how the people of the United States create and control their government. The men who drafted the Declaration of Independence and the Constitution had in view a government based on the "consent of the governed," on the masses in general, if not on universal suffrage. Popular control of government by orderly means is something which had been attained in no sizable state, outside Great Britain, before 1776. It is accomplished in the United States by a great variety of means, some native to the soil but for the greater part evolved by trial and error in the course of many centuries. Among these are political parties and associations, caucuses, primaries, conventions, and platforms, the arts of political organization and leadership, and campaigns and elections, with their accouterments of voting booths, officers, and ballots. The over-all purpose is the choice of such public officers and policies as best represent the views and purposes of the majority of the people. Rivaling the popular election of officials as a means of controlling governmental policy is public opinion, its formation and expression.*

## POPULAR CONTROL OF THE GOVERNMENT

*The actual operation of elections and public opinion as instruments for the control of the government is dependent on the political privileges, abilities, and traditions of the people themselves. What proportion of them are citizens, and what rights does citizenship confer? Who comprise the voting portion of the population, and how extensive is the range of decisions referred to them? What types of political associations have developed? What is the character of the political leadership? Of pertinence, too, are the political customs, beliefs, and ideals which characterize the people generally.*

## CHAPTER VI

# *American Citizenship*

It is not easy to define in general terms the meaning of citizenship in the modern state. The heart of the matter, however, is the idea of membership in the body politic. Who are citizens, how citizenship is lost and acquired, and what classes of people in a country fall short of citizenship are all matters fixed by each state in its municipal law.

THE BASIC RULES OF CITIZENSHIP · The citizenship laws of the various modern states are derived chiefly from one or the other of two ancient concepts from the Roman and the English law, respectively.[1] The first, called the law of *jus sanguinis*, bases citizenship on the blood tie. One was a citizen of Rome because his father was a citizen. This rule harks back to the primitive organization of mankind, when blood kinship was the real or supposed basis of the clan and the tribe. It became incorporated in the laws of Greece and Rome, and was handed down to the states of continental Europe and through them to their colonies in Central and South America. The second concept, *jus soli*, bases citizenship on territory, the place of birth. Birth within the king's allegiance, which meant within his domains, was the rule which developed in England.[2] During the feudal age social organization was based on land rather than on the blood tie. People of all classes, serfs and vassals, owed allegiance to the overlord of their territory; a change of lords meant a change of allegiance. When England passed out of the regime of feudalism, it was an easy step to conceive of citizenship or allegiance to the king as resulting from birth or residence on the soil.

THE COMMON-LAW RULE IN AMERICA · The English common-law rule of citizenship became the law of the English colonies in America.[3] After

[1] C. H. Maxson, *Citizenship* (1930), chap. i; L. Gettys, *The Law of Citizenship in the United States* (1934), pp. 11–30; F. Van Dyne, *Citizenship of the United States* (1904), pp. 3, 7.

[2] One of the best short statements of the English law of citizenship is that of the Court in the case of *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898). Blackstone's classification of the people subject to the laws of England is as follows: "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the king; and aliens, such as are born out of it." Allegiance, he explained, is of two kinds, *natural* and *local*. "Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only. . . . Naturalization cannot be performed but by an act of Parliament." (W. Blackstone, *Commentaries on the Laws of England*, Vol. I, chap. x)

[3] C. H. Maxson, op. cit. pp. 5, 6.

1776, applicable parts of the common law remained the basic law of the new States, and so the rule remained that a person born or naturalized in a State was a citizen of that State. With the adoption of the new national constitution in 1789, this general rule of citizenship persisted, although curiously enough there was no explicit statement to that effect in that instrument. The law of citizenship was rather left to be gathered from casual references to the matter. Senators and Representatives were required to be "citizens of the United States" and "inhabitants" of the State from which elected, from which it might be inferred that a national citizenship was contemplated. No person could be President unless he was a "natural born" citizen of the United States or a naturalized citizen of the States at the time of the adoption of the Constitution. At another point the Constitution states that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," which is a clear recognition of the existence of State citizenship.[4] Thus the ordinary person possessed a dual citizenship, that of his State and that of the United States.

FEDERAL AND STATE CITIZENSHIP · The relative importance of the two citizenships was a matter on which authorities differed down to the time of the Civil War. The States'-rights party held that State citizenship was the substance and national citizenship its shadow: by becoming a citizen of a State a person became a citizen of the United States. Even naturalization, concededly a national function, was only a step toward citizenship. It removed the "alienage" of the person, but it yet remained for him to become a citizen by acquiring State citizenship. Some members of the nationalist group agreed that Federal citizenship came through State citizenship, but did not concede that it was for that reason subordinate. Chief Justice Marshall, in an opinion in 1832, further weakened the States'-rights view by holding that "a citizen of the United States residing in any State of the Union is a citizen of that State,"[5] which amounted to a denial of the right of a State to make or unmake its own citizens. Chief Justice Taney, in the Dred Scott case in 1857, held that the Constitution had never contemplated Negroes as a part of the "people of the United States," that by common consent and general understanding they had never been regarded as citizens of the States or of the United States.[6] Thus they constituted an exception to the English common-law rule that birth within the land gave citizenship. He conceded that States for their local purpose might make Negroes "citizens," but held that this was not the citizenship contemplated by the Constitution and was not binding outside their borders.

[4]*United States Constitution*, Art. I, sects. 2, 3; Art. II, sect. 1; Art. IV, sect. 2.

[5]*Gassies* v. *Ballou*, 6 Peters, 761 (1832).

[6]*Dred Scott* v. *Sanford*, 19 Howard, 393 (1857). In this case, for the first time, the Supreme Court attempted an exhaustive examination of the law of citizenship. Owing to the great differences of views, each justice wrote an opinion, so that there was no official opinion of the Court. That of Taney is usually published, and sometimes is erroneously referred to as the opinion of the Court. Cf. also C. Warren, *The Supreme Court in United States History*, Vol. III, pp. 1–41.

FINAL SETTLEMENT IN THE FOURTEENTH AMENDMENT · These uncertainties were set at rest by the adoption, in 1868, of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside."[7] National citizenship is now primary, and any United States citizen residing in a State is a citizen of that State notwithstanding any law which it might have to the contrary. The only exception recognized is in the phrase "and subject to the jurisdiction thereof." Duly accredited diplomatic officers of foreign countries to the United States and Indians living in tribal relations fall in this category.

NATURAL-BORN AND NATURALIZED CITIZENS · Blackstone divided the people of England into "natural-born" and "aliens," to which later was added the third class of naturalized citizens. He defined the natural-born as those "born within the dominion of the crown of England . . . within the allegiance of the king"; aliens, "such as are born out of it."[8] Natural-born citizens of the United States, then, are those who according to our law were citizens from the time of birth, without going through any process of naturalization.[9] Except for the offices of President and Vice-President of the United States, which must be held by natural-born citizens, all public offices and all legal rights and privileges are equally open to naturalized citizens. The term *nationals* is now used to cover those inhabitants of the possessions of the United States who have not been made by act of Congress citizens of the United States. The Filipinos, for instance, are citizens of the Philippine Islands and *nationals* of the United States, but not citizens of the United States.

COLLECTIVE NATURALIZATION · Naturalization is the process established by law by which an alien or a national may become a citizen of the United States. The power to "establish an uniform rule of naturalization" is vested by the Constitution in Congress, and this has been held by the courts to exclude a concurrent power in the States.[10] Naturalization may be either collective or individual. It had been the policy of Congress for over a hundred years to naturalize by general law all the inhabitants of annexed territories. Indeed, the treaties by which Louisiana, Florida, and Alaska were acquired contained this pledge.[11] But the large unassimilable populations of the Spanish colonies acquired in 1898 led to a change in

[7]The Fourteenth Amendment contains five sections, only the first of which deals with the questions of citizenship and civil rights.

[8]W. Blackstone, op. cit. Vol. I, chap. x.

[9]C. H. Maxson, op. cit. pp. 193, 194. The act of 1940 declares children born abroad of an American parent or parents to be citizens "at birth"; but whether the Supreme Court would hold them to be natural-born citizens within the meaning of the Constitution is an open question. 54 Stat. 1138.

[10]*United States Constitution*, Art. I, sect. 8, clause 4.

[11]C. H. Maxson, op. cit. pp. 111–118; F. Van Dyne, *Citizenship of the United States*, pp. 143–248; L. Gettys, *The Law of Citizenship in the United States* (1934), passim.

policy. The people of the Philippine Islands, Guam, and the Panama Canal Zone have been denied citizenship, but in 1917 the people of Puerto Rico were declared citizens of the United States. The people of the independent republics of Texas and Hawaii, annexed in 1841 and 1898, respectively, were immediately given citizenship. Obviously, Congress by special act could give collective naturalization to any noncitizen group by class as well as by geographical bounds. An example was the act of 1855 which declared that the children born abroad of American parents were citizens of the United States. There is some basis for considering these to be natural-born citizens, but the weight of argument is on the other side. The Fourteenth Amendment, by enunciating the rule of *jus soli*, was an act of naturalization and made the freedmen citizens if, as some contended, they had not been made so already by the emancipation amendment. During the First World War large numbers of resident aliens who had not completed the process of naturalization were drafted into the army, and many of them were sent to fight against their native lands. To ensure that they received the treatment due enemy prisoners if captured, Congress passed an act declaring them citizens of the United States.

NATURALIZATION OF INDIVIDUALS · During the early years of the Republic and, indeed, until recent times the administration of the naturalization laws was lax. Public sentiment was in favor of a large immigration so that the Western lands might be settled and labor provided for the factories. It was likewise favorable to expeditious naturalization. Party leaders, particularly in the cities, took the lead in putting the immigrants through the naturalization process so that their names might appear on the registration and polling lists. Sometimes this was done on a wholesale and rapid scale, just before an election, without too high a regard for the niceties of the law. Congress in 1906 passed a law to strengthen the administration of these laws, and this was followed by supplementary acts in 1918 and 1926.[12] The Bureau of Naturalization of the Department of Labor now has general oversight; and the country, for purposes of administration, is divided into twenty-three districts, each in charge of a director. Naturalization jurisdiction is vested in the United States district courts, the supreme court of the District of Columbia, and all State courts of record having a seal, a clerk, and jurisdiction in actions at law or equity in which the amount in controversy is unlimited.[13]

THE NATURALIZATION PROCESS · There are three steps in the naturalization process. The first is the filing, before one of the designated courts, of a declaration of intention to become a citizen. This must be done at least two years before the applicant is given his final examination. The second

[12]The various laws respecting naturalization are grouped under Title 8, Subchapter III, of the *United States Code*.

[13]*United States Code* (1940), Title 8, Subchapter III, sect. 701.

is the filing of a petition for naturalization, not less than two and not more than seven years following the first. Before filing this application the applicant must appear before a naturalization examiner with two witnesses for a preliminary examination. Here it is ascertained whether he has complied in general with the requirements of the law, whether his witnesses are competent, and whether his declaration of intention and his certificate of arrival are available. The petition must contain data respecting his family (if he is married), affidavits of two citizens as to his residence and good moral character, and a statement that he is not a polygamist or opposed to organized government. If the examiner finds technical defects in his papers, these defects may be remedied before the petition is reported to the court. The third step is the hearing before the court. Since 1926, if it is a Federal court, the judge may appoint one or more examiners or officers of the Bureau of Naturalization to conduct a preliminary hearing on the petition for naturalization. The examiner has the same powers as the court to summon and subpoena witnesses, take testimony, and administer oaths. On the basis of the hearing the examiner makes a recommendation to the court on the petition, which, upon being signed by the judge, becomes its decree. The court may, however, reject the examiners' recommendation and order a court hearing, and this must be done if demanded by the petitioner.

The use of the preliminary examination has the obvious advantage of relieving the court of a vast amount of work and of placing the arduous task of investigating petitions for naturalization in the hands of an agency better qualified for handling details. The naturalization process therefore remains basically judicial but with administrative oversight at the top and aid at the bottom. The provision for a preliminary administrative hearing and recommendation applies only to the Federal courts, but the greater convenience for the petitioner has served to give the Federal courts an increasingly large number of cases to the disadvantage of the State courts. Now that immigration has fallen to a low mark, there is little reason, except tradition, why the entire naturalization process should not be administered by the Federal agencies. Since the process is largely one of ascertaining facts, it would be better to leave this to administrative bodies, with the usual right of appeal to the courts on questions of law.

WHO MAY BE NATURALIZED · Congress has entire discretion under the Constitution to say who may or may not be naturalized. Beginning with the act of 1790, it restricted the privilege to "aliens being free white persons." In 1870 the privilege was extended to "aliens of African nativity and persons of African descent";[14] and in 1940 to descendants of races indigenous to the Western Hemisphere, which would include Indians and Eskimos. A law of 1882 specifically named the Chinese as not eligible for naturalization.[15] Some uncertainties about the interpretation of these

[14] 16 Stat. 256 (July 14, 1870). [15] 22 Stat. 61 (May 6, 1882).

statutes were perhaps responsible for the naturalization of some Japanese (the census of 1910 showed over four hundred such naturalized citizens). In 1922 one Toyato Ozawa, twenty years a resident in the United States, appealed to the United States Supreme Court for the right to be naturalized on the ground that Japanese were "free white persons," as the law required. The Court, however, held that the law referred to the Caucasian race rather than to the color of the individual, an interpretation which clearly excluded the Japanese.[16] A year later Bhagat Singh Thind, a high-caste Hindu, made a similar appeal, but on the ground that he was a member of the Caucasian or Indo-European race. He lost his case on the ground that he was a person of color.[17] The children of persons ineligible for naturalization, however, if born in the United States, are citizens. There was some uncertainty about this until a Supreme Court decision in 1898. Wong Kim Ark was born of Chinese citizens in San Francisco. Upon his return from a visit to China he was denied entrance to the United States on the ground that he was not a citizen of the United States. In upholding his claim the Supreme Court ruled that the Fourteenth Amendment had adopted the rule of *jus soli* with only the exception specifically mentioned therein.[18] Since Wong Kim Ark had been "subject to the jurisdiction" of the United States at the time of his birth, he was a citizen. The language of the amendment was "peremptory and explicit." "Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization." Another problem respecting Orientals was raised by the annexation of Hawaii and the collective naturalization of its people in 1900. Have these thousands of natural-born American citizens of Oriental descent the right to enter the United States in spite of the Chinese and Japanese exclusion laws?[19] In the absence of Congressional legislation the United States Attorney-General ruled in 1901 that they might. But in 1918 Congress by joint resolution ordered contrariwise, permitting specified exceptions on special certificates authorized by the Department of Labor.[20] Hawaiians of white or African ancestry may enter freely. The constitutionality of the law is questionable.

The laws restricting immigration, of course, indirectly set limits to who may be naturalized, but Congress has taken care to debar certain persons

[16] *Toyato Ozawa* v. *United States*, 268 U.S. 402 (1922).

[17] *United States* v. *Bhagat Singh Thind*, 261 U. S. 204 (1923).

[18] *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898).

[19] The joint resolution of Congress of July 7, 1898, had specified that no Chinese should be allowed to enter the United States from Hawaii (30 Stat. 750, 751). The act of April 30, 1900 (31 Stat. 141), organizing the Territory of Hawaii, while making all citizens of the Republic of Hawaii citizens of the United States, denied the right to Chinese laborers to enter any State, territory, or district of the United States.

[20] *American Year Book*, 1925, p. 214; ibid. 1926, p. 215. Newlands Resolution, 30 Stat. 750 (July 7, 1898).

who may have entered the country illegally under false protestations or who have changed their sentiments while here. No one is eligible for naturalization who believes in or advocates opposition to all organized government; or who believes in or advocates or belongs to an organization which believes in or advocates the forcible overthrow of government, the duty of assaulting or killing officers of government, sabotage, or the destruction of property.[21] The obvious object of these restrictions is the exclusion of anarchists, syndicalists, and communists from the privilege of naturalization. The courts have interpreted the statutes to deny naturalization to pacifists or to persons who promise conditionally to defend the United States.[22] Before admission to citizenship a person must furnish proof that while residing here he has been a "person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[23] If the holder of a title of nobility, he must make an express renunciation of it.

THE CITIZENSHIP OF WOMEN · The general citizenship laws of the United States, of course, applied from the beginning to women the same as to men, but in later years special ways existed by which women might gain or lose citizenship.[24] An act of Congress of 1855 declared that an alien woman who married an American citizen was to be deemed a citizen if she herself would have been eligible to naturalization. The law at the time covered only white women, but by the acts of 1870 and 1888 Negro and Indian women, respectively, were included. The statute made no definition of the citizenship status of the American woman who married an alien, but the State Department ruled in 1875 that she lost her American citizenship if she removed outside American jurisdiction and the laws of her husband's country gave her citizenship. The increasing independence of woman's place in society was reflected in several alterations in the citizenship laws after the adoption of the Nineteenth Amendment. The Cable Act of 1922 declared that an alien woman did not gain citizenship by marriage with an American or by the naturalization of her husband; and, furthermore, that an American woman did not lose her citizenship by marriage with an alien unless he was ineligible for naturalization.[25] Later acts place women upon exactly the same basis as men in the matter of acquiring or losing citizenship by marriage. For the alien who marries an American citizen the declaration of intention, the six months' residence in a State, and three of the five years of residence in the United States are dispensed with.[26] Moreover, a short cut to citizenship is provided for those who had lost

[21] 54 Stat. 1141 (October 14, 1940); *United States Code*, Title 8, Subchapter III, sect. 705.

[22] *United States* v. *Macintosh*, 283 U.S. 605 (1935), and *United States* v. *Schwimmer*, 279 U.S. 644 (1929).

[23] *United States Code*, Title 8, Subchapter III, sect. 709(a).

[24] C. H. Maxson, op. cit. chap. iv.

[25] 42 Stat. 1022 (September 22, 1922); L. Gettys, op. cit. chap. v.

[26] Act of October 14, 1940, 54 Stat. 1145; *United States Code*, Title 8, Subchapter III, sect. 717.

their citizenship by marrige to an alien before 1922 or by marriage after that date to an alien ineligible for citizenship. Provided American citizenship had not been forfeited by other acts, such as foreign naturalization, these persons may be restored immediately to American citizenship upon the filing of a petition, without the requirements of a declaration of intention or of residence in the United States. Marriage to an alien ineligible for citizenship no longer incurs a loss of American citizenship; but provision is made for a formal renunciation, if desired. Children born abroad may acquire citizenship through the mother as well as the father.[27]

THE CITIZENSHIP OF INDIANS · The Constitution was silent on the citizenship status of the oldest of Americans, the Indians. By colonial practice they had not been treated as citizens, and this exception to the rule of *jus soli* was doubtless implied in the constitutional clause that "Indians, not taxed" should not be counted as a basis for the apportionment of Representatives in Congress. From the beginning the Federal government dealt with the Indian tribes by means of treaties, and the Supreme Court in 1831 denominated them "domestic dependent nations" in a "state of pupilage" to the United States.[28] In the Constitution, commerce with the Indians was classed with commerce between the States and with foreign nations as subject to national regulation. The mere renunciation of tribal connections, and residence outside the reservation, did not give an Indian citizenship: the right to naturalization, the same as with any other alien, depended upon action by Congress. In 1887, however, such Indians were declared citizens by statute. Moreover, from early times, there had been collective naturalization of various tribes either by treaty or by statute. Finally, by the act of 1924, Congress completed this program of justice for the descendants of the original owners of America by conferring citizenship on all who had not previously acquired it.[29]

CHILDREN OF CITIZENS BORN ABROAD · With respect to the children of American citizens born abroad the United States has with some inconsistency adopted the principle of *jus sanguinis*. The act of 1790 declared that "children of citizens of the United States that may be born abroad beyond the sea, or out of the bounds of the United States, shall be considered as natural-born citizens." The law was changed in 1855 to specify the children of an American father and to deny citizenship if the father had never resided in the United States. To claim such citizenship, the child born abroad was required, at the age of eighteen, to record at an American consulate his intention to take up residence in the United States and remain a citizen, and at the age of twenty-one to take the oath of allegiance. Later changes permit citizenship to come through either parent, if such parent previously has resided ten years in the United States; but the

[27]Ibid. sect. 713.
[28]*Cherokee Nation* v. *Georgia*, 5 Peters, I (1831).
[29]C. H. Maxson, op. cit. chap. ix; 43 Stat. 253.

citizenship is forfeited unless the child resides in the United States at least five years between the ages of thirteen and twenty-one. Exceptions are made in favor of children whose parents are the representatives abroad of the United States or of American philanthropic, religious, commercial, or financial organizations.[30]

EXPATRIATION · May a person give up his American citizenship if it pleases him to do so? Some states of today have granted such a privilege to their citizens, but none except the United States has recognized it as a natural right. The common law of England, true to the spirit of its feudal ancestry, embodied the rule of perpetual allegiance, or, as popularly expressed, "Once an Englishman, always an Englishman." In the first American case involving the right of a citizen to expatriate himself the Supreme Court stated that "if the right of expatriation exists under our laws, not only a renunciation of citizenship, but an actual removal for a lawful purpose and the acquisition of a foreign domicile are necessary."[31] In a case in 1808 the Court held that Coxe, a citizen of New Jersey who had adhered to the British cause during the Revolution and later had settled in London, could not of his own act throw off his allegiance to New Jersey.[32] In spite of these denials of the right of expatriation, our politicians took the opposite side of the question in the controversy with Great Britain which finally culminated in the War of 1812. Finally, in a law which had the air of a proclamation to the European countries from which we had been receiving so many immigrants, Congress attempted to clarify our attitude. Expatriation was declared to be a "natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and American adherence to the principle was asserted.[33] European countries might well have regarded this as a one-way law; for it provided no procedure for the renunciation of American citizenship. Congress in 1906 and 1907 legislated to supply the deficiency, and in 1940 restated and amplified the entire law of expatriation.[34] Eight different methods are now specified by which a citizen may renounce or forfeit American citizenship: (1) undergoing naturalization in a foreign country according to its duly prescribed means; (2) taking an oath of allegiance to a foreign state; (3) serving in the armed forces of a foreign state, unless expressly authorized by the laws of the United States; (4) performing the duties of any office under a foreign government for which its citizens only are eligible; (5) voting in an election in a foreign state; (6) making formal renunciation of American citizenship before a diplomatic or consular officer of the United States; (7) conviction of desertion from

[30]Act of October 14, 1940, 54 Stat. 1138.
[31]*Talbot* v. *Jensen*, 3 Dallas, 131 (1795).
[32]*M'Ilwain* v. *Coxe's Lessee*, 2 Cranch, 280 (1808).
[33]Act of July 27, 1868, 15 Stat. 223.
[34]Act of October 14, 1940, 54 Stat. 1168.

the military or naval service of the United States in time of war; and (8) conviction of treason against the United States or of an attempt to overthrow it by force. The children of parents born outside the United States may forfeit American citizenship if they reside six months or more within the foreign state of which either parent has been a citizen; and so with naturalized citizens who reside at least two years, or three years continuously, in the country of their origin, or five years in any foreign state.[35] Finally, the Department of State ruled that any citizen who has taken up residence abroad with the evident intent of remaining there is considered as having expatriated himself.

DUAL CITIZENSHIP · Every state is free to set up its own law of citizenship, subject, of course, to friction with other states if it is unreasonable. Many conflicts in these laws do exist, with the result that many persons possess dual or even triple citizenship and that, curiously enough, there are many who are citizens of no country.[36] It has been seen that the United States claims as citizens the children of its own citizens born abroad and, illogically, the children of aliens born in the United States. The general rule of the *jus sanguinis* countries is that the citizenship of the child follows that of the father. Fourteen countries, among which are France, Italy, Poland, Russia, and Japan, make such claims, with the result that persons to the number of millions are at the same time citizens of one of those countries by their laws and of the United States by virtue of the Fourteenth Amendment or of our naturalization laws. A competent authority estimated the naturalized persons in the United States in 1930 with dual citizenship as numbering three million, and those born here as much more numerous.[37] At that time there was an agent attached to the Swiss legation temporarily at Washington to collect taxes not only from Swiss citizens residing here but also from those with dual citizenship.

A record of all Japanese born abroad is kept at the respective Japanese consulates, and this information is sent to the district in Japan where the parents were born.[38] At the age of seventeen the names of all males are placed on the military register. A so-called expatriation law of 1916 provided that a minor under seventeen years of age, born abroad, might at the request of a parent or legal representative be permitted to renounce Japanese citizenship; and after that age, having served his term in the army

[35]Ibid. 1169, 1170. Cf. also L. Preuss, "Denaturalization on the Ground of Disloyalty," *American Political Science Review* (August, 1940), Vol. XXXVI, pp. 701–710.

[36]C. Seckler-Hudson, *Statelessness: with Special Reference to the United States*, passim. For the nationality laws of the various countries cf. R. W. Flournoy and M. O. Hudson, *A Collection of Various Nationality Laws* (Washington, 1929).

[37]J. C. Fehr, "Dual Citizenship an International Problem," *Current History* (December,1930), Vol. XXXIII, p. 390.

[38]R. L. Buell, "Some Aspects of the Japanese Question," *American Journal of International Law*, Vol. XVII, pp. 29 ff.; E. J. Hover, "*Derivative Citizenship in the United States*," ibid. Vol. XXVIII, p. 255.

or navy, with the consent of the Minister of Home Affairs. At the end of six years of the law, only a negligible number of American-born Japanese had filed expatriation papers.

STATELESS PERSONS · The unforeseen operation of the various citizenship laws leaves many persons without allegiance to any country.[39] Second-generation American children born abroad may be persons without a country if they have not acquired a new citizenship. Since 1922, alien women marrying American citizens may have lost the citizenship of their native land and do not acquire citizenship here until naturalized. Americans taking the oath of allegiance to a foreign state in order to serve in its army have expatriated themselves and usually not acquired a new citizenship. These are only a few of the many sources of stateless persons.

REGISTRATION OF ALIENS · The outbreak of war in Europe was the occasion for the enactment of the Alien Registration Act of June 28, 1944.[40] At the outset of the First World War, many aliens residing in the United States engaged in activities for the benefit of their respective home countries; and after the United States became a belligerent, some sought to hamper its war efforts, by sabotage and otherwise. With the passage of the Lend-Lease Act in April, 1940, the old trouble reappeared. While the Federal police had been augmented in a degree unknown in the First World War, a ready identification of all aliens was obviously necessary to facilitate their work.

The administration of the act was given over to the Bureau of Immigration and Naturalization of the Department of Justice. All aliens fourteen years of age or older were required to present themselves for registration and fingerprinting, and thereafter to give notification within five days of each change in residence and address. Each registrant was required to give certain information, including the place of his entry into the United States, the work in which he was engaged, and his criminal record (if any). The records are confidential and are made available only to such persons as the Attorney General may designate. The registration, carried out between August 27 and December 26, 1940, revealed a total of 4,741,971 aliens in the country, sixteen years of age or older,[41] as compared with the census figures gathered earlier in the year of 3,479,652 of all ages.[42] Failure to register incurs a heavy penalty, and ineligibility of the unregistered for a return visa to the United States.

SUMMARY · It must be concluded, from a view of the foregoing laws, that the United States has pursued a relatively liberal citizenship policy.

[39] C. Seckler-Hudson, *Statelessness: with Special Reference to the United States*, pp. 11–22.

[40] 54 Stat. 673.

[41] *Attorney General of the United States, Annual Report*, 1941, p. 237. Of the total, 1,212,622, or 25.7 per cent of the aliens, were residents of the State of New York, and 11.1 per cent were residents of California. Pennsylvania, Massachusetts, Illinois, Michigan, and New Jersey each had in excess of 5 per cent of the total. (Ibid. p. 259)

[42] *Sixteenth Census of the United States, 1940*, Vol. II, Pt. 1, "Population," p. 10 (1943).

After the decision in favor of Negro citizenship was made, it became clear that public sentiment would not tolerate permanently a house divided against itself, citizen group against noncitizen group. Such a situation would perpetuate a hereditary underprivileged class, which all political experience had shown inevitably brings weakness and instability to the state. Beginning with the Chinese Exclusion Act of 1882, the immigration policy was brought into accord with the citizenship policy: no persons hereafter would be permitted to take up permanent residence in the United States to whom entrance to the body politic later would be denied. All colored races except the Indians came within the wording of the citizenship phrase of the Fourteenth Amendment, whose breadth was due to the Northern championship of the Negro in the Civil War; and the Supreme Court took away none of its meaning in the Wong Kim Ark case. Of the aliens enumerated by the 1940 census, 924,524 had taken out their first citizenship papers, and 2,555,128 had taken out none.[43] Obviously only a negligible number, mostly Chinese and Japanese, would be unable to qualify for citizenship; and to the children of none of them, if born here, might it be denied. With immigration sharply curtailed, the time was not far distant when the noncitizen element would cease to be significant.

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[43]Ibid.

## CHAPTER VII

# *Civil Liberty and Individual Rights*

It was inevitable that the constitution of the new American republic should stress the importance of individual liberty. The people of the colonies, with an almost unoccupied continent in which to roam, had actually lived a life of liberty in spite of what some regarded as at least the attempted tyranny of the mother country. The late War of the Revolution itself had been more of a struggle for national freedom than for individual liberty, but the two issues were intertwined. Jefferson, in the Declaration of Independence, had expounded the doctrine of individual liberty and natural rights, but had used the greater part of its text for an enumeration of the wrongs done us as a nation.

LIBERTY IN VARIOUS DEGREES · "Liberty, in its absolute sense," wrote Francis Lieber in his treatise *Civil Liberty and Self-government*, "means the faculty of willing and the power of doing what has been willed, without influence from any other source, or from without."[1] The desire for liberty, as thus defined, is an inherent part of every human being, a natural expression of the needs of the bodily mechanism. The minimum desire for freedom to be expected of even the most abject human beings is the desire to satisfy the most urgent bodily wants, such as food, water, and shelter. Even such persons would struggle against masters who should attempt to enforce such deprivations. As the student considers the desire for freedom of individuals progressively higher in the scale of life, he can best visualize these persons as a series of concentric circles. In a society where all degrees of talents and of culture are found, the total field covered by these circles is a very large one. Of course, there are many persons who would be content with a few of the more primitive freedoms contained in the smaller inner circles. The curious thing is that the desire for the higher freedoms is not confined to the talented and the favored. Nor is it always found there, for sometimes a scientist, artist, or technician may ask little more than to be allowed to follow the line of his genius without interruption. At the periphery of the outermost circle is the freedom to participate in the directing and the molding of our social universe. *Political self-government* is the term applied to this most ambitious of all human endeavors.[2]

[1]Francis Lieber, *Civil Liberty and Self-government* (3d ed. 1874), p. 37.

[2]For various conceptions of liberty cf. Carl Becker, *New Liberties for Old* (1941); R. N. Baldwin and C. B. Randall, *Civil Liberties and Industrial Conflict* (1938); J. Corbin, *The Frontiers of Freedom* (1940); G. S. Counts, *The Prospects of American Liberty* (1938); G. Gentile, *The Philosophic Basis of Fascism* (pamphlet; 1926); Adolf Hitler, *Mein Kampf* (1939); H. Hoover, *The Challenge to Liberty* (1934); W. Lippmann, *The Method of Freedom* (1934); H. M. Kallen, *Freedom*

*Why Liberty is Valued* · Freedom is a highly favored article of political faith because all normal human beings desire it. To think, to will, and to act without the restraints of others not only is a pleasurable thing in itself but has a basis of individual usefulness. The absolutely free individual, if such existed, might take and use such material things as his strength and cunning allowed, go where he wished, make of himself what he would, and use other people to his advantage and pleasure. The possession of a large degree of freedom by the individual has advantages also for society as a whole. It promotes initiative, encourages invention and experimentation, fosters the growth of new institutions, and so adds to that sum total of human achievements which we call civilization.

NATURAL AND CIVIL LIBERTY · When a life of freedom is mentioned, the layman is apt to visualize a situation in which individuals, day by day, may go where they like and do what they please with little interference from other persons, including officers of government. In this sense the early explorers and colonists of the vast and almost unoccupied North American continent possessed virtually complete freedom. Thousands of miles from the nearest government and its laws and officials, unimpeded by fellow creatures except for the few and poorly armed natives, they had that full "faculty of willing" and "power of doing" which Lieber described. De Soto on the Mississippi, Père Marquette along the Great Lakes, Coronado in the sunny plains of the great Southwest, found no frontier officers demanding taxes or certificates of health. Years later, Daniel Boone, Kit Carson, and David Crockett had to produce no hunting licenses and encountered no traffic congestion, but at the same time enjoyed the benefits of no such information as "Inspected drinking water 500 yards ahead." Obstacles to the freedom of the individual increased almost in direct ratio to the increase in the numbers of the human inhabitants; for step by step the game and wild fruits disappeared, the timber and minerals were used up or pre-empted, and the empty spaces were filled. *Natural liberty* is the term sometimes used to designate the kind of liberty described above; *civil liberty*, to designate the regime of liberty established by law in the state.

THE PARADOX OF LIBERTY · The concept of complete liberty for the individual contains an inescapable contradiction.[3] If, in any community, there were one absolutely free individual, then all his fellow citizens would by that very fact be rendered unfree; for in exercising his own freedom he

*in the Modern World* (1928); H. W. McCracken and C. G. Post, *Invitation to Freedom* (1941); S. W. McCall, *The Liberty of Citizenship* (1919); E. D. Martin, *Liberty* (1930); A. T. Hadley, *Freedom and Responsibility* (1921); J. S. Mill, *On Liberty* (1859); G. L. Scherger, *The Evolution of Modern Liberty* (1904); G. H. Soule, *The Future of Liberty* (1936); H. Wallace, *New Frontiers* (1934); L. Whipple, *The Story of Civil Liberty in the United States* (1927); T. V. Smith, "Political Liberty Today," *American Political Science Review* (April, 1937), Vol. XXXI, pp. 243–252; K. Lowenstein, "Militant Democracy and Fundamental Rights," ibid. (June, 1937), Vol. XXXI, pp. 417–432.

[3]F. Lieber, op. cit. chap. iii; J. S. Mill, op. cit. chap. iv; T. J. Norton, *Losing Liberty Judicially* (1928), pp. 23–31; J. A. Ryan, *Declining Liberty and Other Papers* (1927), chap. i.

would extinguish theirs. He might use his freedom to hunt and fish on the property of others, thus destroying their liberty to make a living; or to hire children to work in his coal mine, thus depriving them of the right to grow to normal manhood and womanhood. It follows, then, that there can be no absolute liberty for any person in the world. If the national ideal is the maximum of individual freedom for all the citizens, this can be attained only through laws which restrain the acts of all as respects all others. Curiously enough, a free society is one in which all are bound by proper laws. At what point the law should enter in and restrain and at what point the individual should be left free is a difficult question. It is safe to say that this is a recurring problem, to be solved again in each generation, in the light of the social ideals, the economic conditions, and the material environment of the times.

For instance, during the first century of our national existence, freedom of contract was regarded as a right so dear that it should be generally exempt from governmental interference. But when the country became urbanized, and there were large numbers of people depending entirely on wages for a livelihood and possessing a bargaining power unequal to that of their corporation employers, government proceeded to abridge, in many ways, the right of contract both of employer and of employee. One might not contract to work in unsanitary conditions, with dangerous machinery, or for long hours. Woodrow Wilson, for instance, in his candidacy for the Presidency in 1912, proposed a program of regulation and restraints on trusts and monopolies. This program, which he referred to as the New Freedom, was based on the idea that a greater amount of freedom would be attained for businessmen in general if the practices of the few powerful and unscrupulous ones were restrained.[4] The line between the individual's freedom and the restraints of government can hardly be determined in any other way than by experimentation. If his freedom is made a little too large, then the freedom of his neighbors may suffer; if too small, all persons are equally unfree. Somewhere there exists a line which yields a maximum of liberty for all persons and of benefit to the community at large.

How Civil Liberty Is Established · Lieber defined civil liberty as consisting in "guarantees (and corresponding checks) of those rights which experience has proved to be most exposed to interference, and which men hold dearest and most important."[5] These guarantees of the liberty of the individual are directed against the two possible sources of hostile invasion: the government itself and other individuals and classes of individuals. An idea of those which we hold "dearest and most important" may be gathered from a hasty view of the national and State bills of rights. Their total

[4]W. Wilson, *The New Freedom* (1913), chaps. i, xi–xii.

[5]F. Lieber, op. cit. p. 40. "We come thus to the conclusion that liberty, applied to political man, practically means, in the main, protection or checks against undue interference, whether this be from individuals, from masses, or from government" (ibid. pp. 39, 40).

effect is to mark out a sphere of action in which the individual is free to act and is made immune from interference by all others. These guarantees handicap the government in dealing with individual citizens.

## *GUARANTEES OF INDIVIDUAL LIBERTY IN THE NATIONAL CONSTITUTION: AGAINST THE FEDERAL GOVERNMENT*

Guarantees against the Federal government are scattered throughout the body of the Constitution, but the larger part are found in its first ten amendments. The framers had contended that no bill of rights was needed to protect the citizen against the Federal government, since that government was constructed without power to legislate on any subject except those enumerated in the Constitution. But the liberal leaders of the day, in particular Jefferson and George Mason, demanded, out of abundant caution, that a list of such limitations should be adopted.[6] The first ten amendments were the answer to that demand. The Ninth Amendment, to make sure that some Federal agency, such as Congress, an administrative officer, or a judge, might not at some time regard these articles as the sum total of a citizen's rights, provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth stated that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

FREEDOM OF RELIGION · The guarantees of the Constitution are all such as had been found by experience in England or on the continent of Europe to be those whose violation led to deep resentment or violent resistance. At the head of the Bill of Rights stands the guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The thirteen States had pretty generally made discriminations on the basis of religion. Some established state religions to which all must contribute through taxation; others required a religious test for officeholding, voting, or admission to citizenship.[7] Many of these intrusions on the individual conscience were in existence at the time of the adoption of the Constitution. James Madison, in Virginia, drafted a "Memorial and Remonstrance" to the legislature against a proposed church tax, asserting that "religion, or the duty we owe the Creator," was not within the cognizance of the civil government.[8] Jefferson at the same

[6]James Madison to Thomas Jefferson, October 24, 1787, *Records of the Federal Convention* (M. Farrand, Ed.), Vol. III, pp. 131–136; George Mason to Thomas Jefferson, September 30, 1787, ibid. Vol. III, pp. 367–368.

[7]Allan Nevins, *The American States during and after the Revolution, 1775–1789* (1924), pp. 420–441.

[8]*Letters and Other Writings of James Madison* (1884), Vol. I, pp. 162–169. He further argued that the proposed establishment was "a departure from that generous policy which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens."

time wrote that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty."[9] Happily these sentiments were written into the national constitution, placing it on a plane of liberality superior to that of most of the constituent States.

The meaning of this guarantee is that Congress may not provide for a state church after the style of those times; it may not show by any other means a preference for one religious belief or organization over another, including financial aid or other emolument; it may not interfere with the free exercise of religion. Jefferson admitted that government might interfere "when principles break out into overt acts against peace and good order." The Supreme Court many years later accepted this reservation in a case involving polygamy in the Territory of Utah. It held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[10] According to this dictum, acts of an individual or of a religious group contrary to the established law of the land cannot find protection in this clause of the Constitution.

FREEDOM OF SPEECH AND OF THE PRESS · A guarantee by government of noninterference with freedom of thought and of conscience would be valuable in itself, but considerably less valuable than if coupled with the freedom to express thoughts and beliefs. Congress is forbidden to make any law "abridging the freedom of speech or of the press," and so is denied the power to interfere with the two most effective means of expression at that time.[11] Had this clause been written in 1925, the radio, telegraph, telephone, and motion picture might have been expressly mentioned; but their inclusion would have made little difference in its meaning and application.

Freedom of expression, like all freedoms in general, is a good in itself, but society at large has an ever greater stake in it.[12] To deny it is to bar the orderly course of social progress. Ideas themselves are useless unless they may become the property of the people, while writing and discussion in turn lead to the generation of other ideas. Freedom of expression has a social usefulness because it leads to the interchange of ideas and stimulates invention and the development of the arts and sciences. The Fathers rightly saw that to stifle free expression would be to condemn popular government to failure from the outset. The First Continental Congress, in

[9]Statement in his draft of "A Bill Establishing Religious Freedom," June 13, 1779, *The Works of Thomas Jefferson* (P. L. Ford, Ed., 1904), Vol. II, p. 440.

[10]*Reynolds* v. *United States*, 98 U.S. 145 (1878).

[11]*United States Constitution*, Amendment I.

[12]Z. Chafee, *Freedom of Speech in the United States* (1941), pp. 31–35; G. J. Patterson, *Free Speech and a Free Press* (1939); W. H. Wickwar, *The Struggle for Freedom of the Press* (1928), pp. 13–18; John Milton, "Areopagitica," *The Works of John Milton* (F. K. Allen, Ed., 1931), pp. 297–299.

an address to the people of Quebec in 1774, made this summary of the value of the freedom of the press:

> The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.

What are the rights of the American citizen under the clause guaranteeing freedom of speech and the press? Clearly this clause cannot mean that the citizen is permitted to say and write whatever he may please and under all circumstances. The injuries which one may inflict on others by means of the tongue and the pen may be quite as grievous as those by brute force. This is unquestionable; but once it is admitted that the freedom of speech and the press is not absolute under the First Amendment, we are confronted with the great difficulty of drawing the line between those uses of the pen and tongue which may be forbidden or made actionable by law and those which are exempted under the Constitution. Blackstone defined freedom of the press as consisting only in "laying no previous restraint upon publications and not in freedom from censure for criminal matter when published."[13] The government could not operate a censorship, but was free to punish such writings after publication as it might make punishable by law. Obviously, the First Amendment means more than lack of censorship; for the deterrent effect of threatened punishment for writing or speaking might be as potent in stopping the freedom of expression as the acts of a government censor. A death penalty for communistic utterances would be as effective in preventing them as the negative of a censor. The common law has established rather definite limitations to the use of language and writing as respects individuals. A slanderous statement about a person is a civil wrong, and the perpetrator is liable in damages unless he proves the truth of his statements. If he prints a defamatory statement, he is likewise liable.[14]

Criminal libel and slander are those of sufficient seriousness to be considered offenses against the state. Even the truthfulness of a libel is not a defense if malice and an intent to injure can be proved. The common law and American statutes make the publication of profanity and of obscene writings and pictures a criminal offense. *Seditious libel*, which consisted in expressing dissatisfaction with the established government, was a crime at common law in England at the time when our Constitution was adopted.

[13]"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."—W. Blackstone, *Commentaries on the Laws of England* (Chitty ed.), Vol. IV, p. 151

[14]W. H. Wickwar, op. cit. pp. 18–24.

Any publication that tended "to bring into hatred or contempt or to excite disaffection against" the king, his ministers, Parliament, or the constitution, or which excited citizens to attempt other than by lawful means the "alteration of any matter in Church or State by law established," was seditious libel.[15] This law is an example of a type employed by all nations of the world at some time in their history, as a protection against criticism and attack from within. It is a law generally indefensible in a democracy, which requires for its health constant criticism of its acts on the part of its citizens. Direct incitement to overthrow a government by force is generally illegal in modern states, but to draw a line between this type of opposition and that which attempts to discredit the party in power and its policies to the advantage of the "outs" is sometimes very difficult.

Only on three occasions in our history has Congress legislated on the subject of free speech and press. In 1798 the country was torn by conflicting sympathies for the warring powers of Europe. The French Revolutionary doctrines were viewed with sympathy by the American liberals and with fear and distrust by the Hamiltonian party. On July 14, 1798, the fifth anniversary of the fall of the Bastille, Congress passed the so-called Sedition Act. The first section forbade conspiracies to impede the execution of the laws or to intimidate officeholders from performing their duties, and forbade individuals to incite to "insurrection, riot, unlawful assembly, or combination."[16] The second forbade the writing or publishing of "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame" or bring them into disrepute. The law was an emergency one, expiring automatically on March 3, 1801. The first section was undoubtedly constitutional; the second, a virtual re-enactment of the English law of seditious libel, was doubtless unconstitutional, although its validity was never tested in the Supreme Court. A number of prosecutions and convictions under the law were carried out, but its most noteworthy effect was the demise of the Federal party. During the Civil War there were numerous suppressions of newspapers and arrests of persons for utterances, either by executive order or by order of the military commanders, but there was no legislation.

At the time of the First World War, Congress passed two regulatory laws directed at speech and the press. The first, June 15, 1917, made punishable a number of acts such as the procuring of information regarding military movements and plans, the making or conveying of false reports "with intent to interfere with the operation or success of the military or naval forces of the United States," "to cause insubordination, disloyalty, mutiny, or refusal of duty," or to "obstruct the recruiting or enlistment service."[17] Since all these offenses were direct incitements to unlawful acts, the Supreme Court found no difficulty in upholding the law in the

[15] W. H. Wickwar, op. cit. pp. 26–28. [16] 1 Stat. 596, 597. [17] 40 Stat. 217.

case of *Schenck* v. *United States*.[18] It ruled, however, that the printed or spoken words suppressed must constitute a "clear and present danger" of bringing about unlawful acts, not one that is indirect and remote.

The act of May 16, 1918, was much more drastic. It punished anyone who should "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States," or any language intended to bring them into "contempt, scorn, contumely, or disrepute"; or who should "willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies," or use language to incite curtailment of the production of supplies needed for the war.[19] The law itself and several convictions under it were upheld by the Supreme Court in decisions which left the protection given the individual by the First Amendment clouded in uncertainty. The conviction of Eugene V. Debs, perennial candidate of the Socialist party for the Presidency of the United States, for a political speech made at Canton, Ohio, brought the freedom-of-speech clause to its acid test.[20] Certainly the toleration and protection of political opposition to the government in power is one of its primary functions. The Supreme Court, in affirming Mr. Debs's conviction, however, held that if there were passages in the speech which encouraged those present to obstruct the recruiting service, then "the immunity of the general theme may not be enough to protect the speech." Justice Holmes, who was with the Court's majority in the earlier cases, finally went to the minority in time to write a well-phrased dissent in which the "free trade in ideas" was extolled. Early in the Second World War there was established a voluntary censorship of the press, speech, radio, and all other means of communication with respect to all matters pertaining to the operations of the army and the navy. This seemed unlikely to encounter any difficulty in the courts. The individual is guaranteed by the Constitution freedom of speech and of the press, and Congress has the same authority for raising and equipping armed forces and carrying on war. Obviously, neither the individual nor Congress, when their respective rights clash, is required to give way entirely to the other. It is the task of the courts to locate the proper boundary between the two.

FREEDOM OF ASSEMBLY AND OF PETITION · Congress is forbidden to abridge the right of the people "peaceably to assemble, and to petition the government for a redress of grievances."[21] This guarantee is a logical corollary of the rights of free speech and press. It has the same social basis

[18]249 U.S. 47 (1919).

[19]40 Stat. 219. The act was amended in 1940 to increase the penalties to ten years' imprisonment or a $10,000 fine. 54 Stat. 79.

[20]*Debs* v. *United States*, 249 U.S. 211 (1919).

[21]Amendment I.

of utility, and is subject to the same legal questions as those discussed above. The Supreme Court once said, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[22] Congress may, and did during the First World War, punish persons for assembling and drawing up petitions when such amounted to a direct incitement to unlawful acts. The right to assemble and petition here guaranteed is only with respect to the Federal government: Congress may not legislate to give protection if the petitions are directed to the State governments only.

THE RIGHT TO KEEP AND BEAR ARMS, AND THE QUARTERING OF SOLDIERS · The Second Amendment forbids Congress to infringe on "the right of the people to keep and bear arms" inasmuch as a "well-regulated militia" is "necessary to the security of a free state." This provision grew out of the historic struggle in England and America between the people and the royal power. The regular army stood as a symbol of the latter; the militia, of the former. A rural people is generally accustomed to the use of firearms, and its fighting qualities were to be preserved for use against tyrants at home as well as enemies from abroad. The technique of modern warfare renders this constitutional guarantee practically obsolete. The amendment prevents Congress from disarming the citizenry, but does not stand in the way of police measures either of Congress or of the States which regulate the sale of firearms or forbid the carrying of concealed weapons or the organization of military companies. The States, however, may not go so far as to "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."[23]

Soldiers may not be quartered in any house in time of peace without the consent of the owner, nor in time of war except as prescribed by law. The prohibition goes to the root of an old abuse which existed in England and the colonies. It prevents both the annoyance and the intimidation which might arise from such an invasion of the sanctity of the home.

THE INVIOLABILITY OF LIFE AND PRIVATE PROPERTY · Congress may pass no law depriving any person of "life, liberty, or property, without due process of law," nor authorize the taking of private property for public use "without just compensation."[24] Here is a basic recognition of the institution of personal liberty and private property. The essential part of the provision goes back to Magna Charta. It was directed against the king's power, his arbitrary seizures of private property and interferences with the lives and liberties of the people. In the United States it protects the in-

[22] *United States* v. *Cruikshank*, 92 U.S. 552 (1875).
[23] *Presser* v. *Illinois*, 116 U.S. 265 (1885).
[24] Amendment V.

dividual citizen against the powers of the government of the people. The English philosopher John Locke, in his *Two Treatises on Government*, had referred to "life, liberty, and estate" as three inherent, inalienable rights of the individual citizens,[25] and Jefferson, in the Declaration of Independence, had paraphrased it to "life, liberty, and the pursuit of happiness."

There are four ways by which government in the United States may legally deprive a person of his property. The first is by taxation, which is simply a legal regular means by which the government takes a fixed amount of the citizen's property for its own support. The second is by the police-power regulations of government in the interest of the public safety, order, health, morals, and convenience. Examples are the destruction of diseased milch cattle, of houses to prevent the spread of a fire, of private bridges and other structures which impede street or river traffic. The third is by the forfeiture of property and money as a penalty for their misuse or for the commission of crime. The fourth is under the power of eminent domain. This is distinguished from the police power in that the property taken, such as land for new roads, for parks, or for a sewage-disposal plant, is for the use of the state. In such cases the government first attempts to purchase the land by negotiation with the owner; then, if agreement is impossible, condemnation proceedings are begun in a court, at which a fair price is set on the property and the transfer made to the government. In the earlier years, when the Federal government desired a piece of land, the proper State government was notified; the State then used its power of eminent domain to condemn the land and transfer it to the Federal government. Now either method may be used. Congress may delegate its power of eminent domain to individuals or corporations if the land is to be used for a public purpose. Railroads and other public utilities in general have been large recipients of this power. Government may use it to take over property for temporary use, such as the railroads during the First World War. In such cases this amendment requires that a fair compensation be paid.

TITLES OF NOBILITY · The prohibition against the granting of titles of nobility was strictly in accordance with the equalitarian sentiments of the American Revolution.[26] It has been seen that in order to be naturalized, all aliens must renounce such titles conferred in their native lands. To permit titles of nobility would have been to countenance class distinctions and encourage the special privileges which flow from them. The First Congress debated at length the proposition of giving a title of address to the President and Vice-President, but this was defeated by the liberals of that body.[27] The same section of the Constitution forbids any Federal official to "accept of any present, emolument, office, or title of any kind whatever, from any

[25]John Locke, *Two Treatises on Civil Government* (London, 1884 ed.), p. 234, sect. 87.

[26]*United States Constitution*, Art. I, sect. 9.

[27]W. Maclay, *Sketches of Debate in the First Senate of the United States* (G. W. Harris, Ed., 1880), pp. 38–51. The debate took place between May 8 and May 15, 1789.

king, prince, or foreign state," without the consent of Congress, which was intended to be a safeguard against foreign influence in the government. The consent of Congress has not been withheld when the President and other high officers have been given presents by heads of foreign states as marks of courtesy and respect.

GUARANTEES AGAINST EX POST FACTO LAWS AND BILLS OF ATTAINDER · An ex post facto law is one which makes something a crime which was not a crime at the time it was committed. Besides the unfairness of the general principle of changing the "rules of the game" after the game has started, it offered an opportunity for vicious practices. A party in power might proscribe the leading members of the opposition party by cleverly drawn statutes which defined as crimes some of their acts innocently committed in the past. Indeed, the law had been put to this use in England. An ex post facto law is a retroactive law, but not all retroactive laws are ex post facto. A Connecticut legislature altered the laws respecting court proceedings in inheritance cases so that it changed the legal heirs in a certain case, and a Missouri statute provided immunity for suits against persons who had acted under the military authority of the State or of the United States.[28] When tested, the United States Supreme Court held that although retroactive, they were not ex post facto since they were civil, not criminal, laws. Not even all criminal laws come within this prohibition but only those which operate to the disadvantage of the person affected—if they aggravate the crime, increase the penalty, or make the defense more difficult. An act of Congress of 1865, which provided that no one might practice law in a United States court unless he should take an oath that he had never served in the military or civil service of any hostile government, was held to increase the penalty for an act committed in the past and so was ex post facto.[29]

A bill of attainder is a legislative act which declares a given person or persons guilty of a specified offense and metes out punishment. It was a legally established procedure of the British Parliament, which retained many of its original attributes as a court. The bill of attainder was an instrument of the ruling party to be feared, for an opponent might be destroyed by a majority vote when the legal charges against him were too flimsy to stand up in a court. Perhaps the most conspicuous instance of its use was the condemnation to death, by an act of Parliament, in the seventeenth century, of the Earl of Strafford, a general of King Charles I's army, when it was found that his prosecution for treason was not going well.[30] The separation-of-powers principle of our Constitution would seem clearly to have precluded the use of any such judicial power by Congress, but the prohibition was included to remove all doubts.

[28]*Calder* v. *Bull*, 3 Dallas 386 (1798); *Cummings* v. *Missouri*, 4 Wall. 277 (1867).
[29]*Ex parte Garland*, 4 Wall. 333 (1867).
[30]T. P. Taswell-Langmead, *English Constitutional History* (7th ed., 1911), pp. 417, 718.

THE GUARANTEE AGAINST ARBITRARY ARREST AND IMPRISONMENT · Arrest on trumped-up charges and imprisonment for indefinite periods have been favorite means of tyrannical governments for the suppression of opposition. The English writ of habeas corpus is a judicial device for the prevention of this evil. The person imprisoned may immediately petition a court for a writ ordering the jailer to "produce the body" of the petitioner in court and show cause why he is held. If no legal grounds are found, such as the order of a magistrate or an indictment by a grand jury, the prisoner is ordered released. This device is rightly regarded as of the utmost importance in the scheme of individual liberty. It ensures a quick hearing, discourages the lodging of flimsy charges against an individual, and deprives the executive head of the state of a potent means of intimidation. The suspension of the privilege of the writ is forbidden "unless when in cases of rebellion or invasion the public safety may require it."[31]

Under what conditions may it be suspended and by whom? During the Civil War, President Lincoln suspended the privilege in various parts of the North where strong disloyal elements existed or invasion was threatened. Many persons were imprisoned for indefinite periods without trial or were tried before military courts. Shortly after the close of the war the Supreme Court, in the *Ex parte Milligan* case, answered these questions.[32] The Constitution, it averred, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." The privilege of the writ could be suspended only as authorized by Congress, and only in territory where the ordinary civil authorities had ceased to function because of the stress of war. "The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration," the Court asserted. It is extremely unlikely that so stringent a rule would be upheld today; but the First World War offered no comparable situation, and the privilege of the writ was never suspended. President Roosevelt's proclamation of February, 1942, authorizing the army to designate zones in which the civilian population would be subject to control without the ordinary processes of law, is itself a sharp departure, but obviously stands in no peril of judicial interference.[33]

THE GUARANTEE AGAINST BROADLY DEFINED TREASON · Treason, or disloyalty and hostility toward one's own country, is universally regarded as the most serious of all crimes against the state. It was an ever-present temptation to governments in times of stress so to define treason as to imperil or to destroy the opposition. The British Parliament has designated a considerable number of acts as constituting high treason. The American Constitution safeguards legitimate opposition to an existing government

[31] *United States Constitution*, Art. I, sect. 9.
[32] 4 Wall. 2 (1866).
[33] 7 Fed. Reg. 1407.

by declaring that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[34] Congress by statute and the courts by construction may not make anything else treason. This, of course, does not prevent the definition of other crimes and provision of punishment, as in the case of the Espionage Acts during the First World War. The Constitution, by providing that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court," in effect confines treason to *acts* of war against the United States or of adherence and aid to its enemies. Mere words or plans are not enough. The requirement of two witnesses to the treasonable activity is a further safeguard. Congress may declare the punishment for the crime of treason, but is forbidden to authorize an "attainder of treason," used in early England and Continental countries, by which the person convicted was disqualified from bequeathing property to his heirs or his property was confiscated by the state.

Happily the law of treason has not called for much interpretation in the course of our history. Benedict Arnold's attempt to hand over the post of West Point to the British during the Revolution is, of course, the *cause célèbre*, but he was never caught or brought to trial. Aaron Burr, who had been Vice-President of the United States, was charged with treason for assembling armed forces on the Ohio River, but was acquitted when brought to trial. John Brown paid the death penalty for his attack on Harpers Ferry, under the charge of treason against the State of Virginia.

GUARANTEES TO PERSONS ACCUSED OF CRIMES · There is a further group of guarantees, for the protection of a person accused of crime, whose inclusion in our Constitution is a reflection of the old struggle in England between king and people.

1. *Indictment by a Grand Jury.* No one may be brought to trial in a Federal court "for a capital or otherwise infamous crime except on a presentment or indictment of a grand jury."[35] The common-law grand jury is a body of twenty-three men or women drawn from the people of the community in which the crime is committed. Evidence is presented to them in secret by the government's prosecutor; and if there is a showing of probable guilt, they vote a "true bill," and bind the accused over for trial. This device is valued as a safeguard against trumped-up and flimsy accusations; for to undergo trial for a crime is usually something of a stigma even if later the charge is proved false. It serves also to apprise the accused of the exact charges against him.

2. *Trial by Jury.* A jury is required in "all criminal prosecutions" in the Federal courts.[36] This institution, of British origin, had long been held

[34] *United States Constitution*, Art. III, sect. 3.
[35] Ibid. Amendment V.
[36] Ibid. Amendment VI.

one of the most important safeguards of liberty. The twelve men, chosen from the neighborhood, represented in a way the popular element in the judicial procedure, while the judge represented the royal power. The jury's part in the trial was to pass on the facts in the case; the judge's, to rule on questions of law. Except when juries were packed by the government's agents, a fair trial of the accused might normally be expected. Custom ordains that petty criminal cases may be tried without a jury; and the accused in any case may now waive a jury trial.

3. *A Speedy and Public Trial* . The accused is entitled also to a speedy trial (the privilege of the writ of habeas corpus ensures that) and to a public trial, the purpose of which is to ensure that the other judicial guarantees of the individual are respected.[37] He may not be transported to distant and strange neighborhoods for trial: the trial must be held in the State and district in which the crime was committed. He must be informed of the "nature and cause of the accusation," a double assurance because of the grand-jury requirement; have the privilege of confronting the witnesses against him in open court; be granted compulsory process in bringing his own witnesses into court; and have the assistance of legal counsel.[38]

4. *No Unreasonable Searches and Seizures.* The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The experience with the "writs of assistance" used by the royal officers in the colonies for the discovery of smuggled goods was fresh in the minds of those who drafted the amendment. An officer with such a writ was not confined to specially described premises but had a sort of roving commission to search suspected vessels, ships, vaults, cellars, and warehouses in general. James Otis's impassioned address at Boston in 1761 against the use of writs of assistance was the beginning of the Revolution. "Then and there," John Adams later said, "the child Independence was born."[39] Four years later Lord Camden, sitting in the court of King's Bench, declared illegal general warrants for the searching of private houses for the discovery of books and papers. "The great end for which men entered into society," he said, "was to secure their property. That right is preserved sacred and inviolable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action though the damage be nothing."[40] While an important purpose was to incorporate the principle that "every man's

[37]Ibid. [38]Ibid.

[39]Letter to William Tudor, March 29, 1817, *The Works of John Adams* (C. F. Adams, Ed., 1856) (12 vols.), Vol. X, p. 248.

[40]*Entick* v. *Carrington*, 19 State Trials, 1002–1030 (1765). The meaning is that the mere unauthorized entrance on another's property is an offense, even if no damage is done.

house is his castle," the amendment had an important bearing on another guarantee.

5. *No Compulsory Self-incrimination.* No person in a Federal court "may be compelled in any criminal case to be a witness against himself."[41] This rule was a reaction from the general use of torture to extort confession in the various countries of the world. Judges in the Roman law countries, such as France, always have been entitled to question the prisoner at length in the course of the trial. Not only does this clause exempt the accused from going on the witness stand, but his private books and papers may not be used as evidence against him. If seized, however, as an incident to a legal arrest and search, they may be used. Even a witness in a suit, civil or criminal, may refuse to answer a question if the answer would tend to incriminate him. It is compulsory self-incrimination if the government requires an accused person to produce things for use as evidence against himself. It is unreasonable search and seizure if his premises are searched for the purpose of turning up possible evidence. Property may be searched for stolen goods and a person arrested for an offense, and the premises on which the arrest was made may be searched for weapons or other things connected with the crime. In general, warrants are required for all searches unless the officer is in hot pursuit.

6. *No Double Jeopardy.* No person is subject "for the same offense to be twice put in jeopardy of life or limb."[42] He may not be twice tried or punished in the Federal courts for the same offense. However, if one act constitutes an offense against both the United States and a State, he is not protected from punishment for each offense. For instance, shortly before the Civil War one R. Eels had been tried and convicted under a Federal law for secreting a runaway slave; and when tried and convicted for the same act under an Illinois law, he asked for release on the ground of two punishments for the same offense. The Supreme Court of the United States ruled that his aid to the fugitive slave had constituted two offenses, and that the Constitution did not forbid a punishment for each.[43] The making and passing of United States coins is a violation of both the Federal counterfeiting laws and the fraud laws of the State where the act was committed, and so is subject to two punishments; likewise, before the repeal of the Eighteenth Amendment, the sale of intoxicating liquor was an offense against both the Volstead Act (Federal) and the State prohibition law.[44] Punishment for one offense committed in an escapade does not free the person from punishment for a separate offense committed at the same time. To be placed in jeopardy requires that a person shall have been regularly charged with a crime before a court competent to try him; a mere arrest is not enough.

[41] *United States Constitution*, Amendment V; E. H. Levine, *Third-Degree Methods* (1934).
[42] *United States Constitution*, Amendment V.
[43] *Thomas Moore* v. *Illinois*, 14 Howard, 13 (1852).
[44] *United States* v. *Lanza*, 260 U.S. 377 (1922).

7. *No Cruel and Unusual Punishments or Excessive Bail or Fines.* The prohibition of the Eighth Amendment against cruel and unusual punishments was a ban, so far as the Federal courts were concerned, on the use in this country of the tortures and cruelty common at that time in the administration of justice in the Old World. Some such practices had found their way to colonial America, as was evidenced in the Salem witchcraft trials. The clause does not prevent the infliction of death by electrocution or the lethal chamber as being unusual, but only such punishments as cause prolonged pain or are in the nature of torture. Excessive fines are forbidden, as a protection against a harsh or prejudiced court; excessive bail, so that a court may not in that way inflict the punishment of imprisonment upon a person entitled by law to release on moderate bail.[45]

## *GUARANTEES AGAINST THE STATES ENFORCED BY THE FEDERAL GOVERNMENT*

If ours were a unitary state, such as France or Great Britain, one list of guarantees would suffice for the liberty of the individual. But in our system of two basic jurisdictions his liberty is subject to invasion from two different sources, the national and State governments. Of the two the State has the greater breadth of legislative power and hence the greater opportunity to restrict the freedom of the individual. It establishes the general system of rights of persons and of property. Included therein, for example, are landownership and its incidents, inheritance, family relationships, agriculture, mining, business, local commerce, and the relation of capital and labor. Their regulation in the public interest, under the guise of the police power, implies the laying of restrictions on persons and the use of property. The capacity of Congress to do so is entirely incidental to its power to legislate on the subjects of its enumerated powers.

THE SOURCES OF GUARANTEES AGAINST THE STATES · The safeguards against the State's infringement of the liberty of the individual are (1) those placed in the national constitution and enforced by the Federal government,[46] and (2) those placed in the State constitution and enforced by the State itself. The original Constitution forbade the States, as well as the Federal government, to pass bills of attainder or ex post facto laws or to grant titles of nobility.[47] These clauses restrict the States in the same way that they restrict the Federal government, which already has been described. None of the guarantees of the first ten amendments, such as those ensuring freedom of speech and of the press and jury trial, were set up against the States, which were left free to follow their own policies in these

[45] *United States Constitution*, Amendment VIII.

[46] T. M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States* (8th ed., 1927).

[47] The original prohibitions against the States are found in Article I, sect. 10, of the *United States Constitution.*

respects. The prohibitions against the coining of money, emitting bills of credit, making anything but gold or silver legal tender, and the laying of duties on exports and imports were put in as safeguards of Federal power rather than of civil rights, but they do have a certain place in the protection of personal and property rights. There are a few other prohibitions on the States, including those of the vital Fourteenth Amendment, which call for special attention.

NO IMPAIRMENT OF THE OBLIGATION OF CONTRACTS · Agreements are pledges by two or more persons, each to the other, to do or not to do certain things. They may involve only personal acts or the disposition of property, or both, and they may run the entire gamut from the trivial to the profound, as the making of a luncheon engagement or an agreement to furnish the cement for building the Grand Coulee Dam. The making of agreements is one of the devices by which men co-operate in society. *Contracts* are agreements whose performance government will enforce or else award damages to the party who was injured by the nonperformance. The distressed condition of debtors in the United States in the years immediately following the Revolution had led to demands for "stay" laws, postponing the payment of debts, or laws decreasing their amount. In Massachusetts, Shays' Rebellion had been directed particularly against the courts. Such legislation was now outlawed by a clause of the new Constitution forbidding any State to pass any law "impairing the obligation of contracts."[48] Its simple meaning was that no State legislature might pass any law which set aside the agreements or contracts entered into by two parties. "Impairing the obligation" is a technical phrase meaning anything which changes the respective responsibilities of the two parties either by increasing or by decreasing their duties.[49] Examples of laws which have been held to fall afoul of this prohibition are those discharging a person from the obligation to pay his debts (except under general-bankruptcy laws), denying a creditor the right to levy execution on the property of a debtor, freeing the stockholders of a corporation from personal liability for its debts up to the amount of their shares, and taking away the franchise of a street railway or other public utility.

An early decision of Chief Justice Marshall in the Dartmouth College case gave an unexpectedly broad operation to the clause by declaring that corporation charters are contracts.[50] Subsequent interpretations, however, have lessened the rigor of this limitation on State legislation. It is held that no State by legislation may bargain away the "sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people."[51] The grant, for instance, of a right to operate a

[48] *United States Constitution*, Art. I, sect. 10.
[49] *Fletcher* v. *Peck*, 6 Cranch, 87 (1810).
[50] *Dartmouth College* v. *Woodward*, 4 Wheaton, 518 (1819).
[51] *Manigault* v. *Spring*, 190 U.S. 473 (1905).

lottery or manufacture intoxicating liquor for a term of years, although in the form of a contract, may be revoked later by the legislature.[52] The legislature may set a scale of public-utility rates notwithstanding existing contracts for different ones. In the depression years following 1930 many States enacted mortgage-moratorium laws, impelled by the same causes as existed in 1785, 1837, and 1873. That of Minnesota, passed in 1933 for the period of the emergency, provided for an extension of the time within which a foreclosed property might be redeemed by the dispossessed owner upon certain conditions, including regular payments to the creditor sufficient to cover taxes, insurance, and income on the money loaned.[53] The Supreme Court ruled that this law did not impair the obligation of contracts but was an exercise of the State's police power to protect the vital interests of the community.

SLAVERY AND INVOLUNTARY SERVITUDE · The adoption of the Thirteenth Amendment invalidated all State and territorial laws recognizing and sustaining the institution of slavery. Involuntary servitude is permitted only as punishment for crime. A question arose as to whether the amendment invalidated the ancient law of the sea that a sailor could be compelled to stay by his ship if he had signed for the voyage.[54] The Supreme Court held that it did not, classing this exception with those of the child's subjection to the parent and of the obligation of military and naval personnel to obey their superiors. Peonage, once widespread in Mexico, is compulsory service, usually of farm labor, based upon the indebtedness of the peon. Comparable practices in the United States have been declared involuntary servitude.[55] Statutes punishing by fines or imprisonment anyone breaking, without just cause, a contract to work on a farm have been declared invalid as tending to establish peonage.

THE END OF STATE INDEPENDENCE: THE FOURTEENTH AMENDMENT · The restrictions of the original Constitution, important as they were, had left the States somewhat like independent republics in respect to their power over their citizens. The states could maintain an established religion, restrict speech and press, discriminate against races, confine landownership to designated classes, and provide a harsh and unfair judicial procedure. The Civil War forced eleven Southern States to alter their institutions regarding slavery and collateral matters and left in them several million freedmen, whom the Fourteenth Amendment declared to be citizens. This situation posed a difficult problem. As already pointed out, the mass of the citizen's personal and property rights are set by the common and statute laws of the State. Could these war-torn States be expected to extend the full benefits of their laws to the ex-slaves? The

[52]*Boston Beer Company* v. *Massachusetts*, 97 U.S. 25 (1878).
[53]*Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934).
[54]*Robertson* v. *Baldwin*, 165 U.S. 275 (1897).
[55]*Clyatt* v. *United States*, 197 U.S. 207 (1905).

radical Republican party in Congress thought not. They announced that it was now time for the guardianship of individual liberty to be transferred, for the greater part, from the States to the nation; Congress had a duty, similar to that of the Fathers of 1787, to see that a Constitution adequate to the times was provided.[56] Some of the leaders were troubled by the fact that severe restrictions designed for the Southern States must necessarily extend to all the States.

The Fourteenth Amendment was the solution offered for the problem. Three things were forbidden the States: (1) to make or enforce any law which should "abridge the privileges or immunities of citizens of the United States"; (2) "deprive any person of life, liberty, or property without due process of law"; (3) or deny to any person within their jurisdiction the "equal protection of the laws." It is clear that these three elevated the courts to a place of power which they never before had attained. Enforcement would be, primarily, not by executive officers but by the courts through the suits brought before them. Almost any kind of State law might be caught in the net of these restrictions. Finally, Congress was empowered "to enforce, by appropriate legislation, the provisions of this article." The extent to which the amendment took away State control of civil liberty and established national standards will be considered.

THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP · The professed object of the framers was to ensure equal and perhaps identical rights for the citizen throughout all the States. Should the States not voluntarily legislate to do this, Congress now could step into the breach. It was admitted that this might extend to the setting up of codes of law for persons and property, supplanting or supplementing those of the States. All State laws must now pass the test, before either Congress or the Federal courts, of whether they deprived a person of the privileges and immunities of citizenship. Just what the privileges and immunities of citizenship were was not clear, but obviously Congress and the courts were authorized to define them. John F. Bingham, the author of the amendment, particularly emphasized that they included as a minimum those enumerated in the Bill of Rights. This revolutionary change in our frame of government was prevented from going into effect by two decisions of the Supreme Court. In the Slaughter House Cases it was decided that the "privileges and immunities" which a State was forbidden to abridge were only those which the American citizen derives from the Federal government and its restricted powers.[57] Among these, for instance, were the right to travel from one State to another, to use the mails, to engage in interstate commerce, to vote at a Federal election, to secure patents and copyrights, or

[56]For statements of John F. Bingham of Ohio, Thaddeus Stevens of Pennsylvania, and Raymond of New York, cf. *Congressional Globe*, 39th Cong., 2d Sess., pp. 428, 429, 2286, 2459, 2462, 2501–2503, January–May, 1866.

[57]*Slaughter House Cases*, 16 Wall. 36 (1873).

to become a naturalized citizen. But those rights which the framers had intended to protect—to testify in court, to own land, to use public accommodations, and the mass of others included in the common law—the Court held were "privileges and immunities" derived from State citizenship and consequently not included in the amendment. This decision left the "privileges and immunities" clause meaningless, since the States never had had authority to interfere with the rights of citizenship flowing from the Federal government.

A few years later the Supreme Court, in the Civil Rights Cases, considered an act of Congress of that name which required an equality of treatment for persons of all races and colors in public conveyances, inns, and theaters and other places of public amusement.[58] The law was declared invalid as an attempt to regulate "privileges or immunities" which were derived from State authority. A further blow to the plans of the framers of the amendment came in the ruling that the power of Congress to enforce it by "appropriate legislation" did not confer full power over civil rights but only the power to correct State laws by declaring them "null, void, and innocuous." By these two decisions the Court denied to Congress the authority to establish a national system of civil rights, which had been the chief aim of the dominant party in the Andrew Johnson administration. But a negative control of these rights through the power of the Federal courts to review State legislation was retained. This came about because of the force given to the two remaining clauses of the amendment.

Due Process of Law · The States are forbidden to "deprive persons of life, liberty, or property without due process of law." The substance of this guarantee is supposed to have been derived from a paragraph of Magna Charta which read, "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by lawful judgment of his peers or by the law of the land."[59] This might be given some such free translation as the following: "The king promises that never, by his own will or caprice, shall a citizen be deprived of his life, his freedom, or his land or other property, but only by means of a court and jury and the established law of the land." As compared with the due-process clause of the Fourteenth Amendment, the chief difference is the substitution of "State" for "king." The State would be free to deprive a person of life, liberty, or property provided it did so by the regularly established courts and laws. There is absolutely no doubt, however, that the authors of the amendment meant to go beyond that point and establish standards of right and justice to which the laws and court procedures of the States must conform. Unfortunately, what those standards were was not stated, and so the courts were handed the opportunity, for which they had not asked, to resolve themselves into little legislatures. While the use of the due-process clause as a

[58] *Civil Rights Cases*, 109 U.S. 3 (1883). [59] *Magna Charta*, chap. xxxix.

means of judicial legislation was one of the most strongly voiced criticisms of the Supreme Court in the 1933–1937 controversy, the newly constituted Court seems to have abdicated none of its pretensions in that respect.

For want of a better test as to what is or is not due process, the courts ask the question "Is the law arbitrary or unreasonable?"[60] In a large number of cases this is satisfactory, but there are many on the border line in which the "reasonableness" may depend chiefly on the social philosophy of the majority of the justices. The public opinion and popular attitudes of the day as to what is reasonable or nonarbitrary undoubtedly have much force in determining the decision in such cases.

1. *Deprivation of Life.* A State may require the enrollment of all able-bodied male citizens in its military units without their consent, and this is not a violation of due process. The guarantee against the taking of life, however, consists principally in certain safeguards in criminal prosecutions. A trial in which there is not fair notice and hearing and the privilege of legal counsel, or where the proceedings are accompanied by mob violence and intimidation, is not due process. Persons, however, may be brought to trial without a grand jury; they may be tried without a petit jury; and they may be required to testify against themselves.[61]

2. *Deprivation of Liberty.* How far a law may go in restraining the liberty of the individual and limiting him in the use and ownership of property is always a difficult question. Legislation for the good of the social order always works to the injury of some individuals in such ways as causing unemployment, disrupting business, or adding to the costs of production. The enforcement of the "due process" restriction squarely raises the question as to where the freedom of the individual properly leaves off and legislation for the social good begins. Among the several thousands of State laws which in the past fifty years have been poured into the Supreme Court's due-process sieve, some of the characteristic ones which went through and some which did not are worth noting. It is not a deprivation of liberty, without due process of law, to suppress nuisances, even if in so doing the individual's free use of his property is restricted; to require vaccination of all persons within an area threatened by an epidemic of disease; to limit the freedom of contract in numerous ways, as, for example, in occupations requiring labor under unhealthful conditions or for excessive hours; to forbid the owners of motor vehicles of more than a given weight or size to drive them on the public highways; to establish certain

[60]Cf. statements of Justice Holmes in *Otis* v. *Parker*, 187 U.S. 606 (1903), and *Adair* v. *United States*, 208 U.S. 190 (1908); Justice Sanford in *Gitlow* v. *New York*, 268 U.S. 652 (1925); and Justice Butler in *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924).

[61]R. L. Mott, *Due Process of Law* (1926), pp. 208–213, 246–247; *Selective Service Draft Cases*, 245 U.S. 366 (1918); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Hurtado* v. *California*, 110 U.S. 516 (1884); *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

standards of education and character for all persons entering a given trade or profession; or to forbid membership in associations which teach the duty of overthrowing government by force. Aliens, as a protection to wild game, may be forbidden to possess or carry hunting arms and, as a matter of social policy, to own or to lease land.[62] Looking at some of the laws which were sifted out as deprivations of liberty without due process of law, one sees various ones infringing the freedom of press, speech, assembly, religion, and education;[63] as examples of the last-named, an Oregon law giving the State a monopoly of all elementary and grade-school education, and a Nebraska law forbidding the teaching of a foreign language in any school below the high-school grade.[64] To the same category belong all laws for the purpose of segregating races by residential districts.[65]

The attitude of the United States Supreme Court, since the wholesale change in its personnel in 1937, toward State laws infringing the freedom of religion, speech, and the press, has been wavering and sometimes reactionary. Several cases involving the question of freedom of speech have arisen from the relation of employer and employee; while others involving both freedom of religion and that of speech and the press were due to the missionary zeal of several small religious sects, particularly Jehovah's Witnesses. In the case of *Minersville School District* v. *Gobitis* (1940)[66] the Court, by a five-four vote, sustained a law of West Virginia excluding from the public schools children who, because of religious belief, refused to salute the flag. Two years later, in a similar case,[67] the Court reversed itself in a six-three decision, one new judge having joined the Court and two judges having changed their minds. The Court held that "one's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend upon the outcome of no elections." In January, 1944, however, the Court, in a five-four decision, again demonstrated its wavering conception of the meaning of freedom of religion by upholding, under the Massachusetts child-labor law, the conviction of a parent who had furnished a child religious tracts to sell in the streets.[68] Two years earlier, in a five-four decision, the Court had sustained the conviction of members of the Jehovah's Witnesses sect for selling religious tracts without a license.

[62] *Northwestern Fertilizing Company* v. *Hyde Park*, 97 U.S. 659 (1878); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Hunting* v. *Oregon*, 243 U.S. 426 (1917); *Sproles* v. *Binford*, 286 U.S. 374 (1932); *McNaughton* v. *Johnson*, 242 U.S. 344 (1911); *Whitney* v. *California* 274 U.S. 357 (1928); *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1914).

[63] *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Gitlow* v. *New York*, 268 U.S. 652 (1925); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Hamilton* v. *University of California*, 293 U.S. 245 (1934).

[64] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

[65] *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

[66] 310 U.S. 586 (1940).

[67] *West Virginia Board of Education* v. *Barnette*, 63 Sup. Ct. Rep. 1178 (1943).

[68] *Prince* v. *Commonwealth of Massachusetts*, 64 Sup. Ct. Rep. 438 (1944).

Here the minority held that the license taxes were in violation of freedom both of religion and of the press and speech.[69]

3. *Deprivation of Property.* The due-process clauses of the Fifth and the Fourteenth Amendment are among the chief bulwarks of property rights in the United States. Property is understood to include not only material things but intangibles, such as labor, services, good-will, and reputation. The right to property, however, is now far from an absolute one. A State may not flatly legislate to transfer the property of A to B, but it may tax A in order to provide food and shelter for B. It may set the prices to be charged for goods or services by a public utility, provided such prices give a fair return on the value of the property. It may prohibit the manufacture and sale of a product such as intoxicating liquors, thereby destroying or sharply reducing the value of the plant and business affected. It may compel banks to contribute to an insurance fund to be used for the reimbursement of depositors in banks which fail; and landowners of a given district to pay into a fund for the construction of drainage or irrigation works. A State may order the summary destruction of private property without compensation if, like gambling paraphernalia or fishing nets, it might readily be used to violate the law. It may set aside certain areas to which buildings of a given character are restricted, thereby leading to large pecuniary losses in individual cases. As a protection against deception, it may forbid the coloring of oleomargarine yellow and require that all loaves of bread offered for sale be made in certain specified weights. State statutes, however, which take private property for public use without compensation, or which levy special assessment taxes substantially beyond the amount of benefit to the landowner, or any taxes not for a public purpose, or which unreasonably restrict persons or concerns in the conduct of their business are deprivations of property without due process of law.[70]

THE EQUAL PROTECTION OF THE LAWS · Finally, the Fourteenth Amendment forbids the States to deny anyone, whether citizen or alien, the equal protection of the laws.[71] The purpose, avowedly, was to give equal security to all persons regardless of race, class, occupation, or religion. Laws which deny to any race or class the right to own and occupy land, to enter a calling or profession, to use the courts, or to hold public office are denials of the equal protection of the laws; likewise, the trial and conviction of a

[69] *Jones* v. *City of Opelika*, 62 Sup. Ct. Rep. 1231 (1942).

[70] *Smyth* v. *Ames*, 169 U.S. 466 (1898); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Noble State Bank* v. *Haskell*, 219 U.S. 104 (1911); *Lawton* v. *Steele*, 152 U.S. 133 (1894); *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905); *Euclid* v. *Ambler Realty Company*, 272 U.S. 365 (1926); *Powell* v. *Pennsylvania*, 127 U.S. 678 (1888); *Jay Burns Baking Company* v. *Bryan*, 264 U.S. 504 (1924); *Roberts* v. *New York*, 295 U.S. 264 (1935); *Davidson* v. *New Orleans*, 96 U.S. 97 (1878); *Citizens' Savings and Loan Association* v. *Topeka*, 20 Wall. 655 (1875); *Stewart Dry Goods Company* v. *Lewis*, 294 U.S. 550 (1935).

[71] F. J. Stimson, *The American Constitution as It Protects Private Rights* (1923), chap. v; T. Stephenson, *Race Distinctions in American Law* (1910), passim.

person under a judicial system which excludes all qualified members of his race from sitting on a jury.[72] The States do have a great leeway, however, in classifying for purposes of regulation. The separation of the white and colored races in schools, theaters, and other public places may be required, provided equal accommodations for each are made available.[73] Men are not denied equal protection if labor laws are made to apply only to women; chain stores or hand laundries if they are taxed more heavily than independent stores or steam laundries respectively. Employers of six or more men may be required to contribute to an employees' compensation scheme, while those employing fewer are exempted. A habitual criminal may be given a heavier penalty for a specified crime than a first or second offender. The tools of workmen may be made exempt from seizure for debt, while at the same time the lawyer, doctor, or teacher is denied such protection. All in all, the equal-protection clause has served to prevent many unjust discriminations, but has been flexible enough to permit reasonable State regulation.[74]

INTERSTATE COMITY · The United States has treaties with most civilized states mutually guaranteeing certain rights and liberties to their respective citizens when present within the bounds of the other. Without such an agreement a person has only such privileges as may be given him for the moment. The States, which, under the Articles of Confederation, had retained their independence, agreed in Article IV of that document that the free inhabitants of each should be entitled to "all privileges and immunities of free citizens in the several States"; that the people of each State should have "free ingress and regress to and from each State"[75] and should have within each the same privileges of trade and commerce as its own citizens. When the new Constitution was written, substantially this same provision was included in the words "The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[76] The general effect of this was to place the citizen of a State upon the same footing with the citizens of the State in which he was temporarily living. This had a greater value in the days before the Fourteenth Amendment had made national citizenship dominant over State citizenship than it does today. It prevents discriminating legislation against citizens of other States and secures to them an equality before the laws of a State.[77] It does not, however, prevent a State from preserving to its own citizens

[72]*Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

[73]*Arthur W. Mitchell* v. *United States*, 61 Sup. Ct. Rep. 873 (1941); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[74]*Muller* v. *Oregon*, 208 U.S. 412 (1908); *Great Atlantic and Pacific Tea Company* v. *Grosjean*, 301 U.S. 412 (1937); *Quong Wing* v. *Kirkendall*, 223 U.S. 59 (1912); *Graham* v. *West Virginia*, 224 U.S. 616 (1912).

[75]Art. IV. H. S. Commager, *Documents of American History* (1940), p. 111.

[76]*United States Constitution*, Art. IV, sect. 2.

[77]*Coryell* v. *Coryell*, 4 Wash. (U.S.) 371, 380 (1823).

exclusive rights in its own property, such as oyster beds, fishing waters, and wild game, nor prevent it from giving a preference to its own citizens for employment on public works.[78] A State, of course, may charge non-citizen students a higher tuition in its educational institutions than it does its own citizens. In general, however, the clause does prevent a State from treating the visiting citizens from other States as aliens.

## *GUARANTEES OF CIVIL LIBERTY BY THE STATES AGAINST THEMSELVES*

The foregoing section describes how the national government stands as a guarantor of individual liberty against possible State encroachments. The State, in turn, has bound itself in many respects not to violate the liberty of the individual. The more permanent guarantees are found in its written constitution. These have been summarized in an earlier chapter and need only a brief notice at this point.

THE STATE CONSTITUTIONS · Every State constitution has a bill of rights, which in every case embodies the substance of the first eight amendments of the national constitution.[79] In fact, the bills of rights of the Virginia and Massachusetts constitutions were the models upon which the national Bill of Rights was constructed. Thus, freedom of speech, press, religion, assembly, and petition is pledged to the citizen of the State against its own legislative and administrative authorities, and is enforceable in the State courts. Over and above these, various other civil liberties are listed. Examples are guarantees that the military shall be strictly subordinate to the civil power; that no power of suspending laws shall ever be exercised by the chief executive; that no person shall be imprisoned for debt except in case of fraud; and that no distinction shall be made by law between citizens and resident aliens with reference to the possession, enjoyment, or descent of property. With the pledge of religious freedom there are often coupled correlative ones, such as the prohibition of religious tests for holding office or testifying in court and of the obligation to pay taxes for the upkeep of any religious establishment. An example of the last-named is a section of the Florida bill of rights which reads, "No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution."[80] The citizen who believes a liberty guaranteed him by the State bill of rights is being taken away appeals to the State courts for protection, just as one appeals to the Federal courts because of a threat to liberties

[78] *McCready* v. *Virginia*, 94 U.S. 391 (1877); R. Howell, "Privileges and Immunities of State Citizenship," *Johns Hopkins Studies in Historical and Political Science*, Vol. XXXVI, pp. 16, 17.

[79] For the content of the State bills of rights cf. Chapter V.

[80] *Constitution of the State of Florida*, Declaration of Rights, sect. 6.

guaranteed by the national constitution. Now that the Fourteenth Amendment maintains a sort of second wall of protection against State infringement of the citizen's liberty, the value of the State's guarantees against itself is somewhat less.

THE COMMON LAW OF THE STATES · While the pledges of the written constitution are of great weight in determining the scope of his liberty, the citizen is likely to be more conscious of the influence of those laws which govern his routine daily activities. To what rights is he entitled as the owner of a piece of property? What recourse has he against the neighbor who maintains a smudge pot next door? Must he pay for goods sold to him under false representations? Must he endure the repetition of malicious and defamatory statements made against him? Can he pass his accumulated valuables to his children at death? These and analogous questions are common to all human societies. Each community first found the solution to such questions of rights and obligations in social custom, which in time hardened into binding rules. When recognized by government and its tribunals, or adopted by formal legislative bodies, these rules became the law of the land. Such was the origin of the common law of England, which was little more than a statement of those community duties and obligations of the citizen which the government would enforce. Transplanted to American soil, the common law took root and adapted itself to a larger territory, a more numerous people, and finally to an industrial civilization. It served as the basis of the common law of every State of the Union except Louisiana. The rights and the duties of the individual, developed in the course of a thousand years of growth, became, in a large degree, the standard of the freedom of the American citizen. Naturally, great changes have taken place in the law, notably as respects the rights of women and of laborers. But while in each biennium several thousands of statutes are passed by the various State legislatures, those that sharply alter the citizen's personal and property rights are remarkably few.

COMMON-LAW RIGHTS · The rights or liberties of the citizen established by law are commonly grouped under the headings of (1) personal security, (2) personal liberty, and (3) the ownership of property.[81] The right of *personal security* was defined as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." Supporting this right are numerous laws protecting the individual from physical injury, the use of force and intimidation, the impairment of his health by unhealthful surroundings, and defamation by slander or libel. The right of *personal liberty* is the subject of the numerous laws which define the individual's freedom to act, to think, to make decisions, to contract, in general to conduct his life as he wishes, subject of course to respect for the like rights of others. The right of *property* has been defined as the individual's "free use, enjoyment and disposal of all his acquisitions, without any

[81] W. Blackstone, *Commentaries of the Laws of England*, Book I, chap. i, p. 122.

control or diminution, save only by the law of the land." Its character and extent depend upon the very complex system of laws governing the acquisition, use, and disposal of all kinds of property, whether land and buildings or personal property. It is in this field in recent years that social experimentation has been the most active and the rights of the individual have undergone the greatest changes. The common law of a State is in general what the judgment and opinion of its people make it. Blackstone long ago pointed out that so long as the three rights of personal security, personal liberty, and private property were inviolate, the individual was free; "for every species of compulsory tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed."[82]

## *THE ENFORCEMENT OF CIVIL RIGHTS*

Civil rights on paper are one thing, and their actual enjoyment is another. Are adequate means available to the American citizen for the safeguarding of a threatened right or must he be content with the theory of liberty rather than its substance? The answer, happily, is that in our system of government the creation of new rights and the instrumentalities for their enforcement have generally gone hand in hand. With the notable exception of the Declaration of Independence, whose tone was dictated by the needs of the day, American state papers are not noted for abstract statements of human rights. The initiative for the vindication of a right or a liberty may come from either of two sources: the government itself or the person whose rights are threatened.

ENFORCEMENT UPON THE INITIATIVE OF THE GOVERNMENT · Examples of government's initiative in the protection of the citizen's rights, privileges, and liberties are found in the so-called police and welfare laws. Acts inimical to his health, safety, morals, and welfare are prosecuted as criminal offenses. Government is privileged in the case of persistent offenders to have them enjoined by the courts against further violations of the law. Congress, in the National Labor Relations Act, conferred upon labor the right to organize and bargain collectively, and created a board and a regular procedure for the enforcement of this act. The Federal Trade Commission polices the field of interstate business against "unfair methods of competition," and the Department of Justice attempts to ensure the businessman against the evils of monopoly. The various State workmen's compensation laws establish the right of the laborer to compensation for injuries received in the course of his employment and provide a board to make money awards.

ENFORCEMENT UPON THE INITIATIVE OF THE INDIVIDUAL · While government is the watchful protector of some of our rights, to the individual him-

[82] W. Blackstone, *Commentaries of the Law of England*, Book I, p. 144.

self is left the responsibility for the defense of most of them. Government defines rights in its laws and furnishes in its courts the means for enforcement, but the entire responsibility for their use is left to the injured person. If the threatened or actual deprivation of rights comes from government itself, there are at hand various means for enforcement. A court injunction may be secured against the illegal acts of an officer, or his refusal to perform a duty may be remedied by a writ of mandamus. Suit for damages may be brought against an officer if he has illegally interfered with personal or property rights. Release on a writ of habeas corpus may be obtained if there has been imprisonment without cause. A person prosecuted under a law which is violative of some guarantee of personal liberty may plead its unconstitutionality and so gain his freedom, if his contention is sustained. The defense of one's rights against a fellow citizen, of course, is by an ordinary civil suit in a court of law and is of interest chiefly to the contending parties. Occasionally, however, the issue is such that it reaches much farther, as in the trespass suit of the slave Dred Scott against his master, John Sanford, which involved the question of Negro citizenship.[83]

## *SUMMARY OF AMERICAN CIVIL LIBERTY*

Citizens of the United States and resident aliens have a large degree of personal freedom.[84] This means that certain parts of the individual's activities are marked out as free from interference from either the Federal or the State government. These are indicated in the bills of rights and other parts of the Federal and respective State constitutions. The Federal government sponsors two sets of guarantees, those against itself and those against the States, both of which are enforceable in its own courts. The State government's guarantees of liberty, many of which duplicate the Federal ones, are directed against itself. They are enforceable only in its own courts. Each State has a body of common law which governs almost all the conceivable relations which one person may bear to another as a member of the community. This law as a whole is a true reflection of the ideas of right and justice, morality and freedom, which pervade the people of the State. The civil rights of the American citizen are not mere written statements of desirable ideals but are accompanied by instrumentalities for their protection and enforcement. The chief of these are the courts, government prosecuting officers, and boards and commissions. Government takes the lead in enforcement of those rights which are regarded as of more importance to the community than to the individual, and leaves to the individual the initiative for the enforcement of those where his interest is superior to that of the community.

[83] *Dred Scott* v. *Sanford*, 19 Howard, 393 (1857).

[84] For an excellent exposition of the rights of aliens in the United States cf. W. M. Gibson, *Aliens and the Law* (1940). Cf. also W. C. Van Vleck, *The Administrative Control of Aliens* (1932), chap. v.

It goes without saying that even so adequate a civil liberty as that established in the United States will not serve to bring the boon of liberty to all persons. The employee may be restrained by the fear of his employer, or the employer by the fear of the labor union. Economic necessity may be a more potent restraint on liberty in the modern world than government. All the state does is to mark out certain formal limits to the restraints which may be laid on the individual, leaving a fuller attainment of liberty to his own efforts. Much human bondage is caused by lack of intelligence and education, and of the foresight and understanding which they bring. These are matters mostly beyond the ability of the state to remedy. There is a sense in which human freedom is over and beyond what a government may do. The higher freedom of the mind and soul cannot be created in its citizens by the state, but the state can create conditions in which the individual may freely strive for its attainment. To this end the guarantees in the American polity of freedom of the press, of speech, and of religion are its most effective contribution.

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## CHAPTER VIII

# *The Electorate and Its Functions*

The word *electorate* is used to designate collectively all those people who under the law are entitled to vote. As a matter of fact, the people of the United States comprise many electorates, or voting constituencies. To each are given certain duties which it must perform, and others which are discretionary. The people of the United States, in practice although not in the eyes of the law, constitute one electorate with the single obligation of electing a President and Vice-President of the United States. There are State electorates, and county, township, city, and district electorates. They too have a required minimum of obligations, including the election of public officials and the making of certain decisions, such as those relating to bond issues and tax levies. Within their discretion are the sponsoring and the circulating of petitions for the nomination of candidates, for the initiative and the referendum, and for the redress of grievances, to say nothing of all the multifarious activities of party politics.

POPULAR SOVEREIGNTY · The essential thing about the state and its primitive antecedents, the clan and the tribe, is the existence within it of some element which possesses the supreme power. The word *sovereignty* is applied to this ultimate power, and its possessor is called the sovereign. In the annals of mankind's political development, sovereignty has been found to reside variously in one person, in the few, and occasionally in the many. The one-man sovereign is typically a military leader, whether called chieftain, king, emperor, *duce*, or *Führer*. Sovereignty, in the feudal states of late-medieval and early-modern Europe, rested with the great landowning lords. In modern Japan this class seems to have been successful in extending its overlordship to the industries, and so more firmly seating itself in the place of sovereignty.

Several hundred years ago an occasional philosopher ventured to suggest that sovereignty ought to reside in the people, and by the middle of the eighteenth century the assertion was often made, although still a novelty. It remained for the Frenchman Jean-Jacques Rousseau to give the doctrine imperishable form in his little volume *The Social Contract* (1762).[1] The states of Europe had been brought into being by the military

[1]J.-J. Rousseau, *The Social Contract* (G. D. H. Cole, Tr.; 1916), Bk. I, chap. vii. "Again, the Sovereign, being formed wholly of the individuals who compose it, neither has nor can have any interest contrary to theirs." "I hold then that Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself." (Bk. II, chap. i)

and organizing abilities of various energetic leaders, in later time supplemented by the growing nationalistic feelings of their people. Naturally, supreme power had been conceded to belong to the monarch and his associates. The people were subjects, their lands, his domain. Rousseau now declared that the state was nothing more than an association of persons for their common good—a voluntary and conscious association; that the people were not subjects but citizens. The association which they had freely formed constituted a public person under the name of *republic* or *body politic*.[2] "Those who are associated in it take collectively the name *people*, and severally are called citizens, as sharing in the sovereign power, and subjects, as being under the state." That the supreme political power belongs to the people of the state as a whole rather than to a small class or to one person was a doctrine which gained acceptance rapidly in principle but more slowly in practice. It was a catchword of the French Revolution, which in a few years swept over Europe.

POPULAR SOVEREIGNTY IN THE UNITED STATES · The doctrine of popular sovereignty was quickly seized upon as the rational basis for the resistance of the colonies to British rule. The pamphleteer Tom Paine spread the gospel as he urged separation from Great Britain. Thomas Jefferson wrote in the Declaration of Independence that "all governments derive their just powers from the consent of the governed." The preamble to the United States Constitution, "We, the people of the United States, . . . do ordain and establish this Constitution for the United States of America," assumes the principle of popular sovereignty. The constitutions of all forty-eight States enunciate it in their bills of rights. "All power is vested in, and consequently derived from, the people," says the Virginia Constitution.[3] "All power residing originally in the people and being derived from them, the several magistrates and officers of government . . . are at all times accountable to them," reads the Massachusetts constitution; furthermore, "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State."[4] "All political power is inherent in the people" is the statement of Pennsylvania's constitution.[5] All other States follow one or the other of these statements, with the exception of Illinois, Nebraska, South Dakota, and Washington, which prefer the expression used in the Declaration of Independence.

The right and duty of the people to change the form of their government naturally follow. Virginia's constitution asserts that "whenever any government shall be found inadequate or contrary to these purposes [the happiness and safety of the commonwealth] a majority of the community

[2]J.-J. Rousseau, op. cit. Bk. I, chap. vi.
[3]Art. I, Bill of Rights, sect. 2.
[4]Part the First, Declaration of Rights, Arts IV and V.
[5]Art. I, Declaration of Rights, sect. 2.

hath an indubitable, inalienable, and indispensable right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal."[6] This is a strong statement; for it includes all means of change, even force. With a few exceptions all the other State constitutions affirm the same right, some in more cautious terms, others more strongly. Rhode Island restricts the right of change to an "explicit and authentic act of the whole people," the old constitution meanwhile to remain binding on all.[7] South Dakota would limit the right of change to "lawful and constitutional methods"[8]; while South Carolina uses only the term "modify" instead of the stronger "reform, alter, or abolish," found in a majority of the States.[9] On the other hand, three States, Maryland, New Hampshire, and Tennessee, reinforce the people's right to change their constitutions with the declaration that "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."[10]

How the People Rule · To agree that the supreme power belongs to the people is one thing, but to devise a system by which they actually rule is quite another. Many incisive arguments have been written to prove that no such thing as government by the majority has ever existed. Much of the controversy, however, arises from a lack of agreement on terms and too broad a statement of the question. Of course, it is physically impossible for constituencies measured in the millions to make day-by-day decisions on what laws are to be passed or what administrative orders are to be issued. Nor can they pass on more than a few of even the broader issues of policy. But so long as universal suffrage exists, the masses can control the character of the government and its latitude, and even directly make decisions on a limited number of questions. Such a government may be said to proceed from the people.

The methods of popular control in the United States are chiefly three: (1) the use of force, or "direct action" as it is sometimes called; (2) the exerting of pressure on public officials by means of public opinion, the sending of petitions, lobbying, and so on; and (3) voting in elections.

1. *The Use of Force.* While some of the early State constitutions gave a sort of theoretical recognition to the employment of force in extreme situations, its true character as an act of revolution was not mistaken. Force is an instrumentality reserved, with few exceptions, for the use of government. Its disadvantages as a method of popular control are obvious. More often than not, it does not represent the opinion of a majority of the peo-

[6]Art. I, Bill of Rights, sect. 3.

[7]Art. I, Declaration of Certain Rights and Principles, sect. 1.

[8]Art. VI, Bill of Rights, sect. 26.

[9]Art. I, Declaration of Rights, sect. 1.

[10]*Constitution of Maryland*, Declaration of Rights, Art. VI; *Constitution of New Hampshire*, Bill of Rights, Art. X; *Constitution of Tennessee*, Art. I, Declaration of Rights, sect. 1.

ple; it is liable to control by unscrupulous leaders; or, if the leaders are good, they usually are carried to greater extremes than was the original design. Where force comes in, law goes out. The greatly accelerated use of force by several European states during the 1930's in adjusting their domestic affairs was the prelude to its grandiose employment in the international field.

2. *Popular Control through Public Opinion.* The extent to which public opinion controls the acts and policies of government officials depends upon several things: the degree to which such opinion coincides with the self-interest or judgment of the officials, an appraisal of how far they might go in defiance of the opinion of the people without bringing about forcible resistance, and, in constitutional countries, fear of the reprisals of the voters at the forthcoming election. The broad suffrage of the United States, coupled with the great range of elective officials, makes government officials particularly susceptible to the dictates of public opinion. An ear is kept to the ground for murmurs of dissent or approbation; sometimes mere temporary gusts of opinion are sufficient to cause a rightabout-face in the legislative program. President Roosevelt's foreign policy in the year following the election of 1940 was obviously much more closely tied in with the development of public opinion than with the issues of that campaign. James Bryce, a distinguished observer of the operation of democracies, concluded that in the United States "public opinion is, more fully than elsewhere, the ruling power."[11] Public opinion, the real ruler of America, "is a judgment and sentiment of the whole nation which is imperfectly expressed through its representative legislatures, is not to be measured by an analysis of votes cast at elections, is not easily gathered from the most diligent study of the press, but is nevertheless a real force, impalpable as the wind, yet a force which all are trying to discover and nearly all to obey."

The speed with which Congress, early in 1942, after hearing a ground swell of popular disapproval, turned about and repealed a retirement-pension law which it had voted itself, is eloquent proof that times had not greatly changed since Mr. Bryce made his observations.

Other means available to the citizen for influencing the acts of government have been multiplied by the modern devices of rapid communication. The government offices are more accessible to persons and groups desiring to make their wishes known. High-pressure radio speakers may bring down upon Congress and the President showers of letters and telegrams. Special-interest groups in trade, business, labor, and agriculture maintain headquarters in Washington and often in the State capitals for the purpose of exerting a constant pressure on officers of government. Not to be left out of account is the historic right of the people, guaranteed in the national and State constitutions, "peaceably to assemble, and to peti-

[11] J. Bryce, *Modern Democracies* (1921), Vol. II, p. 112.

tion the government for a redress of grievances."[12] The right of petition came into being at a time when popular sovereignty did not exist in theory or in fact; it was the subject's way of reciting his wrongs to the monarch in the hope of having them righted. Unlike the initiative and the referendum, it stated a case and asked a superior power for grace and aid; whereas the initiative and referendum are an exertion of popular lawmaking power. Nevertheless, the right of petition is still a valuable means of voicing popular desires, even if in democratic countries it is directed chiefly to the legislative body. The day-by-day petitions which pile up in Congress and the State legislatures represent usually the wishes of various localities, clubs, or special-interest groups. While often selfish or even antisocial in their demands, nevertheless, taken as a whole, they may be regarded as representing one phase of popular sovereignty.

3. *Popular Control through Voting.* Voting is the process by which a person may register a choice, judgment, or view on some matter which is up for decision. Voting in town meetings or other popular assemblages may be by various simple means, as by voice, tellers, roll call, or show of hands. Individual voting, as at the polls, however, is by the marking of a prepared piece of paper called a ballot, or, in a few localities, by pulling the lever on a voting machine. Some form of voting has doubtless been used in politics since the beginning of civilization.[13] It is known that voting was used in some of the Greek republics. Officers were chosen by lot. Voting was almost daily employed in the active law courts, in which every public man was subject to prosecution by the humblest citizen. Ostracism was the putting to the test of the popularity of an official or prominent citizen: if the number of shell tokens cast against the man was larger than those for him, it carried an automatic decree of banishment. Voting was used in the popular assemblies of Rome. During medieval times it was employed by the assemblages of the clergy and the nobility and by the cardinals of the Catholic Church. There was an electoral body to choose an emperor for the Holy Roman Empire, and the budding English Parliament used a voting system for the choice of the knights of the shires and the commoners of the towns. By the time of the establishment of the English colonies in North America, voting at set times, called elections, was a familiar device in the English system. And so, in time, voting came to be the commonly accepted method of ascertaining the views of the people or their will, not because it was a perfect means but because it was the best that could be devised. Montesquieu asserted in 1740 that there could be "no exercise of sovereignty but by their [the people's] suffrages."[14] Nevertheless, the very practical question was often asked as to the right of the majority to

[12]*United States Constitution*, Amendment I.

[13]C. E. Seymour and D. P. Frary, *How the World Votes* (1918), Vol. I.

[14]Baron de Montesquieu, *The Spirit of the Laws* (1748) (new ed., 1878; T. Nugent, Tr.), Vol. I, Bk. II, sect. 2, p. 8.

make a decision and of the obligation of the minority to obey. The philosopher John Locke answered it with an analogy from the field of physics. As a stone atop a ridge rolls down one side because its center of gravity is there and pulls the whole stone with it, so the minority in a group or a nation must follow the majority.[15] Rousseau, who was much preoccupied with the idea of a "will of the people," gave a more ingenious explanation.

> When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so.[16]

To illustrate. If the proposition of a one-half-mill levy were on the ballot in a general election for the purpose of raising funds to build an airport, each voter should ask himself, "Is this the will of the people," and vote Yes or No accordingly. If he voted No and subsequently found himself in the minority, this would not mean that he had lost but that he had been mistaken in the popular will: he had been voting against his own will. The American application of this rather involved theory is the ready acceptance by the minority, after an election, of the officers chosen by the majority as the government of all.

VOTING IN THE UNITED STATES · The ballot is by all odds the most important instrumentality by which the people of the United States control their government. In fact, the holding of elections may be regarded as almost a major American industry. The ways by which it exerts this control are two: (1) by the choice and the recall of public officials, and (2) by the direct making of laws.

1. *The Choice and the Recall of Public Officials.* The choice of public officials is the most effective of the people's means of the control of government. A fair estimate of the number chosen by the ballot is 750,000.[17] Of these, all but 533 belong to the States and their subdivisions. They include all the key policy-making officials of the Federal and State and local governments: the members of Congress, the State legislatures, and city councils, and the chief executives of the nation, the States, and the cities and villages. They include also many administrative officials whose policy-making powers are scant, such as county engineers, treasurers, auditors, and the

[15] J. Locke, *Two Treatises of Civil Government* (1884 ed., London), Bk. II, chap. viii.
[16] J. J. Rousseau, op. cit. Bk. IV, chap. ii.
[17] C. E. Merriam, "Government and Society," chap. xxix of *Recent Social Trends* (compiled by President's Research Committee) (1-volume ed., 1933), p. 1508.

like, and State officials of the same ilk. They include, further, judicial officers of the States, who theoretically are outside the realm of policy determination. Since almost all the 750,000 officials are elected on a party basis, obviously the voters in selecting them give at the same time a vote of confidence or lack of confidence in the party which they represent.

The recall of public officials has proved only a minor source of popular control up to the present time. This is a device by which public officials, usually elective ones, may be taken from office before the expiration of the term for which they were elected. The purpose, of course, is to make them more accountable to the people, live up to their platform pledges, or follow public opinion. Twelve of the States make provision for the recall of some of their officers, as do many of the reformed city governments.[18]

2. *Direct Legislation.* Legislation by the people directly has existed in some degree since the beginning of our national history, but as a significant feature only since the end of the nineteenth century.[19] Its two chief forms are the simple question, submitted by administrative authorities as required by law, and the formal statute, placed on the ballot by petition or referred to the people by a legislative body. Counties, municipalities, and special taxing districts frequently use the former. Typical of the questions thus submitted are tax levies beyond the regular rate permitted by law, and propositions to build a bridge, a courthouse, or some other public improvement. This is an extremely important means of popular authority in the localities.

Beginning with South Dakota in 1898, twenty States by 1918 had established machinery whereby the people could initiate and pass laws with or without the collaboration of the State legislature. Thirteen of these extend this power to amendments of their constitutions. Several hundred municipalities have similar provisions in their charters. Through the device called the initiative a statute or amendment is drafted and a stated number of signatures are secured. The statute then goes on the ballot for action by the voters at the next election. The referendum is a device by which a statute passed by a legislative body is referred to the people for their action at a general election, the statute meanwhile remaining inoperative. In order to secure this popular action, petitions must be signed by a legally required number of electors. Direct legislation by the people is one of the most significant political developments since 1900, even though its course was much slowed down after its first few years of progress. It has been confined so far to the States, a constitutional amendment being necessary if it is to be extended to the Federal government.

[18]F. L. Bird and F. M. Ryan, *The Recall of Public Officers* (1930), pp. 11–21; C. Kettleborough, "Removal of Public Officers; A Ten Years' Review," *American Political Science Review* (November, 1914), Vol. VIII, pp. 621–629.

[19]For a more extended account of direct legislation cf. Chapter XXII: cf. also E. P. Oberholtzer, *The Referendum in America* (1912), chaps. iv, vii, xv.

THE ELECTORATE · The electorate of the United States is the aggregate of those persons who, under our laws, have been given the privilege of voting.[20] It is not exact to say that this body embraces all the politically active part of our population; for disqualified citizens and aliens may have a part in the formation of public opinion. They may petition Congress for the redress of grievances or they may use their personal influence with legislators and officials to influence the course of government. But with that exception it is substantially the enfranchised part of the population which guides the course of government, determines its policies, and fills the offices.

WHO SHOULD HAVE THE RIGHT TO VOTE? · In the United States universal adult suffrage is today the general rule, to which there are notable exceptions in law and in practice. We did not start with any such breadth of suffrage, but its attainment is a part of the story of the country's historical evolution.

Ideas as to the proper basis of the suffrage have changed from time to time, and there is still no unanimity on the subject in the United States. In the Greek and Roman republics of ancient times the suffrage went hand in hand with citizenship, both in theory and in practice. Indeed, Aristotle reversed the argument to say that those who participated in the government as voters or officers should be citizens. Throughout the Middle Ages and well into the nineteenth century the possession of land was generally the basis for the voting privilege. The first deviations from this rule were in the cities, where the wealthy burgesses attained the suffrage through the possession of personal property; but even there the ownership or occupancy of land was the basis of much of the voting.

The American colonies inherited the English theory and practice. Landowning or taxpaying was generally required, and religious tests existed in most of the colonies. In some the forty-shilling freehold was required; in others a freehold to the value of forty or fifty pounds. Personal property in stated amounts in lieu of land was acceptable. In a few colonies the ownership of property was regarded as an excellent test. When a property test was first adopted in Europe, land was the chief type of property. The same was true in America; moreover, the abundance of land made ownership of it possible for even the less able and acquisitive. The general sentiment was that no one without a stake in the community should vote, and what better test could there be than ownership of land?[21]

[20]Department of Commerce, Bureau of the Census, Press Release of June 4, 1944. Males twenty-one years of age or older were estimated at 44,043,669, including 7,860,000 in the armed forces; females, 44,622,000. At the time of the 1940 election the potential voters numbered 79,863,451, of which 49,815,312, or 62.4 per cent, cast ballots. In contrast, only 31.9 per cent cast ballots in 1932; 35.6 per cent in 1936; and 37.8 per cent in 1940. The female majority of potential voters in 1944 was the first of the kind. In 1940 the males exceeded by 359,419, and in 1910 by 2,800,000. The national average of voting, of course, is much reduced by light voting in the South.

[21]C. E. Seymour and D. P. Frary, op. cit. Vol. I, chap. x.

But the American Revolution, with its championing of natural rights and the "consent of the governed," ushered in a new logic. If government's only legitimate basis is the consent of the governed, as the bills of rights of all the States proclaimed, how could any man rightly be deprived of the opportunity to register his consent through the suffrage? French Revolutionary leaders accepted the logic of the situation and proclaimed the right to vote one of the natural rights of man. Condorcet said: "One of these natural rights we consider to be that of voting for common interests, either personally or by freely elected representatives. Women should have absolutely the same rights. . . . Either no individual member of the human race has any real rights or else all have the same."[22] The New Hampshire constitution of 1783 proclaimed that "every inhabitant of the State having proper qualifications has an equal right to elect and to be elected into office."[23] What were stated in bills of rights as "immutable" principles, however, differed sharply from the operative parts of the State constitutions. Soon after penning the immortal words of the Declaration of Independence, Jefferson drafted a State constitution for the use of his friends in Virginia in which the suffrage was restricted to freeholders and taxpayers. Writing many years later, he said that if he had been in the convention at that time he "probably would have proposed a general suffrage, because my opinion has always been in favor of it. Still, I find some very honest men who, thinking the possession of some property necessary to give due independence of mind, are for restraining the elective franchise to property."[24] Whether he would have done so is extremely doubtful, since we find him at times discussing the suffrage from the standpoint of workability. Jefferson's second draft of a constitution for Virginia, in 1783, had a widened suffrage, but it still included only male owners of property in a certain amount and those who had served in the militia.

The idea that the vote is a natural right of every mature person is one that is widespread among the masses of the people and a favorite battle cry of politicians. It was one of the main arguments put forward in behalf of Negro suffrage in the reconstruction period and by the protagonists of woman suffrage after the Civil War and until its accomplishment in 1920. Since then, however, legislation has proceeded on a different basis, and political scientists generally have rejected the principle of natural rights. According to the newer view, citizenship and the suffrage should not necessarily coincide. Children are citizens, and yet it is plain that they should not be given the privilege of voting. The insane are citizens, but not competent to vote. People with no fixed abode are citizens, but are disqualified from voting as a safeguard against double voting and because of their lack of knowledge of local candidates and issues. The correct

[22]Quoted in ibid. p. 12. [23]Art. X, Bill of Rights.

[24]Letter to Jeremiah Moor, August 14, 1800, *The Works of Thomas Jefferson* (P. L. Ford, Ed., 1904), Vol. IX, p. 142.

basis of voting, therefore, is something other than an inborn right. Viewed functionally, it is a privilege conferred by law on that portion of the population which it seems socially expedient and useful to include. Voting is a political function, and the electorate has certain legal duties.

That there are logical faults in this theory cannot be denied. Ideally, the doctrine of natural rights is agreeable to the theory of democracy on which our government is based. This was undoubtedly the view of Jefferson, who saw also the practical side of the question and never entirely reconciled the two. "We believed," Jefferson wrote in 1822, "that man was a rational animal, endowed by Nature with rights, and with an innate sense of justice; and that he could be restrained from wrong and protected in right, by moderate powers, confided to *persons of his own choice* and held to their duties by *dependence on his own will*."[25] And he pictured men as a whole "enjoying in ease and security the full fruits of their own industry, enlisted by all their interests on the side of law and order, habituated to think for themselves, and to follow their reason as their guide."

Obviously, if Jefferson was playing with the idea of universal suffrage, it was not basically because of any natural right to such a boon but because the mass of the people of the United States happened to be qualified for it because "independent, secure, and accustomed to let reason be their guide."[26] If Americans, on the other hand, were two-thirds urban, living in dense centers removed from the land, and insecure in their economic situation, the case might well be different. The child of nature Jefferson did not believe to be endowed at birth with the right to vote. Writing to Lafayette in 1815, he stated that more than a generation would be necessary before the masses of the French people were ready for democratic government; meanwhile they would need to live under "sensible laws favoring the progress of knowledge in the general mass of the people, and their habituation to an independent security of person and property, before they will be capable of estimating the value of freedom and the necessity of sacred adherence to the principles on which it rests for preservation."[27] Liberty won by a short cut or by accident, with a people unprepared for it, becomes "a tyranny still, of the many, the few or one." Jefferson's advocacy of a relatively broad suffrage for the United States was because of his confidence in the ability of the masses to use the suffrage well. They were capable of selecting the true from the false, "the wheat from the chaff. In general, they will elect the really good and wise. In some instances, wealth may corrupt, and birth blind; but not in any sufficient degree to endanger society."[28] With the chief apostle of equality

[25]Letter to William Johnson, June 12, 1823, *The Works of Thomas Jefferson* (P. L. Ford, Ed., 1904). Vol. XII, p. 253.

[26]Letter to John Adams, October 28, 1813, ibid. Vol. XI, p. 348.

[27]Letter to Lafayette, February 14, 1815, ibid. Vol. XI, p. 455.

[28]Letter to John Adams, October 28, 1813, ibid. Vol. XI, pp. 344–345.

and the natural rights of man leaning toward a utilitarian basis for voting, it is small wonder that the weight of authority in time shifted to that basis.

THE REMOVAL OF PROPERTY REQUIREMENTS · The attainment of general adult suffrage was accomplished unevenly and piecemeal throughout the land. At the time the Constitution was framed, divergent social systems in the thirteen States and conflicting social theories made it the part of wisdom to leave the question of suffrage to the individual States. This was easily done, since the only Federal officers to be elected were members of the House of Representatives, and the number of these to which each State was entitled would not be affected by the suffrage laws. Accordingly, the only rule laid down by the original Constitution on the subject was in Article I, sect. 2, that the "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature"; that is to say, whatever rule defines the suffrage for members of the lower branch of the State legislature automatically becomes that governing the election of members of the Federal House of Representatives from that State.

At the opening of the Revolution the laws of none of the colonies provided for universal manhood suffrage. The qualifications were property ownership or taxpaying in various amounts. The data on which to base studies of those qualified to vote in 1775 are scant, and the estimates of students show considerable variation. A. E. McKinley estimated that about 16 per cent of the population in Massachusetts were qualified voters, and from one sixth to one fiftieth in the various colonies.[29] The liberal theories of the Revolution led to only a small broadening of the suffrage in the first State constitutions and codes of law, but the groundwork in sentiment had been laid. By 1789 about three fourths of the adult males in the Northern States and somewhat less than half in the Southern States were legally entitled to vote, but some form of property-owning or taxpaying restrictions remained in all thirteen of the States.

Early in Washington's administration, sentiment for the enlargement of the suffrage grew apace. Georgia, in 1789, and Delaware, in 1792, abandoned their property qualifications. Ohio entered the Union in 1803 with taxpaying requirements only; Maine, in 1819, with manhood suffrage. New York in 1821 abandoned the property requirement and in 1826 the taxpaying requirement. The conservatives, however, were generally able to hold on to the taxpaying test until well into the 1840's and 1850's. In Rhode Island there was an appeal to force, the so-called "Dorr's Rebellion" of 1842, before the strict property and taxpaying requirements were lightened. A property test remained in North Carolina until 1856, and at the opening of the Civil War taxpaying was required in four other States;

[29] A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* (1905). pp. 487–488.

but these requirements were so light that white manhood suffrage had been substantially attained.[30]

## *DISCRIMINATION BECAUSE OF COLOR AND SEX*

THE FIFTEENTH AMENDMENT · At the outset of the Civil War no State in which there was a considerable Negro population permitted Negroes to vote. Four (Maine, New Hampshire, Massachusetts, and Vermont) extended the privilege of voting to free Negroes.[31] The dictum of Chief Justice Taney in his opinion in the Dred Scott case, that the Negro had generally been considered outside the body politic, seems to have been a true statement of the predominant attitude. Nevertheless, humanitarian leaders had succeeded in arousing many people to the inequity of the situation.

When the Republican leadership in the reconstruction Congress framed the Fourteenth Amendment, which was designed to overhaul the Union and place it on a firmer basis of strength and justice, they did not venture to make suffrage for the Negroes mandatory. The leaders wished to do so, but went only so far as to give Congress power to cut down the representation of such States in the House of Representatives as curtailed manhood suffrage. After the Presidential election of 1868 showed a continued support of the country for the Republican party, the leaders brought forward a Negro-suffrage amendment in both houses. Almost the entire stock of arguments was drawn upon, including the favorite one of natural rights. In the House, Henry Winter Davis, of Maryland, asserted:

> It is nothing but a form of demagogy to say that every man is entitled by Nature to hold office or to vote. These are artificial rights. They are creations of an artificial state and law of society. They do not exist as natural rights. They ought not to exist as universal rights, because the intelligence, the organizations, and the conditions of all nations differ.[32]

Where the argument for Negro enfranchisement broke down, on the ground of his lack of training and experience, the need for the ballot as a means of self-protection was brought forward. "No man is safe in his person or property in a community where he has no voice in the protection of either," argued one Congressman; and another saw in the enfranchisement of the Negro a repudiation of the assumption "that one man can be charged with the liberties and destinies of another."[33]

As the proposed amendment passed the two houses it contained the

[30]Kirk H. Porter, *History of Suffrage in the United States* (1918), pp. 36–46.
[31]Ibid. pp. 80–82.
[32]Speech in the House of Representatives on the proposed Fifteenth Amendment, February 26, 1869, *Congressional Globe*, 40th Cong., 3d Sess., p. 1630.
[33]Remarks of T. E. Stewart of New York, January 25, 1869, ibid. p. 668.

phrase "and hold office"; but when it came back from the conference committee this guarantee had been eliminated, in violation of the rules of the two houses, indignant members contended. Only the lateness of the day and the fear that even a few days' delay would defeat its adoption because of the approaching adjournment of several State legislatures restrained them from sending it back to committee again. It was only a halfway measure, leading Republicans bewailed. It did not guarantee the Negro against discriminations in officeholding, and it did not actually confer the suffrage upon anyone: it simply forbade the denial of the ballot on the basis of race, color, or previous condition of servitude. There was candid admission of a considerable sentiment in the Republican party against wholesale Negro suffrage, and it was thought best to take what could be obtained and to do so quickly. "Trembling converts to liberty," Senator George F. Edmunds of Vermont complained.[34] Strangely enough, the chief need for the amendment at the moment was in the North.

NEGRO POPULATION IN THE SOUTH · The Fifteenth Amendment left the South with a large population legally entitled to vote but recently released from slavery, illiterate, poor, abject, and totally without political experience. In three States (Louisiana, Mississippi, and South Carolina) there were actual Negro majorities, and in a fourth (Alabama) the numbers were close. Voting together, the Negroes would be able to organize and control the governments of these States. In the succeeding sixty years the white population increased at a much greater pace than the colored, until in 1940 Negro majorities had disappeared in all the States. Negro majorities, however, remained in many of the local government units. In 1940 North Carolina's colored population, only 35.5 per cent in the State as a whole, nevertheless was in the majority in ten of the counties. Negroes were in the majority in 17 of the 66 Alabama counties: 19,204 to 3,457 in Lowndes County, 16,082 to 3,103 in Greene, and 21,247 to 5,621 in Sumter; and they formed an almost equally large portion in several others. In South Carolina twenty-two of the forty-six counties had Negro majorities, sixteen more than 60 per cent.[35]

LITERACY, TAXPAYING, AND OTHER TESTS · Within a few years Negro participation in the government was sharply diminished through force, intimidation, terrorism, the false counting of votes, and other devices both numerous and effective. With the withdrawal of troops in 1877 Negro exclusion from the polls became complete. Efforts were then made to give the exclusion such a legal form as would not be a plain violation of the Fifteenth Amendment. Beginning in 1890, all the Southern States experimented with literacy and taxpaying tests coupled with registration requirements. Mississippi in that year required the registration of all

[34]Speech in the Senate, February 25, 1869, ibid. p. 1626.

[35]Sixteenth Census of the United States, *Population*, Vol. II, Pt. 5, pp. 238–241, and Pt. 6, pp. 376–378.

voters.[36] No one was eligible for the list unless he had paid all taxes required of him for the two preceding years and was able to produce documentary evidence of such payment. These included an annual poll tax of two dollars, for which no criminal proceedings for nonpayment were allowed. It was easy for anyone to forget to pay the poll tax and to mislay the evidence of having paid any of the taxes, but particularly so for those in the economic condition of the masses of the Negroes. In addition, no one could vote who was not able to read any section of the constitution of the State, or able to understand it when read to him "or give a reasonable interpretation thereof." In addition, nine crimes were listed for the conviction of which a person was disqualified from voting. Other States rapidly followed the example set by Mississippi, either by constitutional enactment or by statute, if permissible under their constitutions. South Carolina included a property qualification, and listed twenty disqualifying crimes, including miscegenation, wife-beating, and perjury. Alabama's suffrage requirements were particularly complete. There was a property qualification of forty acres of land, if resided upon, or other real estate to the value of $3000 or more. The voters must be of "good character, possess an understanding of the duties and obligations of citizenship, under a republican form of government," and must have been "regularly engaged in some lawful employment, business or occupation, trade or calling for the greater part of the twelve months next preceding the time they offer to register." Twenty-one disqualifying crimes were listed, including conviction as a "vagrant" or "tramp" or for vote-selling.[37]

THE GRANDFATHER CLAUSE · Such suffrage laws in the hands of the white registration boards were adequate to debar the Negro voter, but it was often embarrassing so to apply them as not to exclude considerable numbers of the whites. The famous "grandfather clause" solved this difficulty. That of North Carolina was typical. It started with the usual requirements of ability to read or write "any section"[38] of the Constitution in the English language, and evidence of the payment of the poll tax for the year preceding the election. But it went on to provide that no male person who on or before January 1, 1867, had possessed the right to vote in the State, and no "lineal descendant" of any such person, should be denied the right to register and vote. The date chosen, preceding the reconstruction constitutions and the Fifteenth Amendment, would permit most illiterate whites to vote, but effectively debar all Negroes. This law fell afoul of the United States Supreme Court in 1915 when it came up from Oklahoma.[39] While the Court found no mention of race, color, or previous

[36] P. Lewinson, *Race, Class and Party: A History of Negro Suffrage and White Politics in the South* (1932), chap. vii.

[37] *The Constitution of the State of Alabama and Amendments* (1943), Art. VIII, sect. 182.

[38] *Constitution of the State of North Carolina*, Art. VI, sect. 4.

[39] *Guinn and Beal* v. *United States*, 238 U.S. 347 (1915).

servitude in the statute, it did discover what was in effect the same: the date of January 1, 1867, which set a standard exactly equivalent to the prohibition in the Fifteenth Amendment. Since this decision all the States have abandoned the expedient, but have found the literacy, property-holding, and taxpaying restrictions sufficient for their purpose.

THE WHITE PRIMARY · The States with large Negro populations have sought to keep Negroes not only from voting at the regular elections but also from participating in the primaries. Taking advantage of a United States Supreme Court opinion in 1920 which held that the "elections" which Congress might regulate[40] covered only the final election and not nominating primaries, Texas in 1923 passed a law making Negroes ineligible to participate in a Democratic primary and declaring all such ballots, if cast, invalid. The statute came before the Court two years later, and was declared unconstitutional as depriving Negroes of the "equal protection of the laws" in defiance of the Fourteenth Amendment, leaving unanswered the question of whether the Newberry case had been reversed.[41] The Texas legislature promptly passed another statute, giving each political party through its executive committee the right to "prescribe the qualifications of its own members," and therefore to prescribe who might participate in its nominating processes. This statute also speedily came before the Court, and likewise was declared void on the ground that it denied the equal protection of the laws.[42] The standard interpretation of the Fourteenth Amendment had always been that its prohibitions were directed only against acts of a State, not of private individuals. Both Texas statutes involved State action or State authorization. After the second setback the State legislature left the matter alone, but the State convention of the Democratic party passed a resolution confining its membership to the white race. When this resolution was contested in the courts, its validity was upheld by the United States Supreme Court on the ground that the State had not acted to deprive any person of the equal protection of the laws.[43] Here the matter stood until 1944, when the revamped Supreme Court reversed itself, declaring the Democratic political party in Texas an agent of the State government and hence subject to the prohibitions of the Fourteenth Amendment.[44]

EFFECTIVENESS OF NEGRO DISFRANCHISEMENT LAWS · The various suffrage laws described above have operated to disfranchise the Negroes in the States of the solid South and to give the white man an easy supremacy in

[40] *Newberry* v. *United States*, 256 U.S. 232 (1920).
[41] *Nixon* v. *Herndon*, 273 U.S. 536 (1927).
[42] *Nixon* v. *Condon*, 286 U.S. 73 (1932).
[43] *Grovey* v. *Townsend*, 294 U.S. 699 (1935).
[44] *Smith* v. *Allwright*, 64 Sup. Ct. Rep. 757 (1944). Justice Roberts, dissenting, said: "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, [but] that the opinion announced today may shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term, the court has overruled three cases."

the border States. Because of their elasticity, the degree of the Negroes' exclusion is somewhat dependent upon the attitude of the election officials. In a few States some of the outstanding Negro leaders are regularly permitted to vote. In Louisiana, Negro registration had risen to 130,344, amounting to majorities in twenty-six parishes; but in 1900, after the adoption of the disfranchisement amendment, the number had fallen to 5320. By 1928 there were 1960 registered Negro voters in the State, as compared with 363,057 white voters, although an estimated 168,000 Negroes were qualified by reason of literacy and taxpaying. Paul Lewinson, in his careful study of Negro voting, *Race, Class, and Party*, estimated those voting between 1920 and 1930 at about 3500 in Alabama, 850 in Mississippi, and from 12,000 to 18,000 in Virginia.[45]

The race question is the chief reason for the one-party system of the deep South. While it is true that the rudimentary Republican organizations of that region proclaim themselves "lily-white," meaning that Negroes are excluded from their conventions and primaries, any semblance of equal division between the two political parties would undoubtedly lead to a competition for the Negro vote. This was shown during the Smith-Hoover campaign in 1928, and accounts more than anything else for the increased vote of the Negro in some municipalities, where issues of a nonpartisan nature come up. In Memphis, for instance, at times as many as 3500 Negroes have voted in a municipal campaign under careful arrangement with one of the white parties. Considerable Negro registration has taken place also in Atlanta, Raleigh, Portsmouth, Newport News, Savannah, and Fort Worth. Greatly increased economic strength and emergence of abler leaders of their own race have placed the Southern Negroes in a position to secure greater political strength should the white population become bipartisan. Nevertheless, Lewinson concluded, "It cannot be definitely shown that Negro suffrage gained in the South between 1900 and 1930."[46]

NEGRO SUFFRAGE IN THE NORTH · Until the great migrations of the Negroes to the North after the First World War the sentiment of that region on the question might be termed academic, based on such abstractions as the doctrine of natural rights. Now the question is one of practical politics. Everywhere in the North the Negro is permitted to exercise his right to vote. Large colonies in such cities as New York, Chicago, Cleveland, Cincinnati, Gary, and Detroit at times hold the balance of political power. Their tendency to vote solidly gives them a political strength even out of proportion to their numbers. Until the Presidential election of 1936 they had been a dependable Republican asset, but in that year and still more in 1940 they shifted largely to the Democratic side. The argument of reconstruction days that possession of the ballot is the best of all weapons for a minority group is illustrated by the present situation. The strange spectacle of the Democratic party sponsoring in Congress an anti-

[45]P. Lewinson, op. cit. Appendix II. [46]Ibid. p. 198.

lynching bill of the type sometimes offered in years past by the Republicans for the purpose of placating the Negro vote is a significant one. With New York the pivotal State in most Presidential elections, and the sine qua non of national party success, and with a Negro population of 477,494 in New York City large enough to determine the outcome of the vote of that State in all ordinary years, the Harlem Negroes may yet become the most powerful voting bloc of its size in the United States.[47] Negro political power in the North may well become the instrument for the improvement of their situation in the South, of which the Democratic-sponsored anti-lynching bill is a foretaste.

REMOVAL OF DISQUALIFICATIONS ON ACCOUNT OF SEX · The idea of woman's right to participate in the suffrage in the United States seems to have germinated at the time of the antislavery and antiliquor agitations during the 1830's.[48] The humanitarian nature of these movements appealed to women, and many participated in them, not without the feeling of many male leaders that these were unwelcome allies. In 1840 eight American women delegates chosen to the world antislavery convention, meeting at London, were debarred; "promiscuous female representation" was not to be allowed.[49] One of these, Lucretia Mott, and another, Elizabeth Cady Stanton, the wife of a delegate, eight years later collaborated in calling the first American woman's rights convention. At this meeting a Declaration of Women's Rights was adopted, including a denunciation of the "denial of the elective franchise." The drive was on, and never entirely ceased until the adoption of the national woman-suffrage amendment in 1920.[50]

COMPETITION WITH NEGRO SUFFRAGE · During the Lincoln administration and the years immediately following the suffragist leaders had much to say of the natural right to vote, the same doctrine which had so well served the cause of democracy against aristocracy, of the American Revolutionists against Great Britain, and, in later years, of the antiprohibitionists against the prohibitionists. Idealists, who had seen in the emancipation of the slaves a vital step to a better and happier day, mostly sympathized with the move for woman's political emancipation—men such as Henry Ward Beecher, Theodore Parker, Wendell Phillips, George William Curtis, and Ralph Waldo Emerson.[51] Attempts were made by the women's leaders to have equal suffrage written into the New York constitution of 1867 and into the proposed Fourteenth and Fifteenth Amendments to the national constitution. Republican leaders, who had favored woman suffrage earlier, now withdrew their support, because to encumber the not too popular Negro-suffrage amendment with that of women, they believed, would surely bring about its defeat. And so it came about that not only the

[47]Bureau of the Census, *Statistical Abstract of the United States* (1942), p. 29.
[48]C. C. Catt and N. R. Shuler, *Woman Suffrage and Politics* (1923), chap. i.
[49]Ibid. p. 17. [50]Ibid. p. 20. [51]Ibid. pp. 28, 29.

earlier idealistic supporters but such advocates as Horace Greeley and his powerful *Tribune*, Charles Sumner, and Gerrit Smith opposed any action on the woman-suffrage proposal as tending to defeat that for the Negro.

A PRIVILEGE OF FEDERAL CITIZENSHIP · With the passage of the Fourteenth Amendment, suffragist leaders professed to see in its wording an authorization, even if inadvertent, for woman's right to vote. This amendment forbade any State to make or enforce any law which should "abridge the privileges or immunities of citizens of the United States." Is the right to vote a privilege of citizenship of the United States and hence one which no State could deny? Susan B. Anthony and thirteen other women who registered and voted in the city of Rochester held that it was. The question was ultimately passed upon by the Supreme Court in 1874 in the case of *Minor* v. *Happersett*,[52] with the answer that the suffrage was not a right of citizenship as such and had not been so made by the Fourteenth Amendment.

THE PROGRESS OF ENFRANCHISEMENT · The legal test cases were only incidents in the nation-wide fight which was now waged for the cause. The plan was to win the suffrage State by State, and, with prestige and Congressional voting strength accruing therefrom, to carry on the battle for a national amendment.[53] Two national women's campaign organizations undertook the contest, with local clubs in most of the States. Funds were raised, speakers trained, and headquarters established in Washington, from which an effective lobby operated on Congress. These efforts soon began to bear fruit. In 1869 the territory of Wyoming enfranchised women, and it entered the Union in 1890 with such a constitution. The territory of Utah in 1870 adopted a similar provision, which remained in effect until 1887, when it was superseded by a law of Congress; but in 1896 that State entered the Union with a woman-suffrage clause. Meanwhile, in 1893, Colorado had been added to the list, and was followed by Idaho in 1896. There was a lull in the successes, if not in the campaigning, until the winning of Washington in 1910. Then followed California in 1911, Arizona, Kansas, and Oregon the year after, Montana and Nevada in 1913, the territory of Alaska in 1914, and New York in 1917; and the year 1918 saw the accession of South Dakota, Michigan, and Oklahoma. In addition to the fifteen States, thirteen others had extended to women a suffrage limited to the choice of Presidential electors, and Texas and Arkansas had granted it for the party primary elections.

On January 10, 1878, Senator Sargent of California introduced a resolution in the Senate providing for woman suffrage, a constitutional amendment which had been drafted by a group of women led by Susan B. Anthony. This was introduced in every session of Congress until its adoption forty years after. In 1916 both major political parties were still wary of the issue, although well aware of its looming importance because of the

[52] 21 Wall. 162 (1875). [53] C. C. Catt and N. R. Shuler, op. cit., chap. ix.

existence of fifteen suffrage States. Hughes, the Republican candidate, gave his personal endorsement to the amendment, and President Wilson approved suffrage for women as something to be won through State action. On June 4, 1918, the Senate adopted the resolution by a narrow margin, the House having earlier approved it by a large vote. On August 14, 1920, the State of Tennessee became the thirty-sixth to ratify the amendment, and the next day the Secretary of State proclaimed it a part of the Constitution. Ten States, all south of Mason and Dixon's line except Delaware, refused their approval. All contained large Negro populations, the enlargement of whose voting power was feared even if matched by an equal increase of that of the whites.[54]

RESULTS OF THE ENFRANCHISEMENT OF WOMEN · Woman owed her enfranchisement, it is safe to say, not to any idea of abstract rights but to the logic of facts, the chief of which were her increased ability to use the ballot intelligently and her greater participation in the nation's income and in civic affairs. At the time the Susan B. Anthony amendment was first introduced in Congress, females formed about 9.6 per cent of the gainfully employed population; but at the time it became the law of the land, the percentage was 16.5, a relative increase of 75 per cent. In 1940, with 3,156,982 in clerical positions, 1,838,059 in manufacturing and mechanical industries, and 1,469,661 in the professions, they bulked large among the wage-earners of the nation.[55] The common experience of history is that the attainment of economic power by any given class soon brings political power.

Champions of the movement often predicted a quick reform and cleansing of government if women were given the vote; those opposed frequently professed to see disaster. As is usual with political changes, the results were somewhere between the two extremes. Women's use of the ballot has remained considerably below that of men: while no statistics are available, perhaps one-third less for the entire country. Political machines rise and flourish as before, as witness the Hague machine of Jersey City, the Pendergast machine of Kansas City, and the Kelley-Nash machine of Chicago. Perhaps no methods will ever be devised to measure the responsibility of woman's vote for the electoral vagaries of the 1920's, the prosperity decade, and of the 1930's, the New Deal decade. The presence of women in party meetings and elections has added respectability if not a greater degree of rationality to their conduct. Women have doubtless lent strength to the various movements for social amelioration and reform. But perhaps the greatest accomplishments have been the increased confidence and self-respect given women, and the enlistment of thousands as leaders and workers in civic enterprises.

[54]Ibid. chap. xvi.

[55]Bureau of the Census, *Statistical Abstract of the United States* (1943), pp. 129, 135.

## *EDUCATIONAL REQUIREMENTS FOR THE SUFFRAGE*

EDUCATION AND DEMOCRATIC GOVERNMENT · "No one will doubt that the legislator should direct his attention above all to the education of youth, or that the neglect of education does harm to states," wrote Aristotle.[56] This conclusion was drawn from an observation of the working of government in the sophisticated city states of ancient Greece. Many writers of the last century, at a time when democracy was spreading, expressed opinions in favor of educational requirements as a basis for the suffrage. John Stuart Mill, writing in 1861, said, "I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read and write, and, I will add, perform the common operations of arithmetic." No one could reasonably maintain, he argued, "that power over others, and over the whole community, should be imparted to people who have not acquired the commonest and most essential requisites for taking care of themselves."[57] The classical conception of the close relationship between government and education received from the beginning general support from American leadership; at the same time this statement is no denial of the encomiums often pronounced upon the unlettered man in the new frontier States. The first annual message ever sent to the United States Congress contained the following paragraph, which might well be entitled "Why education is necessary to the electorate of a republic":[58]

> Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community as in ours it is proportionably essential. To the security of a free constitution it contributes in various ways—by convincing those who are entrusted with the public administration that every valuable end of government is best answered by the enlightened confidence of the people, and by teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness—cherishing the first, avoiding the last—; and uniting a speedy but temperate vigilance against encroachments with an inviolable respect to the laws.

President Washington ended by recommending to Congress the establishment of a national university. Motivated by much the same sentiments, Jefferson drew up a scheme of public education for Virginia, extending from the elementary grade through the university; and American govern-

[56]Aristotle, *Politics* (Jowett tr., 1931), Bk. VIII, sect. 1.

[57]J. S. Mill, *Considerations on Representative Government* (2d ed., 1861), p. 168.

[58]G. Washington, "First Annual Message," January 8, 1790, in J. D. Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 66.

ments in general have spent lavishly for the promotion of general education, for the dual purpose of a happy life for the individual and the good of the state.

At least an elementary education is generally regarded today as necessary to a prudent and informed conduct of one's personal affairs. The ability to read and write seems requisite for participation in the decision of public questions. When the nation was rural, elementary education was in many cases beyond the reach of even the ambitious; moreover, the life of the farm and frontier usually endowed an unlettered person with a fund of common sense, shrewdness, and knowledge of everyday affairs which qualified him reasonably well for the simple duties of the voter of that day. Those conditions have now passed away. The school is at hand for everybody, both in the country and in the cities; the voters' burden has greatly increased. Nevertheless, it is to be remembered that literacy, or even education on the higher levels, does not necessarily produce a well-qualified elector.

EXTENT OF ILLITERACY · To what extent would a general literacy requirement for the entire nation decrease the electorate? Much would depend on the test set up. The Census Bureau defines an illiterate as any person ten years of age or older who cannot read or write either English or some other language. To "read or write" may mean merely the mumbling of a few words or a trace of stilted writing. Following this test, the census of 1930 listed 4,283,753, or 4.3 per cent of the total population, as illiterate.[59] Of these 2,407,218 were white; 1,513,892 were Negroes, representing 16.3 per cent of that race; and 362,643 were classed as "other races," chiefly Mexicans. Illiterates of voting age comprised 5.3 per cent of the population, but 20 per cent of the Negroes of that age were illiterate, 15 per cent for the South as a whole. South Carolina, with 18.6 per cent, stood at the top, with Mississippi and Alabama closely following. The regions of the old Northwest Territory and the prairie States west of the Mississippi had the lowest average. Iowa stood at the bottom with 1 per cent, rivaled by Kansas and Nebraska with 1.5 per cent.

In 1940 the Bureau of the Census classed as illiterates all persons, twenty-five years of age or older, who had had less than four years of schooling.[60] On this basis there were 10,104,612 illiterates, of whom 2,799,923 had not attended school, and 7,304,689 had not gone beyond the fourth grade. The State of New York alone had 468,985; Pennsylvania, 228,902; Texas, 179,426; California, 111,337; and New Jersey, 109,563. And yet all five States have free public-school systems of high rank. In May, 1943, it was officially announced that 433,000 physically fit men had been rejected for military service, 183,000 because of subnormal mentality and 250,000 because of illiteracy.

[59] *Statistical Abstract of the United States, 1931*, pp. 34–36.

[60] *The Journal of the National Education Association* (October, 1942), Vol. XXXI, p. 206; *The Americana Annual, 1943*, p. 252.

These figures, however, probably minimize the situation. They merely tabulate the answers given the question asked in the census as to literacy. Tests applied to over a million and a half of the officers and men of the citizen army in 1917–1918 indicated a 25 per cent illiteracy. The test was the ability to read and understand newspapers and to write letters home. The Committee on Illiteracy of the National Education Association estimated in 1928 a national total of ten million illiterates and another ten million of "half-illiterates." Obviously arguments for and against a literacy requirement will be colored much by the standard of literacy meant.

STATE LITERACY REQUIREMENTS · In 1944 twenty of the States used some form of literacy test.[61] The beginning was made in 1855 in Connecticut, and in 1857 in Massachusetts, both of which were inspired by a desire to keep the ballot from the floods of immigrants of the newer stocks then pouring rapidly into those States. Seven Southern States adopted literacy requirements about the turn of the century. Nine States of other sections followed during the next decades: Wyoming, Maine, California, Washington, Delaware, New Hampshire, Arizona, New York, and Oregon. In all except New York the law is administered by election officials, and in such a way as to admit the "half-literate." Professor Holcombe estimated that the Massachusetts law debarred about 4 per cent of those otherwise qualified to vote, which perhaps is representative of the other States having literacy requirements.[62]

In New York the application of the test is entrusted to the public-school authorities, acting under rules adopted by the State board of regents. The constitutional clause empowers the legislature to declare the meaning of the requirement to read and write English.[63] The law was made to apply only to new voters, those who previously had not been registered. All others must obtain certificates of literacy, for which two methods are provided: the first is evidence of graduation or promotion from the eighth or a higher grade of a public or private school, or of completion of the sixth-grade work of a day or evening school; the second, the passing of a test. These tests, prepared by a group of educational psychologists, are made to correspond to the reading and writing achievements of the fifth grade, that is to say, of the average person of eleven years. Applications to take them are made to the local school principal or superintendent, and they are usually given in the school buildings. During the year 1923–1929 a total of 472,126 persons took the literacy tests in the State. Of these 54,824, or 11.6 per cent, failed. The percentage is not large when it is remembered that those taking the tests had not passed through the eight elementary

[61]Council of State Governments, *Book of the States, 1943–1944*, p. 118.

[62]A. N. Holcombe, *State Government in the United States* (1916 ed.), p. 149.

[63]F. G. Crawford, "Operation of the Literary Test for Voters in New York," *American Political Science Review* (May, 1931), Vol. XXV, pp. 342–345; A. W. Bromage, "Literacy and the Electorate," ibid. (November, 1930), Vol. XXIV, pp. 946–962.

grades. The New York system is an interesting experiment in view of a possible future sentiment in favor of a more restricted suffrage. So far its chief effect has been to increase adult interest in night schools rather than perceptibly to diminish the electorate.

RESIDENCE AND OTHER QUALIFICATIONS · United States citizenship and the age of twenty-one years or more are now suffrage requirements in all the States.[64] At one time as many as one third of the States had extended the privilege to aliens who had declared their intention of becoming citizens, but this ended at the time of the First World War. Requirements of residence exist in all the States; for without them the means of rapid communication would make repeating, personation, and other fraudulent practices in voting easy. Thirty-four of the States require a year's residence, nine of them six months, and Maine only three months. Six of those with the six-months requirement lie west of the Mississippi, two in the Middle West, and one (New Hampshire) in New England. The desire of the Western States for additional population was until recently a motive in keeping the requirements low. Among these States is Nevada, which has become the Mecca for applicants for divorce. This is the State which in 1865 levied a poll tax on all persons leaving the State. Six States, all of them of the Old South except Rhode Island, have a two-years residence requirement. All States require a county or precinct residence or both. Four Southern States set the requirement at one year; but sixty to ninety days for the county and ten to thirty for precinct or ward are the most common. Registration as a prerequisite to voting exists either for a whole or a part of the State, in all but Vermont.

THE EXERCISE OF THE ELECTORAL POWER · Democratic theory assumes an eagerness on the part of the masses to participate in the business of government, whether from self-interest or from devotion to the public weal. How does this assumption square with the facts in this country? In the Presidential election of 1936, with the people deeply stirred by extraordinary issues, 45,646,817 votes were cast, a record vote which probably represented nearly 70 per cent of the eligible voters.[65] In 1928 the number had been 36,879,414, or an estimated 60 per cent.[66] A study of twenty-one northern States for the election of 1920 indicated a vote of about 56.3 per cent of those eligible.[67] The results from the 1936 and 1940 elections may indicate a permanent upswing from the 1920 low. The intervening years had brought on a new generation of women, habituated to the idea of votes for women, and the older one had largely passed away. But, notwithstanding this favorable symptom, there is still some distance to go to

[64]Council of State Governments, *Book of the States, 1943–1944*, Vol. V, pp. 118, 119.

[65]*World Almanac*, 1944, p. 428.

[66]Ibid. p. 429.

[67]A. E. Schlesinger and E. McK. Erickson, "The Vanishing Voter," *New Republic* (October 15, 1924), Vol. XL, pp. 162–167.

reach the standard of 1888, when 80 per cent of the eligible voters in the States actually voted.[68] The more nearly equal balance of the two parties in that day may have contributed to the greater interest, or subsequent urbanization may have acted as a deterrent to political interest.

The poor national showing, of course, is attributable in considerable part to the disfranchisement of the Negro in the South. The one-party system of the South, by removing conflict, has deterred interest in voting there, just as it did in Pennsylvania with the preponderant Republican party. In the Presidential year of 1920, 43 per cent of the population of Indiana voted; and the median for the forty-eight States was 28 per cent. At the bottom was South Carolina, with 3.9 per cent. Next in order were Mississippi, with 4.6 per cent; Georgia, with 5.1 per cent; Louisiana, with 6.9 per cent; and Texas, with 8.8 per cent.[69] In 1944 the States of Washington and South Carolina each chose eight Presidential electors; but in so doing the former cast 756,559 votes, and the latter 95,211. In the same year Kansas chose eight Presidential electors and Mississippi nine; but 724,612 votes were cast in the former, and only 162,257 in the latter.[70]

James Bryce, at the end of a lifetime spent in studying democracies, pointed to popular indifference to the affairs of government as one of the main highways leading out of free government.[71] Do the voting statistics of the United States indicate a dangerous apathy? Such a conclusion could hardly be drawn from a situation in which a vote of forty-five million was cast in an electorate of sixty million, as happened in 1936; nor from the vote in any of the Presidential-election years, far as they do fall short of the ideal. The story of the vote in State and local elections, however, is a much less cheerful one. Frequently votes cast in municipal and county elections on bond issues, charter amendments, and other referenda total only 15 to 40 per cent of the normal vote in Presidential-election years.

Causes of the widespread indifference to the ballot are numerous. In general, the rate of voting is lowest in those States in which there is no sharp competition between the two major parties. In States like Indiana, where the two parties are traditionally nearly equal in strength, it is difficult for a voter to remain away from the polls. Intensive propaganda, torchlight parades, and an atmosphere of excitement arouse the most apathetic, and transportation is willingly furnished the decrepit or the reluctant. In local elections, however, the rate of voting is all too often very low.

Superficial observation would suggest general indifference, preoccupation with the ordinary routine of duties, lack of residence, illness, and absence from home as the outstanding causes of failure to vote in elections. The findings of a careful study, under the direction of Merriam, of 5310 cases of failure to vote in the Chicago municipal election of 1924 coincide

[68]A. B. Hart, "The Exercise of the Suffrage," *Political Science Quarterly* (June, 1892), Vol. VII, pp. 307–329. [69]R. C. Brooks, *Political Parties and Electoral Problems* (1923), p. 412. [70]*World Almanac*, 1945, pp. 728–744. [71]J. Bryce, *Modern Democracies* (1921), Vol. II, pp. 602–609.

in general with this conclusion.[72] Indifference, neglect, or ignorance regarding the election was given as the primary cause in 44.3 per cent of the cases. Twelve per cent was due to illness, and 11.1 to absence from home. Some form of disbelief in voting accounted for 17.7 per cent.

Little can be done about the failures due to illness, absence, and residence, which in this study amounted to about 30 per cent of the whole. How about the remaining 70 per cent? Compulsory voting has been urged by some, and this has been tried in certain European countries. The Massachusetts constitution authorizes such a statute, but no legislature has seen fit to act. The value of voting performed at the point of a penalty is exceedingly questionable. Voters hustled to the polls might easily evade the purpose of the law by depositing blank ballots, or, resenting the attempt to dragoon their own free judgment, might resort to other evasions.

Democracy, as James Bryce well observed, is based on the expectation of certain virtues in the people, one of which is sufficient public spirit willingly to participate in the act of voting.[73] A system of free general education so directed as to aid in the wide diffusion of political facts; voluntary associations for the education and the arousing of the elector; newspapers and periodicals free to print the whole truth and make candid comment; and vigorous political parties competing for the elector's favor: these are a few of the means employed to stimulate the performance of the electoral function. If they should fail, it would be time for a different type of state.

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[72] C. E. Merriam and H. F. Gosnell, *Non-Voting: Causes and Methods of Control* (1924), p. 37.

[73] J. Bryce, op. cit. Vol. II, pp. 605–606.

CHAPTER IX

# *Political Characteristics of the American People*

American government is more than what happens in executive offices, legislative halls, and courtrooms. The beginnings of the governmental processes are back among the people. Their beliefs and attitudes on public questions, their social customs, their inherited political institutions, their economic needs, and their individual interests furnish the motive power for the acts of government. The Constitution established or countenanced popular rule. What are the instrumentalities available to the people for exerting this control? It is evident that these are chiefly two: the ballot, by means of which the chief policy-forming offices are filled, and participation in the formation and expression of public opinion. Political campaigns, ballots, elections, and public opinion become significant when the chief factors which cause the American citizen to vote and react as he does on public questions are understood. With that subject this chapter, which might well be called "Political Behavior," is concerned.

HITLER'S LEADERSHIP IN GERMANY · Many Americans who listened to radio speeches by Adolf Hitler in 1938 and 1939 were amazed that anyone should have chosen such ideas with which to sell himself to the German public. They reflected how quickly such a program would have collapsed in America, by ridicule if not by the force of reason. The listener's underestimation of Hitler was due to his failure to comprehend the difference in the political characteristics of the two peoples. Hitler understood as well as the politicians in the democracies that to succeed he must attune his appeals to the beliefs, prejudices, needs, social customs, and way of life of the masses. His purpose was to build up a party organization by persuasion; for the Weimar government was based on universal suffrage.

A few of the issues and slogans employed will show the nature of his appeal. Democracy was condemned: "It does not breed men who welcome responsibility, but frightened hares or artful tricksters. It kills every personality, stifles every initiative, it cripples every achievement."[1] "Chance majorities" are incapable of ruling the state well in the interests of all. Propaganda is a valuable instrument of government, but must be adapted to the least intelligent; for the "great masses' receptive ability is only limited, their understanding small, their forgetfulness great."[2] The inequality of individuals and races was assumed. Human culture today is

[1] N. H. Byrnes (Ed.), *The Speeches of Adolf Hitler, April, 1922–August, 1939*, Vol. I, p. 454.
[2] A. Hitler, *Mein Kampf* (ed. 1939), p. 234.

"almost exclusively the creative product of the Aryan." The best interests of civilization are served when superior and inferior races are associated, the former ruling over the latter. The principles of leadership and authority were stressed. "The will of a people to maintain its existence appears first and in its most useful form in the best brains." It was an old German principle "which knows only an authority which proceeds downward from the top and a responsibility which proceeds upward from the bottom."[3] The freedom of the individual must give way to the social good. Hitler would "safeguard the people as such, if necessary even at the expense of the individual."[4] The German people should be welded into one state from which all other races would be excluded as citizens. The first great need was not so much distant colonies as an enlarged and compact homeland. Land for such colonization was most readily available to the east, in Russia and its satellites. War was glorified and pacifism condemned.[5] To an assembly of the great capitalists and captains of industry was pointed out the necessity of a military state to keep order at home, to open markets abroad, and to overthrow the Bolshevist menace, and the promise was made that the institution of private property would be maintained. Long-term business plans could then be made, "since with this government there is no fear that tomorrow or the day after it will be no longer there."[6] Nevertheless, business was to submit to government planning, as were labor, education, and the fine arts.

BASES OF HITLER'S APPEAL · The progress of his cause from one man with an idea to a militant political party of many million was one of Hitler's proudest boasts. In the beginning he had been able to attract scarcely more than a dozen persons to a meeting; but as the years went by, his hearers were counted in the hundreds and finally in the thousands.[7] The sentiments quoted above show how adroitly he appealed to the political character, the national traditions, and the historical experience of the German people. He played on their love of order and stability, respect for authority, and adaptability to regimentation. It was safe to scoff at democracy in view of their inexperience in self-government, their toleration of the princely classes, and their bias toward one-man government. Nor did he neglect the imperial dogma handed down from the mystical German Empire of the Middle Ages, the memories of glorious military victories, the national union wrought by "blood and iron," or the pride of race fostered by several generations of historians and philosophers. No democratic faces stared out from the gallery of national heroes to confuse his theme.

[3]N. H. Byrnes, op. cit. Vol. I, p. 201.
[4]Ibid. p. 872.
[5]Ibid. pp. 789–790.
[6]Ibid. p. 870.
[7]Ibid. p. 786.

## *AMERICAN NATIONALITY*

POLITICAL MORES · The Latin term *mores* (customs) was added to the vocabulary of the American language early in the century by the Yale scholar William Graham Sumner.[8] Primitive man's first task in life, he explained, was to live, to adjust himself successfully to his physical environment. By the process of trial and error he discovered ways of doing those things which were necessary to his existence. These ways become habit in the individual discoverer of them, and in time are adopted by the group and so become folkways, or custom. The mores of a people are those folkways which, hallowed by age, have been given the stamp of conscious group approval. They find expression in social institutions, such as the family, the church, commercial associations, and government, and in the codes of law and rules of morality adopted. The mores, of course, are subject to constant if slow change to meet new conditions. The nature of the mores is shaped not only by a people's inborn character but also by environmental factors of climate, geography, and natural resources. For instance, a people whose vulnerable location has long subjected them to attack and invasion by strong neighbors probably will have developed a culture in which militarism and the military class have acquired a dominant place. American mores, to begin with, were those of western Europe, and of England in particular. They were quickly modified by the new American setting into which they were transplanted, and in recent decades were further changed by the influx of many new peoples from central and eastern Europe.

DEFINITION OF NATIONALITY · A people which has long lived apart develops customs, traditions, and ways of life which are peculiar to itself. The word *nationality* is applied to such distinct cultures. Carlton J. H. Hayes used it to designate a people who "speak the same language or closely related dialects, who cherish common historical traditions, and who constitute or think they constitute a distinct cultural society.[9] *Nationality* is to be distinguished sharply from *state*, which refers to a people politically organized. The old Austro-Hungarian Empire constituted one state, but its people were of a dozen or so distinct nationalities. By the process of naturalization, people of varied nationalities may become members of the American state; later, by "Americanization," they and their descendants may acquire our language, customs, and social outlook, and so acquire American nationality. England, France, Germany, Italy, and many other European states are known as national states because their people are

[8]W. G. Sumner, *Folkways* (1940 ed.), pp. 5–6.

[9]C. J. H. Hayes, *Essays on Nationalism* (1935), p. 5. Hans Kohn, in *The Idea of Nationalism* (1944), stresses politics as a component element of nationalism. "Nationalism therefore presupposes the existence, in fact or as an ideal, of a centralized form of government over a large and distinct territory" (p. 4). American nationalism, he believes, dates from the period of the Revolution (chap. vi).

chiefly of one nationality. The problems of government in a nation-state are relatively simple, because common language, customs, attitudes, and moral codes promote mutual understanding and an appreciation of other people's viewpoint.

RISE OF AN AMERICAN NATIONALITY · In 1776 the people of the United States were overwhelmingly of British stock; they had no nationality separate from that of the homeland. It was several decades after independence before distinct characteristics, the product of American experience and environment, began to stand out. Political separation from Great Britain itself was a stimulus to the growth of a distinctively American viewpoint. Andrew Jackson was the first President of this type. Frederick J. Turner was one of the first to point out that American nationality made its appearance with the settlement of the lands beyond the Alleghenies and was a product of the frontier.[10] The colonization of the lands westward to the Pacific, involving the addition of thirty-five new States to those representing the original English colonies, made the cultural set of the Middle West the dominant one of the nation. In spite of a near identity in language with that of Great Britain, there is no doubt that the people of the United States have developed a viewpoint and social system which amount to a separate nationality.

THE ENGLISH LANGUAGE · The most characteristic mark of a nationality is a common language. In fact, language was the test chiefly applied by the rivals sitting about the peace table at Versailles in 1918–1919 in asserting their claims for the annexation of territory. A common language ensures a common literature, which is the means by which folkways and social and political ideas are set forth, to become the common property of all the people. Besides serving as an instrument of universal communication, it provides a common ground on which all may meet. English (or, rather, its American version) is the all-but-universal language of the United States from Maine to California. In every State of the Union except New Mexico, where in some parts the courts and administrative offices use both Spanish and English, the latter is the official as well as the popular language. With a foreign-born white population in excess of 11,419,138, English is the tongue of more than 95 per cent of the people of the United States.[11] Since 1917, there has been a slow but steady decline in the number of foreign-language newspapers, and those that remain are becoming increasingly American in spirit.[12]

HISTORICAL TRADITIONS · The American people of all sections and races cherish much the same historical traditions. The traditions originating in the struggle of the original thirteen States for independence have become

[10]F. J. Turner, *The Frontier in American History* (1921), pp. 22, 29, 166.

[11]Bureau of the Census, *Statistical Abstract of the United States* (1942), p. 32.

[12]Newspapers in forty different foreign languages were being published in the United States in 1944. Cf. N. W. Ayer, *Directory of Newspapers and Periodicals, 1944*, pp. 1168–1184.

the common possession of the peoples of the thirty-five States since created. Had the non-British immigration after 1875 been concentrated in two or three States so as to become the dominant element there, radically different patterns of historical tradition might have resulted; but, scattered throughout the forty-eight, the descendants of the foreign-born have quickly imbibed the traditional American historical interests. The deeds of the Revolutionary leaders and those of the War of 1812, and the personalities, social philosophy, and achievements of great leaders in internal policy, such as Jefferson, Hamilton, Clay, Webster, and Calhoun, go to make up the stock of national historical lore, no matter from what ancestry the citizens may have sprung. Slavery in the Old South caused the only perceptible division in the development of American nationalism; and time has added the outstanding leaders of both sides in the civil struggle to the galaxy of heroes honored by the entire country.

RELIGION AND MORALITY · In religion the American people are overwhelmingly of the Christian faith; its common background with the only other large persuasion, the Jewish, ensures a general uniformity in social and political outlook. The general code of morality does not differ radically by regions, and such differences as exist result more from race and nationality than from religion. Sweeping legislation in the early 1920's on the question of intoxicating liquors found its sharpest difficulties in the mores of some of the more recently arrived nationalities.

## *ENGLISH POLITICAL BACKGROUND*

But for English naval supremacy in the seventeenth and eighteenth centuries the political system of the North American continent today from the Rio Grande north would have been either Spanish or French or divided between the two. A governmental system cannot be invented offhand and put into practice at a given moment. Colonists of a new land take with them the political institutions and ideas to which they are accustomed and transplant them with modifications to suit the new home. In France and Spain, as indeed in all the states of Europe, the political systems were shaped largely by two factors which affected Great Britain little, if at all: the Roman law and contiguity with warlike neighbors. The Roman law embodied the traditions of imperial Rome, which included one-man rule, a closely knit administration, and an attitude of paternalism toward the citizen. Its spirit was authoritarian, with power proceeding downward from above instead of upward from the people. The ever-present danger of state extinction by swift invasion gave a traditional pre-eminence to the military class. The three million Englishmen living in America in 1776 had established for each of the thirteen colonies models of government which in the course of more than a century were copied and recopied, with modifications, for the thirty-five States that

were subsequently admitted to the Union, and were made to serve for nearly 132,000,000 people.

REPRESENTATIVE GOVERNMENT · Lawmaking by representatives chosen by the people had been in existence in England for more than three hundred years when Jamestown was settled. Representative government was perhaps England's greatest contribution to the political systems of the modern world. While at that time suffrage was on a strictly limited basis, nevertheless the House of Commons served as the spokesman of the people as against the monarchy. Without a system of representation the masses never could have attained political power. With it there was an opportunity gradually to widen the suffrage until the point of democratic control was reached. The people's control of legislation soon led to their control of the policies of government and the administration of the laws. Representative legislatures were instituted in all the colonies, and these, together with Parliament at home, comprised all there were in the world at that time. Included in this inheritance were the legislative officers, such as the Speaker and sergeant at arms, and the body of parliamentary law and procedure.

THE SUPREMACY OF CIVIL AUTHORITY OVER THE MILITARY · England at the time of the colonization of America was ruled by politicians rather than by generals. It was the rule that the military and naval establishments should be subject to the civil government rather than that the civil government should be subject to them. This was the practice in the American colonies and became a fundamental in our government after independence. In the English Bill of Rights of 1688 was a provision that all appropriations for the army and navy should lapse at the end of each year; and the American constitution forbids such appropriations for longer than two years. We forbid also the suspension of the privilege of the writ of habeas corpus, a bar to military rule, except in case of rebellion or invasion. The dominance of the civil over the military in England was due primarily to the good fortune which had made the homeland an island. No invasion had overthrown the political institutions in six hundred years. The surrounding waters guarded by the navy were a barrier sufficient to enable a small professional army and the untrained militia to repel all attempts at invasion from abroad. The officers of the small standing army were not sufficient in numbers to constitute a ruling caste. America not only inherited the political tradition but had a geographical situation which still better enabled it to leave the military a minor element in the population.

THE DECENTRALIZATION OF POWER · England's insular position not only freed it from the dominance of a military caste but thwarted the introduction of the excellent but centralizing Roman law and allowed the growth of a purely native body of law. Although the Norman kings and their successors appointed such representatives as the sheriff, the coroner, and the justices of the peace in the localities, their power did not grow with the years to make them comparable with the royal representatives in the Con-

tinental states. Courts and administrative officers locally chosen continued to exert important authority. There was never in England the closely knit government, dominated from the top, which was characteristic of the Continent. Furthermore, the colonies were linked to the home government by the loosest of ties;[13] and each colony itself was loosely held together, permitting a large degree of local self-government. With this background it was an easy if not inevitable step to the federation of States provided in the Constitution and to local self-government and home rule in the individual States.

INSTITUTIONS OF LOCAL GOVERNMENT · The colonists brought along and transplanted in America the territorial units of government of the homeland. Chief among these were the county and its officers: the sheriff, coroner, justices of the peace, and lieutenant of militia. The English parish became the town or township; the borough, the city or village.[14]

THE COMMON LAW · The law adopted in all the colonies for the regulation of the people's everyday life was the common law of England. This, as has been said, was "not committed to writing, but only handed down by tradition, use and experience."[15] It was the outgrowth of the social life of the English people, their historical experience, and the decisions of their courts. Very greatly modified in many respects, it became the basic law in every State except Louisiana, where it shares authority with the Roman law. The common law embodies a mass of rules which govern the individual in his dealings with his fellow citizens, the rights upon which he can insist, and the obligations which he must assume with respect to others. It includes also a philosophy of liberty and morality. Ten years before the battle of Lexington the lectures of Sir William Blackstone on the common law given at Oxford University were published in a volume entitled *Commentaries on the Laws of England.* This soon became known to leaders in the colonies, and for the greater part of the last century it was the chief textbook for the study of law in America. Many of its phrases became part and parcel of the thinking of American judges and legislators. "The law of Nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other." "In a democracy, where the right of making laws resides in the people, public virtue, or goodness of intention, is more likely to be found, than [in] either of the other qualities [that is, forms] of government [aristocracies or monarchies]." "For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature." That government best maintains civil liberty "which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."[16] The inheritance of the

[13]A. C. McLaughlin, *A Constitutional History of the United States* (1935), chap. iii.
[14]T. P. Taswell-Langmeade, *English Constitutional History* (7th ed., 1911), pp. 280, 281.
[15]W. Blackstone, *Commentaries on the Laws of England* (Chitty ed., 1841), Bk. I, p. 17.
[16]Ibid. pp. 41, 49, 124, 126.

English common law has been one of the most potent influences toward unity in American political thinking and in American institutions of government.

THE FREEDOM OF THE INDIVIDUAL · The English colonists brought with them strong traditions of the liberty of the individual, which were reinforced here by the misrule of the mother country. The conditions of life in a new and distant land only tended to emphasize the idea. Magna Charta, the Petition of Right, and the Bill of Rights were waymarks in the struggle for the limitation of the powers of government to interfere with the individual. The granting of charters to the colonies were steps in the same direction. The Revolutionary leaders did not fail to rely upon the familiar "liberties of Englishmen" comprehended in the common law.[17] Blackstone had pointed out that arbitrary interference with personal liberty was not countenanced by the English constitution; and that the legislature, not the executive, was made the judge of when an emergency of war or invasion for a short time made arbitrary arrest necessary.[18] The Americans, in framing their constitutions, not only included the traditional English guarantees of the freedom of the individual but added others not yet fully attained in the mother country, such as freedom of speech, religion, and the press.

## *AMERICAN POLITICAL CUSTOMS*

INFLUENCE OF THE FRONTIER · Today more than 70 per cent of the American people are urban dwellers. The struggle is on between the rural and the urban point of view; but, strangely enough, the former still has the upper hand. The reason is apparent if it is remembered that the rural economy was the dominant one for five or six of the seven generations of our national history, and, more important still, that the basic patterns of our political thinking and institutions were laid down during that period. The urban mores must contend against rural ones already well intrenched. The traditions of the pioneer and rural days are still fresh in the memories even of most city dwellers, at least in the South and in all the country west of the Alleghenies. These customs, ways, and attitudes were largely the result of the struggle to conquer and colonize the wilderness.

F. J. Turner, the first historian of the frontier, thus described its influence in molding the American type:[19]

> In the settlement of America we have to observe how European life entered the continent, and how America modified and developed that life and reacted on Europe. Our early history is the study of European germs developing in an American environment. . . . The frontier is the line of most rapid and effective

[17]Cf. the speech of James Otis on the "writs of assistance," in John Adams, *Life and Works* (1850), Vol. II, Appendix, p. 523.

[18]W. Blackstone, op. cit. p. 136.

[19]F. J. Turner, op. cit. pp. 3, 4.

Americanization. The wilderness masters the colonist. It finds him in a European dress, industries, tools, modes of travel and thought. It takes him from the railroad car and puts him in the birch bark canoe. . . . Little by little he transforms the wilderness, but the outcome is not the old Europe. . . . Thus the advance of the frontier has meant a steady movement away from the influence of Europe, a steady growth of independence on American lines. And to study this advance, the men who grew up under these conditions, and the political, economic and social results of it, is to study the really American part of our history.

INDIVIDUAL LIBERTY · "The blessings of liberty to ourselves and our posterity" is the last-named and climactic purpose of the Constitution announced in the enacting clause. No other quality is so universally attributed to the American social system and the American system of government as that of the freedom of the individual. An old song dating back to 1767 runs:[20]

> Our worthy Forefathers—let's give them a Cheer—
> To Climates unknown did courageously steer;
> Thro' Oceans to Deserts for Freedom they came
> And dying bequeath'd us their Freedom and Fame—
> In Freedom we're born, and in Freedom we'll live. . . .

The ideas and the customs of freedom grew as the settlers penetrated into the lands behind the mountains. The settlement of the West was not an affair planned by government. The colonists went where they wished, followed routes of their own choosing, laid out cities according to their own judgment, and located their farms subject only to the government survey. If they were not guided by government, neither were they much restrained by it. Their freedom was largely that natural freedom described so happily by Rousseau and modified only in the most general way by "freedom under the law."[21] The original meetings to organize the local units of government were called not by government officials but by popularly chosen leaders. With the penetration of the Far West, and the exploitation of gold and silver mines on government land, the system for the laying out and recording of miners' claims was often established by voluntary neighborhood associations without the aid of government officials. The allotment of government lands for the grazing of their herds was ordered in the same way. The absence or weakness of criminal law and law-enforcement officers was supplemented by citizens' vigilance committees and lynch law. Many a solitary cottonwood tree of the great prairies served the purpose of capital punishment for criminals according to the standards of the frontier.

[20] In H. R. Warfel and R. H. Gabriel, *The American Mind* (1937), p. 144.

[21] J.-J. Rousseau, *A Dissertation on the Origin and Foundation of the Inequality of Mankind* (1754) (G. D. H. Cole, Tr., 1916).

The spirit of freedom in the colonizing days extended into the succeeding years. It required no knowledge of eighteenth-century philosophy to establish an entire freedom of assembly, freedom to choose the occupation which one might wish to follow, freedom to enter into contracts, freedom to speak even violently, and freedom of religion. Life was not only a freedom for all but in some respect a "free for all." De Tocqueville, writing of his observations in 1831, stated,[22] "Each man has a consciousness of his independent position and his individual dignity which doesn't always make him very agreeable to approach, but which in the last analysis leads him to respect himself and to respect others."

EQUALITARIANISM · The idea of caste and privileged classes survived the trip across the Atlantic and settlement in the thirteen colonies only in a greatly weakened state; it was unable to make the passage across the Alleghenies. The worth of the individual Western settler was determined not by ancestry or class but by what he was able to do. Equality in the West was not a theory but an accomplished fact. The fluidity of population had obscured generally all traces of family connections and prestige.[23] Personal achievements as a hunter, fighter, miner, cowman, and later as a businessman were the gauges of esteem rather than ancestry. Joel Barlow, an American writer of the post-Revolutionary period, wrote:[24]

> In the United States of America the science of liberty is universally understood, felt and practiced, as much by the simple as the wise, the weak as the strong. Their deep-rooted and inveterate habit of thinking is, that all men are equal in their rights, that it is impossible to make them otherwise; and this being their undisturbed belief, they have no conception how any man in his senses can entertain any other.

One result of this attitude was the general esteem in which labor was held: one did not acquire a social stigma by working for another for hire or by pursuing an ordinary occupation. De Tocqueville was shocked to find that white servants regarded themselves as the equals of their masters; that they talked familiarly with everyone and did not hesitate to sit down at the table with others at the inns.[25] The young worker's status as "hired hand" as often as not was only one step toward independence as a landed proprietor.

INDIVIDUALISM · The right of the individual to develop free from the restraint of government necessarily follows from the customs and beliefs

[22]Letter to L. de Kergolay, Yonkers, June 29, 1831, in G. W. Pierson, *De Tocqueville and Beaumont in America* (1938), p. 161.

[23]F. J. Turner, op. cit. pp. 2, 3.

[24]Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe* (1792), quoted in Warfel and Gabriel, op. cit. p. 237.

[25]"It is evident that the white servants regard themselves the equals of their masters. They talk familiarly. In the inns I have seen them sit down beside us at the table when everybody else had been seated and served. It is, furthermore, almost impossible to find servants in America."—Diary note in G. W. Pierson, op. cit. pp. 373–374

described above. Self-reliance was a prime virtue in the frontier community. Poverty or plenty lay before the frontiersman, dependent upon his own individual initiative, strength, and inventiveness. Turner wrote:

> This democratic society was not a disciplined army where all must keep step and where the collective interests destroyed individual will and work. Rather it was a mobile mass of freely circulating atoms, each seeking its own place and finding play for its own powers and for its own initiative.[26]

Farms were laid out, cities founded, and railroads pushed across the continent chiefly on the initiative of individuals outside the government. Individualism acquired great prestige for its part in the conquest and settlement of a continent and in the establishment of its industrial system. Later, when great aggregations of capital in corporate form claimed like independence from the interference of government, the individualism of the masses turned toward restrictive legislation. Thoreau wrote, "There will never be a really free and enlightened state until the state comes to recognize the individual as a higher and independent power from which all its own power and authority are derived, and treats him accordingly."[27]

THE BETTER LIFE AND THE IDEAL COMMONWEALTH · The great expanse of rich and vacant land from the very beginning was a challenge to the settler's idealism: for him individually, a better life than he had ever known at home; for all together, the promise of an ideal commonwealth. The idea pervaded all classes, rich and poor. Aristocratic William Penn drew his Frame of Government, mixing business acumen and the ideal of a community of "brotherly love." The shaggy settler driving his "moving wagon" filled with his grimy family and trailed by his weary dog into the Western sun explains how he is going to new lands, perhaps "Nebrasky," to give his family a better chance in life. The possessors of the new lands would inherit no age-old feuds, no system of vested rights to be compromised with, be confronted with no reminders of fixed class distinctions. A pioneer prairie statesman told his people:[28]

> No ancient issues confuse the theme. No buried nations sleep in the untainted soil, vexing the present with their phantoms, retarding progress with the burden of outworn creeds, depressing enthusiasm by the silent proof of their mighty achievements. Heirs of the greatest results of time, we are emancipated from all allegiance to the past. Unencumbered by precedents, we stand in the vestibule of a future which is destined to disclose upon this arena, time's noblest offspring—the perfected flower of American manhood.

As each successive area was settled, the determination was all the stronger that there a community should be founded in which the evils of

[26] F. J. Turner, op. cit. p. 306.

[27] "Essay on Civil Disobedience," in B. Smith (Ed.), *The Democratic Spirit*, p. 324.

[28] Speech of Senator John James Ingalls, of Kansas, in *The Writings of John J. Ingalls* (W. E. Connelly, Ed.) (1902), pp. 115, 116.

the home community would not be repeated. The Mormons sought religious liberty beyond the Rocky Mountains; crusaders crossed the prairies to make Kansas and Nebraska free States: the ne'er-do-well and the unlucky in the old Indiana community plotted no rebellion but carried their families and scanty possessions to Colorado to start life all over again. The current of optimism runs strongly from pioneer days into the industrial present, as witness President Hoover's hope for "two cars in every garage and a chicken in every pot," and F. D. Roosevelt's "abundant life."

THE PERFECTIBILITY OF MANKIND · The conditions of existence in a new country led easily to a general assumption of the perfectibility of mankind.[29] With the breakdown of caste and family traditions, and with wealth or an easy competence within the reach of all, the way was open to such personal development as lay within the talents or ambition of each. The rapid rise in the community of persons of undistinguished origins was a commonplace. The spirit of the times anticipated not only the amelioration of the condition of the unfortunate but a general advance toward a higher type of commonwealth. Faith in man's perfectibility led to an almost childlike faith in what might be accomplished by education, which was one of several reasons for the enthusiasm for public education in the new States.

THE INTRICACY OF ORGANIZATIONS · A blueprint of American society showing the multitude of clubs and associations of all sizes and kinds would be a cause for amazement. Talent for organization and eagerness to join were not lacking in any frontier community. There was never lacking someone to conduct meetings, to organize a township, county, village, or school district or even a vigilance committee. Soon followed organizations of farmers, cattlemen, miners. The talent was carried over into the organization of political parties. The opposition to British rule had been welded together by the neighborhood and State "committees of correspondence." The habits of organization were the materials of which self-government was made. De Tocqueville observed that the British considered association as a powerful means of action, but the Americans seemed to regard it "as the only means they have of acting."[30] "Thus, the most democratic country on the face of the earth is that in which men have, in our time, carried to the highest perfection the art of pursuing in common the object of their common desires, and have applied this new science to the greatest number of purposes."

DEMOCRACY · Democracy is one of the most-talked-of things today, but the greatest confusion exists as to its meaning. People are violently for

[29]"There is a second idea which seems to have the same character. The immense majority have faith in the wisdom and good sense of human kind, faith in the doctrine of human perfectibility. . . . That the majority may be mistaken once, no one denies; but they think that necessarily in the long run it will be right; that it is not only the sole judge of its interests, but also the surest and most infallible judge."—Letter to L. de Kergolay, Yonkers, June 29, 1831, in G. W. Pierson, op. cit. p. 161.

[30]Alexis de Tocqueville, *Democracy in America* (Henry Reeve, Tr.) (1898), Vol. II, p. 130.

or against a thing, desiring or opposing it without agreeing upon what they are advocating or opposing. Hitler's tirades against democracy were never-ending; but in the intervals he often lapsed into the assertion that the Nazi system was, after all, the best type of democracy. The concept of democracy as applied to government is simple: it means majority rule. Democracy in the organizations of labor, business, or the professions would mean the same thing, rule by majority vote of the members. But as popularly used the concept is much broader, more like that of the slogan of the French Revolution, "Liberty, Equality and Fraternity." A social system is thought to be democratic if there is an absence of class and racial distinctions, and of privilege and snobbery, and the manifestation of a spirit of fraternalism. Democratic government conceivably may exist without social democracy, though with difficulty. Democracy, above all, is not a form of government but may exist in any state where the authority proceeds from the majority vote based on universal suffrage. The democratic state may or may not engage in programs of social amelioration or the regulation of business and labor; the decision rests with the popular majority.

It already has been pointed out how the customs and practices of the new American society conformed to the broader conceptions of democracy. Individuals freely migrated, spoke and wrote, and associated themselves with others for all sorts of purposes. No stigma was attached to the performance of manual labor. Generally, all classes mixed freely in the routine affairs of life. West of the mountains the fluidity of life permitted no fixed classes which might stand in the way of a spirit of fraternity.

FREE PUBLIC SCHOOLS · Free public schools supported by general taxation were one of the major contributions of the American community. Originating[31] in New England, they early became deeply imbedded in the institutional life of the Middle West, whence they spread eventually to all the States of the Union. Three clearly marked policies with respect to general education had appeared by the time of the Revolution. The dominant idea in New England was a tax-supported set of schools from the elementary school to the university. Here the population was homogeneous and chiefly of one religion. Church and state were united in the control of the schools; but by the time of the Revolution, control had passed to the civil government. In the middle colonies, with their mixed populations and sects, the plan of church-supported schools was uppermost. Parochial schools were maintained by Lutherans, Moravians, Quakers, Catholics, and others. In the South and to a certain extent in the middle colonies, where the Anglican Church was uppermost, the dominant idea was the English one of church schools, charging tuition fees for the middle and upper classes, and of charity schools, if any, for the poor. There the first tax-supported schools were charity schools.

[31]Cf. Chapter XL.

Influenced by the liberal ideas of the Revolution, education now came to be thought of as an essential for good government as well as for religion. This was reflected in many ways. The Massachusetts constitution of 1780 made provision for public education, speaking of "wisdom and knowledge, as well as virtue, diffused generally among the people, being necessary for the preservation of their rights and liberties."[32] Jefferson planned free schools for Anglican Virginia;[33] and Washington fought for a national university and admonished in his Farewell Address: "Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened."[34] The early State constitutions began to make provisions for common-school systems, and by the 1830's these, supported by taxation, had become generally established. Great impetus to such schools was given by munificent land grants of the Federal and State governments.

In the rural areas the district school became an integral part of the social system. The school was more than an institution of book learning: it often was the center of the social life of the community. The little red schoolhouse was a gathering place for literary societies, political organizations, and "sociables," a distinction which later in the century it shared with the farmers' granges. Even as a school it served to bring together on a basis of equality the children of rich and poor, old stock and recent immigrant. Side by side with the public school in many communities there existed private and parochial schools, for in no instance was the State given a monopoly of elementary education.

## *AMERICAN POLITICAL BELIEFS*

The student of American voting behavior stands to learn much more from a comprehension of the nation's long-term and settled beliefs than from a cataloguing of the month-by-month reaction to current problems. It goes without saying that never at any time have all people been in agreement on any principle; but that does not gainsay the proposition that there are beliefs so long and widely held that they may be said truly to represent the sentiment of the community. These have grown out of our experiences in war and in peace. Like the mores of primitive man, they are "right" because "they are traditional, and therefore contain in themselves the authority of the ancestral ghosts."[35]

[32]The text is preserved in Chapter V, sect. 2, of the present Constitution.

[33]J. T. Adams, *The Living Jefferson* (1936), pp. 110, 111. Jefferson wrote in 1816, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." (Letter to Colonel Yancey, in S. K. Padover, *Democracy, by Thomas Jefferson* (1939), p. 137).

[34]J. D. Richardson, *Messages and Papers of the Presidents*, Vol. I.

[35]W. G. Sumner, *Folkways* (1940), p. 28.

ROTATION IN OFFICE · It was not in the American social system to regard government as the primary concern of a dynasty, a social class, or even of professional civil servants. Generally speaking, any American citizen was thought competent at the call of his fellow citizens to step from his ordinary occupation into public office and discharge satisfactorily its duties. Government was no mystery revealed to the anointed or trained few. Andrew Jackson gave great impetus to this view by discharging many civil servants and installing his friends in their places.[36] "Rotation in office" was the idea of giving a large number of citizens the chance to take their turn in operating the government. The term "shirt-sleeve diplomacy" refers to the practice of appointing to the State Department and foreign embassies men who are not trained diplomats. The custom has had many direful results for the American government; but it has had the result, for good or ill, of preventing the growth of a vested government class set apart from the general run of the people. It is a hurdle which civil-service reform always encounters.

THE ANTIMONARCHY CULT · The fact that the American Revolution was directed against a monarch, and that the war seemingly had been brought on by his personal policies as against those of Parliament, early gave an impetus to an antimonarchy cult in the United States. No people, it was held, could be free if ruled by a hereditary monarch. Monarchy was a prime cause of war and extravagance; it fostered class distinctions and undermined belief in the political wisdom of the ordinary man. Jefferson, who had resided abroad, helped to set the pattern of American thinking:

> While in Europe, I often amused myself with contemplating the characters of the then reigning monarchs: . . . Louis XVI was a fool. . . . The King of Spain was a fool, and of Naples the same. . . . The king of Sardinia was a fool. The queen of Portugal, a Braganza, was an idiot by nature. The King of Prussia, successor to the great Frederick, was a mere hog in body as well as in mind. . . . No race of kings has ever presented above one man of common sense in twenty generations. . . . There is not a crowned head in Europe, whose talents or merits would entitle him to be elected a vestryman by the people of any parish in America.[37]

Jefferson's hostility, of course, was directed not against figurehead monarchs but against those who actually ruled.

[36] "There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. . . . The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance."—First Annual Message, in J. D. Richardson, op. cit. Vol. II, pp. 448, 449

[37] S. K. Padover, op. cit., p. 241. Tom Paine's strictures on monarchy in his widely circulated pamphlet *Common Sense* were even more caustic: "As the exalting one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of Scripture. . . . Of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived." (*Life and Writings of Thomas Paine* (D. E. Wheeler, Ed.) (1908), pp. 13, 18)

SEPARATION OF CHURCH AND STATE · Judge Cooley described an establishment of religion as "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[38] Most of the States at the time of the Revolution had established churches, but sentiment was running strongly against them. Again Jefferson, both by his writings and by his lead in disestablishment in Virginia, did much to establish in America the principle of separation of church and state. By 1816 only Massachusetts, Connecticut, and New Hampshire retained established churches.[39] The Federal Constitution already had prohibited Congress from passing any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[40] The bill for disestablishment in Virginia, drawn by Jefferson, was based on the premises that "Almighty God hath created the mind free . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . and that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern."[41]

Today no established church remains in America, and no one is taxed to contribute to the upkeep either of places of worship or of religious schools. Americans learned well the lesson of European experience with the state establishment of religion: that nothing serves more quickly to produce division among the people than the use of public funds and the prestige of government to favor one form of religion as against others. For over a century the country has been close to unanimity on this subject.

NATURAL LAW AND RIGHTS · Many political theories are known only to the scholarly few, but that of natural law and rights has long been the common property of all, from the sophisticated and wealthy to the humblest. In its more dignified form it would read that nature had not stopped with the creation of man's body but had endowed him with the laws and rights necessary to his personal well-being and to his successful co-operation with his fellow men. George Bernard Shaw has Doolittle, the cockney dustman, make his "touch" for money on the basis of his rights as one of the "undeserving poor."[42]

The belief in natural rights is as old as Western civilization, having been held by philosophers from the time of Plato and Aristotle on, including the Roman jurists and Saint Thomas Aquinas and other scholars of the Christian Church.[43] In modern days it was re-emphasized by the philosopher John Locke in England and by Rousseau in France. James Otis told

[38]T. M. Cooley, *Principles of Constitutional Law* (1898), p. 224.
[39]J. T. Adams, op. cit. pp. 90–106.
[40]*United States Constitution*, Amendment I.
[41]S. K. Padover, op. cit. pp. 172–173.
[42]*Pygmalion*, Acts I, II, and p. 149. Cf. also G. B. Shaw, *Androcles and the Lion* and *Overruled*.
[43]F. W. Coker, *Readings in Political Philosophy* (1914), pp. 123–128, 494–496.

the colonists that an act of Parliament contrary to "natural equity" was invalid. The belief in natural rights appeared in the Declaration of Independence in the statement that men are endowed by their Creator with certain inalienable rights, among which are "life, liberty, and the pursuit of happiness." Jefferson stated that the duty of the law maker was "to declare and enforce only our natural rights and duties, and to take none of them from us."[44] The doctrine is a convenient justification for anyone restrained by law: the squatter on the public lands, the employer of child labor, the builder who erects a factory in a residential district, the saloonkeeper who sells intoxicants under prohibition. But it also has served well those oppressed because of religion, race, or opinion.

THE RECTITUDE OF THE POPULAR WILL · The readiness with which the losers accept the decision of the majority in hotly contested elections is one of the noteworthy things in individualistic America. Rare indeed are the instances in which the defeated have ventured to suggest the reversal of a popular decision by force. The attitude may be due to the sporting instinct which admires the winner in a fair fight, to respect for law and established processes, and also in part to the widely held reverence for the will of the majority. Losers who, during a campaign, had warmly urged that the success of the opposition would mean the end of orderly government, quietly reflect, when the excitement is over, that there must have been more merit in the opposition than they had believed or else so many people would not have supported it. Jefferson pointed out that there was no halfway step between "acquiescence in the decisions of the majority, the vital principle of republics," and the appeal to force. The decision of the majority even by a single vote should be considered "as sacred as if unanimous." He recognized that the majority would not always be right, but held that the citizen "must go quietly with the prejudices of the majority till he can lead them into reason."[45] Lincoln's often quoted maxim that "you can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all of the people all the time" is taken to sum up the virtues and the limitations of mass judgment.[46]

A MINIMUM OF GOVERNMENT · The desire for a minimum of government was of course a companion piece to the spirit of individual freedom. Jefferson, in his First Inaugural, expressed the general attitude of the leaders of the time when he declared in favor of a government "which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement."[47] Tom Paine looked at government as a necessary evil, to be kept at the lowest point.[48] Alexander

[44]S. K. Padover, op. cit. p. 28.
[45]Ibid. pp. 50, 53, 249.
[46]E. Hertz (Ed.), *Lincoln Talks* (1939), p. 138.
[47]J. D. Richardson, op. cit. Vol. I, p. 323.
[48]T. Paine, *Political Works* (1885), p. 7.

Hamilton, it is true, favored a program of broader government activity, particularly in the fields of commerce and finance; and thirty years later Henry Clay and other Whig leaders brought forward their programs of internal improvements at public expense. The attitude of the masses, however, long conformed closely to that of the Jeffersonians and was reflected in that of the legislatures and the courts. The life struggle was comparatively easy, and government aid was desired chiefly in the exploitation of natural resources rather than to protect one person from another or to give help to the weak. The extension of government in the post-Civil War period found resistance not only in the special interests which were curbed but in the popular antagonism to government interference as such.

NATIONAL SELF-SUFFICIENCY · Another well-grounded popular belief that has had to yield to the strain of changed conditions is that of national self-sufficiency. The masses, absorbed in colonizing a continent, had little interest in what was going on in other countries. From what they knew of conditions in crowded Europe, there was no cause for envy and much for self-satisfaction. America's resources were adequate to supply their maximum needs. In domestic policies the feeling found its expression in tariffs to foster and protect home manufactures and commerce, and in foreign affairs in aversion to "entangling alliances"[49] of whatever kind. Contacts with Europe, it was thought, would only draw us into the whirlwind of its wars and politics and possibly destroy our brand of democracy. The Monroe Doctrine had a deep popular appeal because it was an attempt to keep Europe at arm's length.[50] Politicians opposing American entry into the League of Nations in 1919 and 1920 skillfully appealed to this century-and-a-quarter-old national attitude.

LOCAL SELF-GOVERNMENT AND THE LONG BALLOT · American opinion went even beyond British opinion in favoring decentralization of government. Hamilton was the only member of the Philadelphia convention of 1787 who ventured to suggest a unitary system involving the abolition of the States.[51] Seldom until recent years has a President at his inaugural failed to extol the States as the foundation of our system of government.[52] All major political parties have agreed to the principle, differing only in details as to how much power should be given to the national government. In the words of Jefferson:

[49]Washington, Farewell Address, in J. D. Richardson, op. cit. Vol. I, p. 222; Jefferson, First Inaugural, ibid. p. 323.

[50]Seventh Annual Message, ibid. Vol. II, pp. 218–221.

[51]Max Farrand, *Records of the Federal Convention*, Vol. I, p. 287, June 18, 1787.

[52]Among the principles announced by Jefferson in his First Inaugural (March 4, 1801) was "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against the republican tendencies." (J. D. Richardson, op. cit. Vol. I, p. 323). Cf. also similar expressions by J. Q. Adams, March 4, 1825, ibid. Vol. II, p. 297; William Henry Harrison, March 4, 1841, ibid. Vol. IV, p. 11; James K. Polk, March 4, 1845, ibid. p. 375; James Buchanan, March 4, 1857, ibid. Vol. V, p. 434; Grover Cleveland, March 4, 1885, ibid. Vol. VIII, pp. 300, 301.

Our country is too large to have all its affairs directed by a single government. . . . And I do verily believe, that if the principle were to prevail, of a common law being in force in the United States . . . it would become the most corrupt government on earth. . . . What an augmentation of the field for jobbing, speculating, plundering, office-holding and office-hunting would be produced by an assumption of all the State powers into the hands of the General Government![53]

Not only were the States left powerful but each sublet its powers to hundreds of local governments. Not only were thousands of offices thus made available for election by the people but elections were made frequent because of short terms. Ordinary administrative offices, and in all but a few States even the courts, were made elective. Attempts to reform State and city governments in the direction of greater centralization have always run counter to the strong popular prejudice that the cause of the people is best served by the popular election of many officials.

## *POPULAR POLITICAL HEROES*

The influence of firmly established political beliefs and customs on voting is all the greater when they are associated with great personalities. "A popular hero," wrote Philip Van Doren Stern, "is the living embodiment of his people, with all their characteristics, good and bad. He is one of them, lifted up and made great, yet never divorced from their earthiness, rooted deep in the soil from which he sprang."[54] The choice of Abraham Lincoln by the Americans, for instance, from among all others "to be their representative in world mythology is evidence of their attachment to the principles of liberty, peace and justice for which he stood."

The passage of the years serves to elevate from the lists of great leaders those whose character and achievements mark them as representing in the highest degree the ideals of the nation. Among these in the United States are John Adams, for personal integrity and leadership in the struggle for independence; Alexander Hamilton, for his advocacy of a strong national government and sound public finance; George Mason, for his insistence on the constitutional protection of personal liberty; Andrew Jackson, because he led the common man to political power and fought special privilege; Daniel Webster, as the defender of the Union; and Calhoun, as the advocate of the independence of the States. In later days Theodore Roosevelt symbolized the struggle against special privilege, as well as that for the conservation of national resources; while Woodrow Wilson's name for all

[53]S. K. Padover, op. cit. pp. 46, 47. Madison minimized the danger of overcentralization from the Constitution by asserting that the State and local governments would "exceed, beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system." (*The Federalist*, No. XLIV)

[54]Quoted from Philip Van Doren Stern's introduction to his selections from Lincoln's writings in Bernard Smith, *The Democratic Spirit*, pp. 404, 405.

time to come will be associated with the idea of a league of nations to preserve world peace. These names, and others, are linked in the public mind with certain virtues; but pre-eminence as exemplars of national civic ideals is by common consent accorded to Washington, Jefferson, and Lincoln.

WASHINGTON · Washington's place as a national hero is based on his acts rather than on his words.[55] The Farewell Address, it is true, contained certain precepts, but was chiefly a recommendation for the future conduct of the government. His leadership was pre-eminent in two of the greatest achievements in our political history: the winning of independence from Great Britain and the formation and adoption of a Constitution which should bind the discordant States into one political union. This alone would have been enough to ensure his fame even without the high qualities of character displayed. Scrupulous honesty, personal integrity, a high disinterestedness, and the loftiest patriotism marked him throughout. History does not record examples of many successful military leaders who, flattered by the adulations of the multitude and with the excuse at hand of a disordered country to be set in order, have declined the offer of dictatorial or royal power. "Let me conjure you, then, if you have any regard for your country, concern for yourself or posterity, or respect for me, to banish these thoughts from your mind, and never communicate, as from yourself or any-one-else, a sentiment of the like nature," he told the representative of the disaffected army.[56] Thomas Jefferson, his political opponent, later wrote of him:

> His integrity was most pure, his justice the most inflexible I have ever known, no motives of interest or consanguinity, of friendship or hatred, being able to bias his decision. . . . On the whole, his character was, in its mass, perfect, in nothing bad, in few points indifferent; and it may truly be said, that never did nature and fortune combine more perfectly to make a man great, and to place him in the same constellation with whatever worthies have merited from men an everlasting remembrance.[57]

JEFFERSON · Thomas Jefferson was one of the organizers of resistance to Great Britain, and served many years in public office, including one term as governor of Virginia and two as President of the United States; but his place in the trinity of American political heroes was earned not as a man of action but as the chief spokesman of democracy.[58] Jefferson's intellectual

[55]W. C. Ford, *George Washington* (2 vols., 1900); N. W. Stephenson and W. H. Dunne, *George Washington* (2 vols., 1940); P. L. Ford, *The True George Washington* (4th ed., 1897); J. Corbin, *The Unknown Washington* (1930).

[56]Letter to Colonel Lewis Nicola, Newburg, May 22, 1782, in H. R. Warfel and R. H. Gabriel, op, cit. p. 185.

[57]Letter to Dr. Walter Jones, Monticello, January 2, 1814, in *The Works of Thomas Jefferson* (P. L. Ford, Ed., 1904), Vol. XI, pp. 375–377.

[58]G. Chinard, *Jefferson, Apostle of Americanism* (1929); F. W. Hirst, *Life and Letters of Thomas Jefferson* (1926); J. Parton, *Life of Thomas Jefferson* (1874); H. S. Randall, *The Life of Thomas Jefferson* (3 vols., 1858).

interests were many: he was the most versatile of all the men who have held high political office in the United States. His intellectual curiosity and love of ideas sometimes led to curious contradictions in his copious writings, but there was nevertheless a sound coherence and unity in his conceptions of government. His writings and speeches drew that pattern of democratic thought and ideas which was indelibly stamped on the fabric of American political institutions. Government based on the consent of the governed; the freedom of the individual in general and the special freedoms of speech, the press, and religion; local self-government; and the equality of all men before the law: these were concepts which he did not originate but which he brought home to the masses of the American people and made their property. Translating theories into action, he organized and led a political party. Within a short generation his basic ideas ceased to be those of one party and became those of the nation.

LINCOLN · Lincoln's fame rests on his leadership in the third and fourth of the great events of our national history: the saving of the Union and the extinction of human slavery.[59] He thus preserved the work on which the fame of Washington rests and carried the equalitarian doctrines of Jefferson to their logical conclusion. Both objectives might have been accomplished by a President of smaller caliber, say one of high military talent, and perhaps more expeditiously. But Lincoln was interested in more than a constitutional union: he was interested in a union of hearts. He candidly recognized the differences of opinion in the interpretation of the Constitution. His reproaches to the South were stern and clear-cut, but never bitter. In his First Inaugural he appealed to the "mystic chords of memory" of our common struggle for independence;[60] and in the Second he urged the speedy ending of the war and the establishment of a peace "with malice toward none; with charity for all; with firmness in the right, as God gives us to see the right."[61]

In his opposition to slavery, Lincoln carried forward the democratic dogma. "Let us discard all this quibbling about this man and the other man, this race and that race and the other race being inferior, and therefore they must be placed in an inferior position. Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal."[62] He denounced "the effort to place capital on an equal footing with, if not above, labor. . . . Labor is prior to, and independent of, capital. Capital only is the fruits of labor and could never have existed if labor had not first existed. Labor is

[59]N. W. Stephenson, *Lincoln* (1924); Carl Sandburg, *Abraham Lincoln: The War Years* (4 vols., 1939); J. G. Nicolay and J. Hay (Eds.), *Lincoln's Complete Works* (12 vols., 1894); Philip Van Doren Stern (Ed.), *The Life and Writings of Abraham Lincoln* (1940).

[60]J. D. Richardson, op. cit. Vol. VI, p. 12.

[61]Ibid. p. 277.

[62]B. Smith (Ed.), *The Democratic Spirit* (1941), p. 413.

the superior of capital, and deserves much the higher consideration. Capital has its rights, which are as worthy of protection as any other rights."[63]

But a greater political idea than any expressed in his writings and speeches was Lincoln's life itself. This is what makes him a force in American politics today, long after the issues of disunion and slavery were largely forgotten. He was the supreme embodiment of the equalitarian dogmas set forth by the aristocrat Jefferson. He was born, as he said, of parents of "undistinguished families"; grew up on the frontier with little schooling; worked as a laborer; and rose to eminence without benefit of special privilege. He was an exemplar of the capacity of a free society to nurture individual ability no matter where it may be found and to summon it to leadership when needed.

The American people know that he saw beyond the temporary measures of his day to ideals of eternal importance. They remember that he and the men of his time had to fight to preserve those ideals; they remember the part he played in this struggle; they know what he did and they will not forget what he said.[64]

James Russell Lowell, in his *Commemoration Ode*, stressed the same theme:[65]

His was no lonely mountain-peak of mind,
Thrusting to thin air o'er our cloudy bars,
A sea-mark now, now lost in vapors blind;
Broad prairie rather, genial, level-lined,
Fruitful and friendly for all human kind,
Yet also nigh to heaven and loved of loftiest stars.
Nothing of Europe here,
Or, then, of Europe fronting mornward still,
Ere any names of Serf and Peer
Could Nature's equal scheme deface
And thwart her genial will;
Here was a type of the true elder race,
. . . . . .
The kindly-earnest, brave, foreseeing man,
Sagacious, patient, dreading praise, not blame,
New birth of our new soil, the first American.

[63]First Annual Message, in J. D. Richardson, op. cit. Vol. VI, p. 57.
[64]Philip Van Doren Stern, in B. Smith, op. cit. p. 405.
[65]James Russell Lowell, "Ode Recited at the Harvard Commemoration," July 21, 1865, in *Complete Poetical Works* (H. E. Scudder Ed., 1924), p. 344.

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CHAPTER X

# *Public Opinion as an Instrument of Government*

In a previous chapter public opinion was classed as one of the three instrumentalities available to the people of the United States for the control of their government, the other two being the filling of public offices by election and the making of laws by direct popular vote. More than half a century ago James Bryce observed that "in no country is public opinion so powerful as in the United States. . . . Towering over Presidents and State governors, over conventions and the vast machinery of party, public opinion stands out in the United States as the great source of power, the master of servants who tremble before it."[1] Most observers would agree that the force which Bryce visualized has increased with the passage of years. Governmental policies seem often to have been adopted and discarded almost on the basis of a day-to-day sampling of popular sentiment. Administration spokesmen frequently sound off on problems up for consideration, and if a sentiment cautiously expressed meets a cool reception, it may quietly be laid aside and another position taken. Laws on the statute books which lack popular interest may be allowed the sleep of death, but they receive a vigorous enforcement if backed by public sentiment. Public opinion, in short, is the medium in which the machinery of government operates. An unfavorable opinion slows up or entirely stalls the mechanism, while a favorable one ensures its ease of operation.

WHAT PUBLIC OPINION IS · The term *public opinion* refers to the expressed attitude of a preponderant portion of the population.[2] Take, for instance, a proposition for the acquisition of Uruguay or any other territory in the Western Hemisphere by any European or Asiatic power. American public opinion exists on that question, and it would speedily be made known. Sometimes "public opinion" is thought of as the aggregate of the attitudes which the people of a community hold toward a question. These may range all the way from mild interest, through light sentiment, deep feeling, and impulsive conviction, to judgments based on a meticulous examination and appraisal of facts. It is simpler, however, for the student to confine the term to the dominant expressed judgment of the group. This represents as well as may be the people's judgment, which may be given expression in

[1]James Bryce, *The American Commonwealth* (New York, 1889), Vol. II, p. 225.

[2]A. L. Lowell, *Public Opinion in War and Peace* (1923), pp. 83–84. Cf. also the definitions by H. L. Childs, *An Introduction to Public Opinion* (1940), p. 44; W. Lippmann, *Public Opinion* (1922), p. 29; C. W. Smith, *Public Opinion in a Democracy* (1939), p. 17; A. N. Holcombe, *The Foundations of the Modern Commonwealth* (1923), pp. 30–38; H. D. Lasswell, *Democracy through Public Opinion* (1941), p. 20.

various ways, such as a vote at the polls, the speeches of responsible leaders, or newspaper editorials. *Public*, for the purposes of the student of political science, refers to a community of definite geographical boundaries, set aside for purposes of government. American public opinion on foreign policy is that of the people of the entire nation, which may be somewhat different from public opinion on the same question in Texas or Oregon. States, counties, cities, villages, townships, and school districts constitute "publics" of varying sizes, each of which on occasion expresses its opinion on political questions.

THE LIMITS OF PUBLIC OPINION · A. Lawrence Lowell once pointed out an inherent limitation on the scope of public opinion. "The opinion," he said, "must be such that while the minority may not share it, they feel bound by conviction, not by fear, to accept it."[3] To illustrate, a large majority in a state might be of the opinion that the practice of a certain religion whose adherents numbered only one fourth of the population should be banned. Such a law would represent majority opinion and the will of the majority, but the injured minority would never accept the law as legitimate and would submit only under force. Lowell would contend that no public opinion existed on the subject, only two opinions which would be public, or general, for each group. It follows that public opinion and the legislation which results from it have a much wider field in those countries with a homogeneous population, where the people are generally agreed upon the basic ends and methods of government. The old Austro-Hungarian monarchy best illustrated the difficulty in the formation of public opinion because of its many nationalities; Great Britain and France well illustrate the opposite. The United States has been able to overcome the handicap of racial diversity by the rapidity with which immigrants have been absorbed into the national stream. Its federal form, which provides forty-eight separate chambers in each of which a public opinion may be formed and become effective, has eased the problem, as has the decentralization of each State, which to a certain point permits local public opinion in cities, counties, and townships to exist and dominate the administration. The field in which public opinion can operate is limited also by the inherent difficulty of many civic questions. Public opinion on the present method of amending the Constitution, on a managed currency, and on the powers of the Federal Reserve Board either does not exist or is limited to certain slogans and catchwords.

STAGES IN THE DEVELOPMENT OF PUBLIC OPINION · For the purposes of the general student of politics the subject of public opinion may conveniently be broken down into four phases, which represent stages in the development of a given opinion.[4] (1) The first embraces the customs,

[3] A. L. Lowell, *Public Opinion and Popular Government* (1926 ed.), p. 15.

[4] For an analysis by Clyde L. King of the stages in the development of a public opinion, cf. W. Brooks Graves, *Readings in Public Opinion* (1928), pp. 105, 106.

settled beliefs, moral codes, economic and social conditions, and established heroes of the nation. Opinions which run counter to these stand small chance of adoption by the public. (2) Another concerns the information needed for the formation of opinion, and facilities available for its transmission to the people: the press, the radio, the motion picture, the school, and the church. (3) Next is the problem of the reception by the people of the information and opinions thus made available, and finally (4) the formulation, expression, and general acceptance of an opinion as the public's opinion. A fifth aspect of the question, of great present-day significance, concerns the deliberate manufacture of public opinion commonly referred to as propaganda. The first phase was the subject of the preceding chapter and does not call for further examination here.

## *THE TRANSMISSION OF INFORMATION AND READY-MADE OPINIONS*

INFORMATION THE VOTER SHOULD HAVE · A wise and judicious opinion on a given issue can hardly be expected unless it grows out of a wide understanding of the pertinent facts. Unfortunately, the data on which the citizen must base his judgment are mostly second-hand or worse. Only with respect to a few questions is his knowledge derived from his own observation. He must depend on the reports of persons unknown to himself, often anonymous, and censored and edited to an unknown degree. Opinion based on something that did not take place plus an unawareness of things that did take place is the stuff of which the "will of the people" all too often is made. Many a political battle of New Orleans has been fought on information no more complete than that of Andrew Jackson's battle of the cotton bales.

What is available to the citizen for the formation of opinion on a proposed bill for the regulation of labor? In this case, as in many others, the size of the country is an obstacle to the formation of rational and just opinion. Labor in the manufacturing Northeast is one thing; in the prairie States another; in the Mountain States something different; and in the South, with the perennial color question, still another. The citizen's factual equipment should cover numbers of laborers by States and regions, their occupations, their standards of living, their attitude toward unionization, and so on. But labor does not exist as an entity in a vacuum. He should know something about the management of business and manufacturing enterprises, the profit system, accounting, seasonal demands, and so on. As a matter of fact, few voters have access to such information or have the time or ability to analyze all the factors concerned. Issues involving agriculture, conservation, shipping, trusts and monopolies, to mention only a few that demand a national public opinion, call for the gathering and dissemination of accurate information on a large scale, in

the hope not, perhaps, that all voters will receive and master it but that some in each community will do so.

NATIONAL AND LOCAL PUBLIC OPINION COMPARED · Much may be said for the proposition that the rationality of public opinion varies inversely with the size of the unit in which it is formed. The orderly formation of national public opinion meets several severe handicaps: the size of the country, which makes the securing of adequate information difficult; the inherent complexity of national affairs; and the high-powered propaganda agencies which seek to control opinion. Emotion, myth, and one-sided information play a relatively higher part than the logic of events. The field of foreign relations is the spot par excellence of irrationality in national opinion. The average citizen's conception of the different nationalities, of their economic problems and of their struggles for existence and dominance, is inadequate if not grotesque. Such historical studies as have been made on the sinking of the battleship *Maine* in 1898, the Venezuela controversy with Great Britain, the Boxer Rebellion, and the "shedding of American blood on American soil" as alleged by President Polk cast a dubious light on the capacity of the people to form a reasonable opinion on events in the foreign field. On the other hand, the inherent difficulties in national opinion are overcome to a considerable degree by the interest centered on national questions by newspapers and periodicals and the agitation of the high-powered political parties.

In the local constituencies, the counties, cities, and villages, public opinion has its greatest factual basis. No city is so large but that every voter, no matter how absorbed in his own affairs, comes into personal contact with some phase of the administration of its government. If a taxpayer, he notes immediately the increase in his general property tax; if a householder, the failure to collect garbage or to give police protection; if a commuter, the efficiency of the transit system. Government touches him any way he turns, and his knowledge of it is largely from direct observation. Again, many of the city's electors have personal acquaintance with the officers of government: the mayor, his cabinet, or the local councilman. The citizen knows their character, their scale of living, their weaknesses and their virtues. The degree in which this is true, of course, is strictly dependent on the size of the municipality; but even in the largest, knowledge acquired by personal observation or from word of mouth gives a pretty fair picture of the officials as well as of the local issues. The spectacle of the mayor of one of our largest cities a few years ago campaigning for re-election with the help of a troupe of minstrels and a trained monkey was proof of a local opinion not altogether responsive to facts; but it suffered in comparison with many appeals of national leaders only in dignity, not in the chord struck.

TRANSMISSION AGENCIES IN THE UNITED STATES · Facilities for the speedy and full transmission of news and information, and freedom to use them,

are basic in a country governed by public opinion. Science and mechanics fortunately have furnished the physical means for this task in the United States. The railroad, motor car, airplane, newspaper, telegraph, telephone, and radio are entirely adequate to the needs. The shortcomings of news collection and transmission arise chiefly from the human element: inaccurate observation, pandering to the craving for the sensational, and the selection, suppression, or coloring of news by special interests. The speed and breadth of news transmission was dramatized, for instance, at the time of President Harding's death in 1923. The President passed away at San Francisco, August 2d, shortly before midnight. Vice-President Coolidge was notified of the event at his home in a crossroad Vermont village within an hour, and shortly thereafter had taken the oath as President. When the morning newspapers appeared throughout the thousands of cities and villages of the land, the people learned that while they slept they had lost a President and acquired a new one.[5] Twenty years later, home radios brought an hour-by-hour account of political events.

NEWSPAPERS AND PERIODICALS · Still first among the agencies of public opinion in the United States are the newspaper and its more leisurely and introspective companion piece, the periodical. Thomas Jefferson, a prime mover for the freedom-of-the-press clause in the First Amendment, foresaw their mission as molders of public opinion. Writing to Madison from Paris in 1787, he said:[6]

> The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The only way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.

How well his hope has been fulfilled is shown by the fact that in 1944 there were 12,889 newspapers of all kinds in the United States, of which 2006 were dailies, with an aggregate circulation of 46,706,904 copies, while there were 17,956 periodicals.[7]

WHAT IS NEWS · The best which the thoughtful citizen expects from the combined efforts of the various news-collecting and news-disseminating

[5]L. C. Hatch and E. L. Shoup, *A History of the Vice Presidency of the United States* (1934), pp. 61–64.

[6]Letter to Edward Carrington, January 16, 1787, *The Works of Thomas Jefferson* (P. L. Ford, Ed.; 1904), Vol. V, pp. 252–253.

[7]N. W. Ayer and Sons, *Directory of Newspapers and Periodicals, 1944*, p. 11.

agencies is a true picture of the panorama of contemporary life. That the flow of modern social life is much more than appears on the surface goes without saying. An apparently simple event may be only the outward manifestation of potent unseen social forces; yet it is all together, both the seen and the unseen, with which public opinion must eventually deal. Walter Lippmann correctly observed that much of the weakness of democratic government lies in its failure to devise a mechanism to make the invisible world visible to the citizens of the modern state.[8]

What is news? Not the recording of the routine acts of social life, even if their number were not legion. Specialized journals, indeed, do record much that is routine and statistical in the fields of business, commerce, technology, and science; and this may be news to their subscribers. But for papers of general circulation it is the recital of episodes which lie outside the orbit of the routine and the usual in life.[9] The announcement by a labor leader of a projected strike in an automobile factory is news. The reporter's account of the incident is concerned mostly with its points of human interest; he makes no attempt to give an account of the relations of labor and management in the automobile industry in general, of which this incident is but a small fragment of the entire picture. In short, the news is mostly a series of unrelated episodes rather than a drama with the required unities. The work of the press, Mr. Lippmann concluded, "is like the beam of a searchlight that moves restlessly about, bringing one episode and then another out of darkness into vision." Alone it is insufficient for an adequate public opinion. Men "cannot govern society by episodes, incidents, and eruptions."[10]

EVOLUTION OF THE AMERICAN NEWSPAPER · Colonial newspapers and those of the first half century under the Constitution were very largely individual affairs: individually owned, edited, and often operated. Their circulation was small; paid advertising, negligible. The owner and editor in a large sense was the newspaper. To mention the name of a newspaper was to bring to mind the personality of its editor. Newspapers were positive in tone, dogmatic, unsparing of personalities. They possessed the saving grace of telling the truth at least about one party to the controversy: their opponents. No public office or person was too high or dignified to escape their virulent attacks. Fisher Ames, a leading Federalist, said, "The newspapers are venal, servile, base, and stupid"; and Jefferson, of the opposition party, wrote, "And the fact is that so abandoned is the tory press in this particular [lying and licentiousness] that even the least informed of the people have learnt that nothing in a newspaper is to be believed." John Ward Fenno, editor of the *United States Gazette*, was in agreement. "The American newspapers," he wrote, "are the most base, false, servile and venal publications, that ever polluted the fountains of society—their editors the most ignorant, mercenary, and vulgar automatons

[8]W. Lippmann, op. cit., p. 365. [9]Ibid. chap. xxiii. [10]Ibid. p. 364.

that ever were moved by the continually rusting wires of sordid mercantile avarice."[11]

In 1835, with the founding of the New York *Morning Herald* by James Gordon Bennett, began the era in which the newspapers rose from the level of local guerrilla combatants to that of journals of national opinion. Bleyer wrote that "the *Herald's* business and editorial office was one basement room, where its founder, seated at an improvised desk and counter consisting of a plank resting on two flour barrels, wrote news and editorials, received advertisements, and transacted all the business of the paper."[12] He promised the public that his paper would be "just, independent, fearless, and good-tempered," a new vision for the reading public. Six years later Horace Greeley founded the *New York Tribune*, destined to be the most powerful organ of opinion in the history of the American press. Chiefly because of the force of its editorials the *Tribune* rapidly acquired a large circulation. Greeley consistently followed the idea that the purpose of a newspaper was "to lead and to lead" rather than to discover the public tastes and cater to them. His editorship of the paper was therefore a constant crusade. Bleyer wrote: "He made the *Tribune* a medium for expressing his personal opinions on all the questions of the day. With an open mind he espoused new ideas in almost every field of human activity. Every movement for social, economic, and industrial betterment found in him an earnest advocate."[13]

In 1851 Henry J. Raymond established the *New York Times*. In 1844, in Massachusetts, Samuel Bowles founded the *Springfield Republican*. In 1868 the New York *Sun*, the oldest of American dailies, was purchased by Charles A. Dana and associates. The price, $175,000, is proof that the American newspaper had passed from the era of the individual promoter to that of corporate management and big business. Dana revolutionized the paper and became one of the important contemporary influences. His innovation of printing the news in condensed form was soon copied by other newspapers. E. L. Godkin, with his weekly periodical the *Nation*, established in 1865, began a career of a third of a century of great influence. The *Nation* under his editorship was nonpartisan, nonjingoistic, and devoted to a true liberalism and high ideals in government, which he defined as a "bundle of mutual services." Never of large circulation, it exerted a tremendous influence through the class of its readers and the newspaper editors and writers whom it supplied. Godkin was editor also of the *New York Evening Post*, in which paper he upheld the same standards as in the *Nation*.[14]

[11]Letter to Timothy Pickering, November 5, 1799, Fisher Ames, *Works* (1854), Vol. I, p. 264; Letter to Thomas McKean, February 19, 1803, *The Works of Thomas Jefferson* (P. L. Ford, Ed., 1904), Vol. IX, pp. 451–452; *Gazette of the United States*, March 4, 1799.

[12]W. G. Bleyer, *Main Currents in the History of American Journalism* (1927), p. 186.

[13]Ibid. p. 237.

[14]Ibid. chaps. ix–xii.

THE NEWSPAPER AS BIG BUSINESS · Newspapers have not escaped the nation's trend toward bigness common to the industrial world. The total of daily and evening newspapers reached its peak in 1909 at 2600; by 1944, in spite of a 30 per cent increase in the nation's population, the number of newspapers had declined to 2006.[15] The decline resulted in a virtual monopoly of the field in many communities. In 1940 there were 1201 cities with only one newspaper or with all the newspapers under one ownership, leaving only 237 giving the reader a choice. Akron, Ohio, with a population well in excess of 200,000, and Jersey City, with 317,715, had only one newspaper each. Chicago in 1892, with a population of a million, had six English-language newspapers; in 1943, with a three-and-a-half-fold increase, the number had been reduced to three.[16] Detroit's newspapers had been reduced to one in the morning and two in the evening; Cleveland's, to three papers, with two under one ownership. Atlanta, New Orleans, Indianapolis, and Milwaukee, among the larger cities, had only one morning paper each. The mortality had not been confined to the small papers but included such revered names as the *New York Herald* and *Evening Sun*, the Chicago *Examiner*, the Cleveland *Leader*, the Philadelphia *North American*, and the *Boston Evening Transcript*.[17]

The same considerations which induce consolidations in industry are responsible for those in the newspaper world: decrease in overhead expenses, the economies of large-scale production, and the larger profits from the absence of competition. With a plant and equipment running into the tens of millions, the newspaper inevitably follows the line of the largest net return. The reader receives more newspaper for his money, but loses the opportunity to choose among various points of view.

THE CHAIN NEWSPAPER · The formation of newspaper chains accounts in part for the decline. The first of these, the Scripps-McRae League of newspapers, founded in 1895 with four dailies, had expanded in 1937 to twenty-four (the Scripps-Howard chain). The Hearst-owned chain, starting in the 1890's, by 1935 included twenty-four daily newspapers. The concentration of newspaper control is shown by the fact that in 1935 there were fifty-nine chains, of all sizes, with a total of 329 dailies which together furnished more than one third of all the newspaper circulation of the country.[18] In 1935 the Hearst chain alone furnished 11.1 per cent of the total daily newspaper circulation. The power over public opinion exerted by the single management of the larger chains is thus tremendous. In 1930 chain daily circulation was two fifths of the total daily and more than half of the Sunday circulation.

[15]A. M. Lee, *The Daily Newspaper in America* (1937), pp. 64–66; N. W. Ayer and Sons, op. cit. (1944), p. 11.

[16]G. L. Bird, "Newspaper Monopoly and Political Independence," *Journalism Quarterly* (September, 1940), Vol. 17, pp. 209, 210. In G. L. Bird and F. E. Merwin (Eds.), *The Newspaper and Society* (1942), pp. 431, 434.

[17]Ibid.

[18]Ibid. pp. 442–448; A. M. Lee, op. cit. pp. 215, 216.

NONPARTISANSHIP · The consolidation movement has been accompanied by a trend away from formal partisanship. In 1899, 732 dailies called themselves Democratic and 801 Republican. In 1929 these numbers were 434 and 505 respectively. In the same period there was a fivefold increase in the number taking the halfway step and calling themselves Independent Democratic or Independent Republican; while those professing to be independent rose from 397 to 792. The decline in formal partisanship continued throughout the next decade. The slight decrease in the number of Independent Republican dailies was more than offset by a 50 per cent increase in those classed as Independent Democratic[19]. In 1438 communities publishing newspapers, only 66 have a choice between Republican and Democratic papers. The two trends are closely related. Papers that are strongly partisan suffer in advertising both because of the attitude of advertisers and because the subscribers are collected chiefly from a single political party. The Independent Democratic paper, for instance, maintains a mildly Democratic tone for over three years out of the four, becoming strongly partisan only during the quadrennial Presidential campaigns. The greater editorial freedom also may be a consideration. Independent papers are able to participate in the primary campaigns of both parties.

Which of the two policies better serves the reading public is a matter of doubt. The partisan paper tends to give its readers but one side of an issue; the independent paper might logically be expected to give both. The independent paper, however, is often independent only in the sense that it does not give long-time support to any one party. The Scripps and the Hearst chains usually place the support of the entire chain behind a given candidate; for instance, the former supported Hoover in 1928, Roosevelt in 1932 and 1936, Willkie in 1940, and Dewey in 1944. Horace Greeley thought that the advantage from the public's viewpoint was in the avowedly party newspaper. "An openly party paper will, nine times out of ten," he said, "speak out its honest thought; a neutral paper seldom or never can. If it does, it will lose subscribers at every turn. Its only safe course is to avoid political discussion altogether, and thus leave the most important topics wholly untouched."[20]

COLORLESS EDITORIALS · The average educated American, if asked, perhaps could not name offhand the editors of half a dozen papers of national importance. The editorial page has sunk to a relatively low level in popular esteem because business expediency demands a policy which will not offend important advertisers or large blocks of subscribers. Partly filling the vacuum thus created is the syndicated editorial column, appearing simultaneously in hundreds of papers from coast to coast. These often

[19]G. L. Bird, "Newspaper Monopoly and Political Independence," *Journalism Quarterly* (September, 1940), Vol. 17, pp. 211, 212, 214. In G. L. Bird and F. E. Merwin, op. cit. pp. 207–209.

[20]W. G. Bleyer, op. cit. p. 218.

are of a merit superior to the old-fashioned editorial, but nevertheless represent the thought of but one person in place of the independently conceived ideas of many editors. One advantage is that sometimes several are used on one page, giving the readers the benefit of the divergent views expressed. The editorial page of the chain newspaper inevitably has but one point of view and one policy dictated by its proprietor or board of editors.

VARIEGATED INTERESTS · The modern newspaper attempts to interest all ages and classes of people. Politics and government; finance; art and literature; science; religion; crime and the police court; advice to the housewife, the gardener, and the lovelorn; pictures and sketches for those who care little for reading; a children's and a woman's page; columns for sportsmen—all are offered. The enormous circulation of the papers is evidence that they appeal to the interests of almost all classes. That they publish much merely for commercial ends, and in general are led rather than lead, is true. William Randolph Hearst expressed this sentiment in answer to a series of questions in 1924. "The American people are an independently thinking people. Newspapers do not form the opinion of the public; but if they are to be successful they must express the opinion of the public."[21] Godkin in his last years was repelled by the sensationalism and the "childishness" of the press. What was needed in them, he thought, was "mainly maturity, the preparation of the paper for grown people engaged in serious occupations."[22] What he did not take into account was that but a small percentage of the population would purchase and read such papers. The present-day paper, with its variegated offering, has the virtue of bringing the masses to read something of politics and government, even if inadvertently and by headlines only.

COVERING THE NEWS · The newspapers of today cover the news immeasurably better than those of the early days; they would be derelict if they did not avail themselves of the vastly improved means of communication and of manufacture. Local news is gathered by local people; this comprises a large share of the space of small-town newspapers and those of the ordinary county seats. News from abroad and from the nation at large is gathered by several large agencies.[23] Dominant among these is the Associated Press, which was incorporated in 1892. Acting as a news-gathering and news-distributing agency, it serves about a thousand daily newspapers. It has contracts with the chief agencies of the same kind in Europe, whereby news of that continent and of the world in general is secured for the American newspapers. The United Press, the outgrowth of the original Scripps-McRae Press Association organized to provide news for that chain, is another strong agency. Unlike the Associated Press, it sells news to any newspaper which is willing to buy it. The Hearst papers are served by the International News Service, and this organization serves

[21] W. G. Bleyer, op. cit. p. 383.
[22] W. G. Bleyer, op. cit. pp. 284, 285.
[23] A. M. Lee, op. cit. chap. xiv.

about 400 newspapers in the United States and abroad. Several of the stronger dailies, in addition, maintain their own agencies in foreign countries. Special correspondents are sent to spots where dramatic events are in the making.

News agencies are protected by law against rivals in their property in the news. Their news may not be copied or rewritten by other newspapers or agencies for profit until its commercial value as news has passed away. In the case of *International News Service* v. *Associated Press* (1918) the Court did not say what that length of time is. It disclaimed any intent to confer "upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."[24]

REPORTING GOVERNMENTAL ACTIVITIES · Many of the larger newspapers maintain press bureaus at Washington; many of the smaller ones, special correspondents. The President, while in Washington, holds frequent press conferences at which he gives out news and discusses political questions.[25] It is an unwritten law that he may not be quoted directly except in public addresses or addresses to Congress. During a session of Congress news gathering at Washington is carried on on a magnificent scale. During the F. D. Roosevelt administration a news service in the form of mimeographed letters was developed by many of the administrative departments, particularly those engaged in carrying out the legislation of the New Deal. For many years individual Congressmen and Senators have used the franking privilege to send out copies of the *Congressional Record* and many other administrative reports to newspapers and individuals for the purpose of spreading intelligence concerning governmental activities. Special press galleries have long been provided in the houses of Congress; administrative departments willingly provide copy for the reporters on their rounds. Through these means the newspapers furnish a wealth of news about government to the citizens in every corner of the United States. Press bureaus of a smaller size are maintained by State and local newspapers in most of the State capitals. These, of course, are most active during the legislative session.

INDEPENDENCE OF THE NEWSPAPERS · Do the newspapers print the news, the whole news, and nothing but the news? The charge often is made, particularly about election time, that the press is biased or bought; more serious is the widespread belief that it suppresses news or distorts facts for its own private profit or at the behest of strong interests or pressure groups. All these complaints doubtless are true; the chief question is to what extent.

The average American regards the newspaper as a quasi-public institution, with a duty not only to give the news unbiased and complete but

[24] *International News Service* v. *Associated Press*, 234 U.S. 215 (1918).

[25] R. Desmond, *The Press and World Affairs* (1937), pp. 309, 316. G. L. Bird and F. E. Merwin, op. cit. chap. xxii.

to go out and fight evil and help the good. In all this he frequently is disappointed; for the newspaper has also the character of a private business enterprise run for profit, and its public-service aspect is not permitted to overrule the profit motive. Crusades for good government and the devotion of space to the genuine enlightenment of the electorate must naturally be tempered by a consideration of their relation to financial receipts. The existence of a profit is dependent upon the advertisers, while, on the other hand, the value of the advertising to the businessman is in proportion to the number of subscribers. It is estimated that the subscribers today pay only from one fourth to one third of the cost of the newspaper.[26] It is obvious that if the price of the daily paper were raised to ten or twelve cents to meet the cost, the number of readers would swiftly decline. On the other hand, a radical cut in the size of the paper, to decrease costs, similarly would greatly decrease the subscription rolls. Another result would be a sharp decline in news coverage at home and abroad. The situation is that the commercial side of the newspaper subsidizes a breadth of news coverage which the people as a whole would be unwilling to pay for directly.

The only alternatives in sight are endowment by private funds and tax support, which would mean government dominance either through subsidy or through outright ownership. It requires little reflection to see that this would lead to a subversion of the news and opinion beyond anything yet known. After all, the modern newspaper of general circulation catering to both the subscribers' desire for unbiased news and the advertisers' desire to repress has a pretty broad community basis. Increase in its size and capitalization probably has increased rather than decreased its capacity for resisting the pressure of the large advertiser. Also, the advertisers generally represent many conflicting interests, and on relatively few matters are agreed upon what should be suppressed or distorted. On the face of it, the chain newspaper, with its revenue drawn from many communities, is in a better position for independence in local news than the single paper; while the latter is in a stronger position on national questions than the chain. This seems to be borne out in practice. On the whole, pressures from religious and racial groups seem to be more potent than those from business.

PERIODICALS AND MAGAZINES · Periodicals and magazines have maintained an almost uninterrupted increase in numbers during the past decades. The total for 1943 was nearly eighteen thousand.[27] These are mostly monthly, bimonthly, and quarterly publications. The greatest circulation naturally is in those devoted to short stories, pictures, and news. Many are official organs of learned, professional, trade, and industrial societies and organizations. Their contribution to the formation of public opinion, because of infrequency of publication, is more in the analysis and discussion

[26]For some aspects of the business side of the newspaper cf. several articles in G. L. Bird and F. E. Merwin, op. cit. chap. vii, "Advertising and the Reader."

[27]N. W. Ayer and Sons, op. cit. p. 11.

of current happenings than in the diffusion of news. Nine of eleven women's magazines listed in 1944 had circulations in excess of a million copies a month; five of the general monthlies exceed 600,000 copies. Several agricultural journals run beyond a million copies a month.[28] While there is no periodical comparable in influence with the *Nation* of two generations ago, their total contribution to public opinion is undoubtedly great.

THE RADIO · The most serious rival of the newspapers in the transmission of news is the radio. Its importance extends back only to the era of the First World War. By 1940 the number of receiving sets had reached 51,000,000, and in the next three years had increased to nearly 60,000,000. Nearly 90 per cent of all homes were equipped with radios.[29] The potentialities of the radio in the transmission of information and opinion is almost incalculable. People in the 1850's drove as far as twenty miles in carriages and farm wagons over rutted roads to listen to the Lincoln-Douglas debates; today all but a negligible part of the population could listen in the comfort of their own homes. President, governor, and mayor may appeal directly to their respective communities with little exertion and without reliance on newspapers or railroad travel.

ORGANIZATION AND MANAGEMENT · In America, almost alone among the world's nations, the radio is privately owned and operated. In other respects its development resembles that of the newspapers. Its financial support comes from advertising services to private industry, and here again arises a conflict between the freedom of the news and money profit. In one respect there is a sharp difference. The number of newspapers which might be initiated, at least in the early days, was limited only by personal ambition and success in the scramble for subscribers, whereas the number of broadcasting stations cannot go beyond the number of frequencies available. Government regulation consequently was necessary from the beginning. At the present time more than half of the 800 standard broadcasting stations of the country are combined by purchase or affiliation into four so-called national networks.[30] Their total net income for 1940 was in the neighborhood of $14,000,000, which, of course, does not include the local income of affiliated stations. Newspapers and periodicals, which in 1929 had secured 97 per cent of the advertiser's dollar distributed to them and the radio, within a year had dropped to 87 per cent, an estimated loss of $87,000,000.[31] It is evident that the newspaper increasingly must share with this new industry the popular support for the transmission of news.

RADIO NEWS SERVICE · Down to 1933 the news associations had freely supplied their services to broadcasters desiring to purchase them, but by

[28]Ibid. pp. 1185–1198. [29]*World Almanac, 1944*, p. 663.

[30]T. P. Robinson, *Radio Networks and the Federal Government* (1941), chap. iii.

[31]Mark Ethridge, "Perils of the Press," *The Quill* (June, 1939), Vol. 27, p. 4. In G. L. Bird and F. E. Merwin, op. cit. pp. 428–430.

that time the inroads on newspaper revenue led to a less liberal policy. Thereafter their sales of news to broadcasters was to be through a newly formed agency, the Press-Radio Bureau. The networks were to be supplied with two five-minute news summaries daily, and there were other severe restrictions. This attempt of the newspapers to control the field was doomed to failure. The Columbia Broadcasting System already had established its own news service, with bureaus in the main centers at home, and these were soon extended abroad. In 1934 the Transradio Press Service was organized and was made available to individual stations. Faced with such competition, the press associations were forced to give way. Now the International News Service, the United Press Association, and the Associated Press all sell their services to the broadcasting stations.[32]

A survey by the Federal Communications Commission in 1938 showed that during a typical week of that year an aggregate of 3984 station hours, representing one tenth of all radio broadcasting time, was devoted to news; the National Broadcasting System in 1943 reported nearly one fifth of its station time in a typical week used for that purpose.[33] News programs in most communities are available hourly or oftener from early-morning hours to near midnight. These programs are chiefly of two types: factual statements of the news and commentaries of an editorial character. The listener may choose his favorite analyst as he chooses his newspaper, his columnist, or his editor.

FREEDOM OF THE AIR · The citizen may very well be interested in how a news facility so expeditious and universal as the radio is controlled. No single hand can control the several thousand American newspapers, for there is no master lever to be grasped. With the radio, however, the situation is very different. The nature of its mechanism leaves it open to easy enslavement by the government. The Nazis could not stop the writing or printing of thousands of papers and handbills in the conquered countries, but they found little difficulty in suppressing all but the smallest amount of broadcasting. In a country of free traditions, such as the United States, the threat from private interests is far greater than from the government. A careful student of the radio concludes that today there is no such thing as free speech, in the traditional meaning of the term, and there never will be.[34]

Censorship of the radio comes from two sources, the management and the government, but chiefly from the former. Fear of antagonizing powerful religious, business, labor, and political groups very soon led the radio managements to establish codes of self-regulation. These culminated in 1939 in the adoption of a general code by the National Association of

[32]T. R. Carskadon, "The Press-Radio War," *The New Republic* (March 11, 1936), Vol. 86, pp. 132–135. In G. L. Bird and F. E. Merwin, op. cit. pp. 542–548. Cf. also ibid. pp. 549–553.

[33]N. Trammell, *Radio Must Be Free* (1943). Statement to Senate investigating committee, December 7–8, 1943.

[34]T. P. Robinson, *Radio Networks and the Federal Government* (1943), p. 82.

Broadcasters.[35] Among its provisions are those requiring that news broadcasts shall be factual and presented without editorial bias. Public questions, including those of a controversial nature, are to be given discussion in proportion to the public interest, but without charge except during a political campaign. Religious programs must not contain attacks upon another's race or religion. Sacrilegious, profane, salacious, obscene, or indecent material is banned. The provision that "false and misleading statements and all other forms of misrepresentation must be avoided" furnishes a catch-all for a general censorship. The code makes the further statement that "freedom of the air is not to be construed as synonymous with freedom of the press or freedom of speech."

The Federal Communications Act of 1934 explicitly states that it shall not be construed to give the commission the power of censorship or of interfering with the right of freedom of speech by radio.[36] Nevertheless a power of censorship does exist under other provisions of the act. All station licenses are given only for the limited period of three months on the basis of "public interest, necessity and convenience." Naturally no company will risk its investment in plant and equipment by a news policy which might offend any strong interest. The commission is the judge not only of what constitutes public interest, necessity, and convenience but also of "obscene, indecent, and profane language," which the act prohibits on the airways. The sword of Damocles hangs over the station-owner's head.

The alternatives are the same as for the newspapers: government ownership and operation or subsidy, and private endowment, any of which promises less from the standpoint of freedom. The present system, outside the forbidden fields, furnishes speedily and accurately a wealth of factual material, a fair if timid service of news analysis, and an excellent forum of discussion during the periodic political campaigns.

THE MOTION PICTURE · Another agency for the transmission of news and opinion is the motion picture. Starting from scratch at the opening of the century, by 1941 this institution had about 17,000 theaters, with a total seating capacity in the neighborhood of 12,000,000 and an estimated weekly attendance of 85,000,000.[37] It undoubtedly is one of the greater influences in the field of public opinion, although in the transmission of news it plays a small part in comparison with the press and the radio. Its influence is chiefly indirect, the molding of customs, manners, and morals. The highly developed pictorial technique, in combination with the human voice and with music, gives it a breadth and depth of mass appeal even superior to that of the newspapers and magazines; if applied

[35]Ibid. pp. 76–81. The code was substantially amended in May, 1941.

[36]"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." (*48 Stat. 1091*)

[37]Motion Picture Producers and Distributors of America, *Film Facts, 1942* (1943), p. 7.

intensively to the fields of opinion and government its potentialities would be almost beyond imagination.

MANAGEMENT AND CONTROL · Private ownership and operation, the profit motive, and a quasi-public character put the motion picture in the same class with the press and the radio. There is a further resemblance in its semimonopolistic character, owing to the great investments involved (it is a two-billion-dollar industry) and the control which the producers exert over the offerings of the individual theaters. Eight gigantic companies now control the greater part of the field, including production, distribution, and exhibition.[38] The career of the neighborhood theater attempting to operate independently is usually lean and short.

NEWS SERVICE · Newsreel "shorts" are now shown in most theaters at least twice a week. Attempts to use shorts as sponsored programs have not been successful, because resented by the admission-paying public. Somewhat less than half the newsreel on the average is devoted to social, economic, or political matters which would have a bearing on public opinion.[39] Pictures of public officers speaking in connection with important current happenings and of candidates for national office expressing their particular views are frequently included. The number of films of a partisan nature is small, perhaps for the same reason that the large newspaper tends to be independent, namely, fear of offending a sizable block of patrons. Several government-produced films showing the work of administrative projects were generally banned on the same grounds. Naturally, after Pearl Harbor the motion-picture industry freely made its facilities available to the government for purposes of propaganda.

FREEDOM OF THE FILMS · Is freedom of expression maintained in the motion-picture industry? Here competition cannot operate as a regulator of quality; for the business tends to be monopolistic. Censorship might be applied either at the source, in the production of the pictures, or at the end, when they are exhibited. Under recent Supreme Court decisions Congress might conceivably regulate at the source, but so far has not acted except as the Antitrust Act applied. Six states, Kansas, Maryland, New York, Ohio, Pennsylvania, and Virginia, and sixteen cities, including Boston, Chicago, Los Angeles, and San Francisco, have legislated to establish standards to which pictures must conform before they may be exhibited, and have set up boards for the enforcement of the standards. These standards, however, have more to do with morality than politics.[40]

Threats of public regulation and attempts at control by pressure groups led the industry to a scheme of self-regulation. The Motion Picture Producers and Distributors Association was organized in 1922 for this and

[38] Lewis Jacobs, *The Rise of the American Film* (1939), p. 422.

[39] Edgar Dale, *The Content of Motion Pictures* (1935), p. 201; H. J. Forman, *Our Movie-Made Children* (1935).

[40] M. F. Thorp, *America at the Movies* (1939), p. 184.

other purposes, and Will Hays resigned the office of Postmaster-General in President Harding's cabinet to become its head. A code to govern the making of pictures was ultimately announced. Although a large portion of its twelve sections deal with matters of morals and taste, there are several with direct political implications.[41] Forbidden is any picture "which will lower the moral standards of those who see it." Hence the sympathy of the audience must never be thrown to the side of crime, wrong-doing, evil, or sin. Law is not to be ridiculed, detailed methods of crime presented, or ridicule thrown on any religious faith. The history, institutions, prominent people, and citizenry of other nations must be represented fairly. That pressure groups at Hollywood exert controls beyond those published in the code seems evident. Russian-made films long were excluded from the distributors' lists, thus depriving the American public of one of the important sources of information concerning that extensive land.

THE SCHOOL · The schools are a leading force in the molding of public opinion, but their influence, except at the college level, is chiefly indirect. They have much to do with the passing on of facts and opinion, but generally little with the transmission of the news. They attempt to give a foundation of scientific knowledge which may furnish a basis for rational opinion on current affairs. Like the churches, they are influential in the formation of basic attitudes respecting contemporary society. Presumably the one million and more students enrolled in colleges, normal schools, and universities are exposed to a stream of conclusions and opinions on social and economic questions which ultimately greatly affect public opinion on political questions.

Studies of the curricula of the public schools show that State legislatures have prescribed the teaching of nationalism and patriotism in various forms, as well as such topics as health, prohibition, conservation of life and property, social responsibility, and ethical principles and practices.[42] Bessie L. Pierce, of the University of Chicago, after a careful study of social-science textbooks used in the schools, concluded that they are universally pro-American and patriotic but foster traditional character patterns. The Spaniard is represented as harsh and cruel; the German, as militaristic and rapacious; the French, as the traditional friends of the Americans; the British, as their traditional enemy.[43] That these representations actually have generated attitudes responsible for certain expressions of public opinion cannot be doubted; for instance, the alacrity with which the American public supported President Grover Cleveland's sharp note to Great Britain in the Venezuela affair, the facts of which were practically unknown to the public.

[41]M. F. Thorp, op. cit., pp. 196–200.
[42]President's Research Committee, *Recent Social Trends* (1933), pp. 365–367.
[43]B. L. Pierce, *Civic Attitudes in American School Books* (1930), passim.

THE CHURCHES · The churches, like the schools, have little to do with the transmission of news, but much with opinion and moral attitudes. The United States census of 1936 listed over 200,000 separate churches or congregations, comprising 256 denominations with a total membership of about 56,000,000.[44] As pre-eminent in the teaching of morality, their indirect influence on national opinion is profound but nevertheless difficult to measure. It probably bears chiefly on public policy toward the family, morals, and social welfare.

The churches, as national organizations, seldom announce a stand on pending political questions, but from time to time make general pronouncements. Individual leaders and affiliated societies, however, often cast their weight on the political scales. The Federal Council of Churches in 1908 adopted a "social creed" which dealt with the problems of labor.[45] This, with its subsequent amendments, declared in favor of social legislation common to most of the States: social insurance, the eight-hour day, a living wage, prohibition of child labor, and regulation of the conditions of labor for women and children. In 1912 an article for the "right of all men to the opportunity for self-maintenance—for the protection of workers from the hardships of enforced unemployment" was added, as were, later, the minimum wage, farm relief, and unemployment pensions. Other pronouncements have been made by several of the larger Protestant denominations.[46]

In 1891 Pope Leo XIII issued his encyclical *On the Condition of Labor*, which was amplified in 1931 in another, by Pope Pius X, *On Social Reconstruction*.[47] Among the principles announced were the duty of the state to legislate in the interests of labor, the right of labor to organize, the encouragement of marketing and consumers' co-operatives, an adequate living wage, and the formation of vocational groups or guilds in industry to include labor as well as capital.[48] The National Catholic Welfare Conference in 1919 issued the Bishops' Program of Social Construction, embodying a comprehensive program with respect to labor, including minimum wages, social insurance, public housing, prevention of excessive profits, and the participation of labor in the management of industry.[49] The Central Council of American Rabbis has issued occasional statements on social policy. The direct effect of all these pronouncements would be found in the editorial policies of the religious journals and the pulpit utterances of clerics.

[44]Bureau of the Census, *Fifteenth Census, Religious Bodies*, Vol. I, p. 24.

[45]H. F. Ward (Ed.), *A Year Book of the Church and Social Service in the United States* (1916), p. 198.

[46]Notable pronouncements on social policy from time to time have been made by the Methodist General Conference, the Presbyterian General Assembly, The Northern Baptist Convention, the National Council and National Brotherhood of Congregational Churches, and the Five-Year Meeting of Friends. Cf. H. F. Ward (Ed.), op. cit.

[47]J. A. Ryan, *Social Doctrine in Action* (1941), chap. xvi.

[48]Ibid. pp. 242–262.

[49]Ibid. pp. 146, 147.

## *RECEPTION OF NEWS AND OPINION BY ELECTORS*

It is evident that the average American is the object day by day of an almost uninterrupted bombardment of information, facts, and fiction by newspaper, radio, and word of mouth. To much of it he does not turn a reflective ear; but normally he is constantly forming judgments, some of them merely impressions, others considered opinions. A given piece of information naturally will produce widely dissimilar effects on the minds of the different individuals receiving it; just as the same object will suggest entirely different facts to the various persons viewing it. A certain piece of stone may tell one story to the chemist, another to the geologist, another to the jeweler, another to the engineer, and still another to the workman. Similarly, the news of a strike or lockout at a steel plant conveys different information to persons as variously situated as business managers, laborers, farmers, ministers, and artists, and brings forth correspondingly diverse opinions. Man's receptivity to news differs both because of varying degrees of accuracy in the use of the senses and because of the preconceptions which each carries.

THE OPINIONS OF INDIVIDUALS · Public opinion is not a mysterious thing which hovers in the air above the heads of the people in the community. Unless the citizens as individuals form judgments on civic questions, there is nothing from which public opinion can be made. Dogmas handed down by a ruler to an illiterate or uninformed people are dogmas still, and not public opinion. How does the individual come into possession of an opinion on a public question? It is plain that not all our sixty-million-odd electors have opinions on all public questions. A small percentage have opinions on many, while a very large percentage have opinions on only a few.

1. The ideal method for the acquisition of an opinion may be called the rational or scientific. Observations are made, facts are gathered and tabulated, and, by the processes of measurement and reason, conclusions are drawn and an opinion is formed. This is the method of the scientist for the ascertainment of truth, but obviously is open to only a strictly limited portion of the population. The scientific study of social problems has greatly increased in the twentieth century, chiefly on the part of the universities and of endowed research foundations, such as the Brookings Institution, of Washington, D.C. Government has organized or sponsored many important studies, such as the Report of the President's Committee on Social Trends, released in 1931, and those of the National Resources Planning Board during the Franklin D. Roosevelt administration. Though these are read chiefly by scholars, their findings become known to government officers and writers for newspapers and periodicals, and so exert a powerful influence in the formation of opinion.

2. Much more numerous are the people who adopt opinions because of their consistency with other opinions already held. For example, a proposition for State old-age pensions is brought forward. Citizen Jones may have observed little need for the proposal, and may have no idea of the number of aged involved or of the total cost. But he does hold opinions of social responsibility for individual misfortune and is emotionally predisposed toward charitable enterprises. He therefore forms a judgment in favor of the proposition.

3. Many people take their opinions almost unmodified from those of leaders or other persons whom they respect. Such acceptance cannot be said necessarily to be irrational. No person is qualified to form an opinion on all public questions, so great is their number. Even the specialist must rely on the judgment of a friend or leader who is especially qualified to speak on particular questions. The ability to pick qualified leaders in opinion is second in importance only to that of arriving at a judgment independently.

4. Still more people accept or reject opinions by a process of suggestion. The suggestion may have been unconscious or may have been systematically planned. Usually the person so acquiring an opinion believes he has arrived at it by a process of independent thought. Here is the place for subtle propaganda and popular "education," the happy hunting ground of the advertising and public-relations man; politically speaking, the pastures of the special interests, the demagogue, and the dictator, with his symbols, pieces of ribbon, brown uniform, and benevolent offerings to "the people."

THE INFLUENCE OF STEREOTYPES · Walter Lippmann, in his able volume on *Public Opinion*, explained the part played in the formation of opinion by the "stock of images," the "stereotypes," which we carry in our heads.[50] These he defined as "an ordered, more or less consistent picture of the world, to which our habits, our tastes, our capacities, our comforts and our hopes have adjusted themselves. They may not be a complete picture of the world, but they are a picture of a possible world to which we are adapted." Every person has a store of mind pictures which he has been building up through the years. There are stereotypes of the doctor, the minister, the reformer, the ward politician, the statesman, the farmer, as well as of the nationalities: the Russian, the Englishman, the German, and the Chinese. The motion picture, the newspaper, the advertiser, and the politician make use of them. The stereotype is a substitute for thought and analysis. It is a label and identification badge for a whole inventory of qualities. The lazy or the busy person will prefer the stereotype to the reality, because the former comes automatically and the latter must be ascertained by a process of analysis. Habit, William

[50]W. Lippmann, op. cit., chap. vi.

James explained, is a device by which we may accomplish the day's work with a minimum of thought for the simpler operations, leaving to the rational faculties the problems outside of routine. The stereotype, analogously, is a saver of time and energy; but unfortunately it too often occupies the place where thought ought to be, and deceives the holder as to its true nature.

## *THE EMERGENCE OF A PUBLIC OPINION*

No two public opinions have the same life history. The elements which enter into and produce each are too numerous, complex, and intangible ever to be assembled a second time. The similarities are sufficient, however, so that a typical sequence of events may be set forth into which many opinions would fit in general and into which others would approximately fit. It is to be remembered that we are dealing with a mass phenomenon, the resolving of the opinions of millions of people into one expression which may truly be taken as the opinion of the public.

1. SOCIAL CHANGE · The occasion for the expression of a new and noteworthy national opinion is some event or condition which deeply affects or threatens to affect the mass of the people. Examples are the stock-market crash of 1929, the German invasion of Czechoslovakia, the bombing and burning of London; or, less spectacular, the growth of trusts, the sit-down strikes, President Franklin D. Roosevelt's attack on the United States Supreme Court, the protracted drought in the States beyond the Mississippi. Concerted national action may be required, interest is widespread, and most people develop opinions on the subject.

2. PERIOD OF DISCUSSION · A period of discussion ensues, in the homes, clubs, forums, and legislative halls, by press, radio, and news films. Individual opinion now begins to be swallowed up in group opinion: the various interests particularly affected, such as trade unions, farmers' granges, and chambers of commerce, arrive each at an opinion which is public for that group. Spokesmen for the various interests come forward. Books and pamphlets are written. This is the day of the leader par excellence; for if he picks the right formula, he may ride on it to a position of great power. The names of Huey Long, Dr. Townsend, Father Coughlin, William Lemke, and General Hugh Johnson were household words in the period of discussion following the banking crisis of 1933. The contest among the different views resolves itself into a struggle for existence; for one opinion grows by devouring others.

3. STATING THE FORMULA · Up to this point there is nothing which may claim to be public opinion. There are throughout the country hundreds of little publics, each with its opinion. Perhaps no two group opinions are exactly alike, and many have no common factor running through them. How is an opinion representative of the attitudes of the individuals and

groups in a population of 130,000,000 to be formulated? Masses can express themselves only by Yes or No. Leadership must frame the propositions that are to be accepted or rejected, but it cannot be arbitrary in performing this function. It has the delicate task of drawing a formula which may be unlike the opinion held by any group approaching a majority but which will be accepted finally as representing the opinion of the preponderant element. Its general acceptance will come about both because it represents an agreement on facts and because it satisfies the varied emotions aroused by the discussion of the problem. Just as courts often contend that they merely restate or discover existing law and do not make it, so leaders are wont to say that they merely uncover an opinion. Nevertheless, it remains true that the giving of concrete and final form to a public opinion is the work of a single person or a small group.

4. THE STAMP OF APPROVAL · Often an overt act or event stamps an opinion as the "public opinion of America." It may be a formal act of government, a cataclysmic event, a national election, or a piece of legislation passed with little opposition. The end of the Civil War signified the emergence of a national opinion on slavery and disunion; the attack on Pearl Harbor ended abruptly the discussion between interventionists and isolationists. The general run of newspapers and magazines accept this opinion as the opinion of the people and no longer a matter of controversy. There are always irreconcilables, but their voices are lost in the general chorus of approval.

PUBLIC-OPINION POLLS · The steps described above include the final one of agreement on what constitutes the opinion of the public on the pending question. It should not be assumed that public opinion on all such questions can be determined with certainty. The best tests, votes in an election on men and issues, are not frequent or comprehensive enough to register opinion on all important public issues. Many civic questions receive wide discussion without the carrying through of the discussion to the point where clear-cut opinion is reached. One of the most essential talents of the successful politician is his ability accurately to appraise public opinion on various issues. This he does by rule-of-thumb methods, by his understanding from long experience of the wants and mental slants of the average man. Of course, he is aided by the reports brought in from precinct and district voters, from which he is able to get a panoramic view of public sentiment. Newspaper editorials, corner-grocery forums in the small towns, discussions in legislative bodies, and grumblings heard in busses, railway cars, and hotels, taken together, may show which way the wind is blowing.

It became apparent to many people how important it would be to government officials as well as to businessmen if a more accurate and practicable way of ascertaining public opinion on specific questions were available. The most active interest naturally was in the measurement of sentiment during the course of political campaigns. Several metropolitan

newspapers developed polls of public opinion, but these were of a scope too limited to give them full validity. Beginning in 1916, the *Literary Digest* instituted its series of polls, mailing out millions of ballots. These predicted the outcome of elections with great accuracy until that of 1932, when the poll predicted the re-election of Herbert Hoover. By 1944 there were a number of active polling agencies, the best-known of which were the Gallup poll, Crossley, Inc., the magazine *Fortune*, and the American Institute of Public Opinion. All conducted their work on the plan of scientific sampling.[51] Instead of the random mailing of millions of ballots, the question is asked of a relatively few thousand persons carefully selected according to vocation, income, sex, and other classifications to represent a properly weighted numerical cross section of the population. The polls obtained a high reputation for accuracy growing out of their predictions for several elections; but of course there is no means of measuring the accuracy of the numerous polls not followed by elections. The social and political importance of these polls is apparent; the Gallup poll, for instance, is published in more than seventy-five leading newspapers of the country each week. Executive and legislative policies can hardly fail to be considerably influenced by the results of the polls. In the course of a national political campaign the party shown consistently ahead may well gain strength from the desire of a certain percentage of the voters to be on the bandwagon. Harwood L. Childs suggested with good reason that such polls "may well be regarded as an activity vested with a public interest," and so subject to public regulation.

## *THE CONTROL OF PUBLIC OPINION*

THE AMERICAN IDEAL · George Washington, Thomas Jefferson, George Mason, and others of the Revolutionary leaders were fully awake to the vital relation of an untrammeled public opinion to the form of government which they had instituted. Freedom of the press, of speech, of religion, and of association were not only boons to the individual but implements of social progress. Forms of society and human institutions rise and in time are discarded in favor of others. Jefferson, at least, would have agreed that all life is a series of experiments whose outcomes point the way to a better adjustment to life. The freedoms of the Bill of Rights leave the way open to all persons for an examination of contemporary society, the suggestion and discussion of changes, and the propagation of fresh ideas. Normal public opinion in a free society might be defined as one resulting from the free interplay of ideas based on a maximum diffusion of facts and individual opinions. The standards professed by the newspaper and radio codes are based on this assumption. That a public opinion so generated might fall in quality below that of a highly selected circle of persons is beside the point.

[51] G. Gallup and S. F. Rae, *The Pulse of Democracy* (1940); H. L. Childs, op. cit. p. 60.

THE MEANS OF DISTORTION · The conditions for the growth of a representative public opinion in the United States are probably superior to those in any other state in the world, but they naturally fall short of the ideal. The chief obstacles are the leaders of special groups which normally have a vested interest in keeping things as they are. Chief among these are industrial, racial, nationalistic, and religious organizations. These attempt to stifle discussion by setting up taboos or discrediting their opponents. The chief means by which the development of a normal opinion may be thwarted are plain: the suppression of news, the distortion of admitted facts, and the putting forward of entirely false assertions. A public opinion growing out of an imperfect knowledge of the facts, out of a distortion of what actually happened, or out of things which never existed must partake of the weaknesses of its ingredients.

THE CONTROL OF PUBLIC OPINION · Reverence for public opinion was one of the accompaniments of the world-wide democratic advance in the nineteenth century. Public opinion was sometimes thought of as a sort of mystical emanation from the people, a wisdom superior to that of the individuals who made up society. The writings of Rousseau had identified public opinion with the "will of the people," and often the expression was heard "The voice of the people is the voice of God." The shock to many millions of people was therefore great when, at the time of the First World War, it was discovered that public opinion could be manufactured.[52] After the war, disclosures were freely made that high-powered organizations in all the principal warring countries had been engaged in the manufacture of opinion, within their respective countries and, so far as possible, in the neutral and rival countries as well. Indeed, this was recognized as a necessary complement of military action. During the two and a half years of the war before our entry, the United States was the scene of a gigantic contest waged by England and France to win our support and by Germany to keep us neutral.[53]

WHAT IS PROPAGANDA? · Alarmed at the apparent threat to the purity of public opinion, many students after the war made a close study of manufactured opinion. Various scholars brought forward definitions each reflecting a somewhat different point of view, some assuming that propaganda was a new invention of the human race. The thread running through all these is the concept of propaganda as a conscious attempt at mass persuasion, which perhaps takes the student far enough into the question.[54]

[52]"None of us begins to understand the consequences of propaganda, but it is no daring prophecy to say that the knowledge of how to create consent will alter every political calculation and modify every political premise."—W. Lippmann, op. cit., p. 248

[53]H. Lasswell, *Propaganda Technique in the World War* (1927).

[54]Cf. the definitions of Lasswell, op. cit.; L. W. Doob, *Propaganda, Its Psychology and Technique* (1935), pp. 72–81, 87, 89; H. L. Childs, op. cit. p. 88; F. E. Lumley, *The Propaganda Menace*, pp. 43, 44; C. J. Friedrich, "Education and Propaganda," *Atlantic Monthly* (June, 1937), Vol. 159, pp. 693–701.

Stated in this way, it is only another name for an activity as old as mankind. The Indian chief Pontiac, who organized the tribes against the whites at the close of the Revolutionary War, from all evidences that exist, was an expert propagandist, as was Mohammed a thousand years earlier. The stage had been set for attempts at the control of mass opinion—universal literacy and suffrage, means of rapid communication, an all-embracing postal system, and the widespread circulation of newspapers and magazines—when the First World War presented the occasion. Furthermore, the art of advertising, which is only another name for propaganda in the economic field, already had developed the technique.

SOURCES OF POLITICAL PROPAGANDA · The Democratic and Republican parties and government itself are the three most powerful agencies of propaganda in the United States today; next come the minor political parties. The primary purpose of the major parties is an immediate one, the winning of votes for the next election; for this purpose, they avow many principles, some of them conflicting, in order to persuade a maximum number of people. The minor parties champion one or more fundamental ideas with the purpose of ultimately winning the support of a majority of the people. Their drive is more constant and more intense than that of the major parties. A case in point is the Communist party, which, as a branch of the Third International of Moscow, employed the techniques developed from world-wide experience. A list of other powerful propaganda agencies would be almost identical with the great special interests often referred to as pressure groups. Among these are the United States Chamber of Commerce and local chambers, the trade associations, the labor unions, the National Grange, the American Legion, the churches and their affiliated societies, the National Education Association, the National Association for the Advancement of Colored People, and the many organizations of the professions.

THE PROPAGANDA MENACE · No one could seriously assert that the efforts of organized groups at mass persuasion are in general inimical to popular government.[55] The so-called propaganda menace is nothing more than the abuse of an essential device. Like many other evils, bad propaganda succeeds because it is directed at human weaknesses: a defective knowledge of the facts; the unanalytical, emotion-dominated, and lazy mind; cupidity; and exaggerated self-interest. Its direct evils may be classified under the three headings of concealment of the source, the methods employed, and large-scale operation. The potency of the propagandist's outgivings is multiplied if the propaganda appears to emanate from unbiased and highly respectable sources. Examples are the use of James Bryce's name, attached to the manufactured document on German atrocities in Belgium during the First World War; the nation-wide appeal for small contributions to a fund for sending milk through the British

[55]F. E. Lumley, op. cit. chap. v.

blockade for German babies, engineered by the German propaganda machine in the United States; the world-wide publicity given the Sacco-Vanzetti and Scottsboro trials, whatever their merits, by the Third (or Communist) International; the attempts of utility interests to place their literature in the schools as textbooks; in the economic field, the offer of "counsel" to investors by newspapers and radio, backed by interests with particular stocks to sell.

DECEPTIVE METHODS OF APPEAL · The art of propaganda has been subjected to intensive study, but little has been discovered that is newer than the practices of the earliest recorded civilizations. The tactics of the ancient medicine man and priest, and, in modern days, of the salesman and advertiser, and the attorney at a criminal trial, have been taken over, elaborated, and applied to mass political persuasion. The Institute for Propaganda Analysis has a sevenfold classification of propaganda devices which it offers for the guidance of the unwary. Among these are "name-calling," or the use of such names as "Bolshevik," "Red," "economic royalist," and "trouble-maker," by which the opposition is condemned without a critical examination of its views; "glittering generalities," or identifying proposals with generally accepted virtues, such as "freedom," "democracy," and "the right to work"; and "card-stacking," by which the propagandist stacks the cards against the truth, using false or incomplete statements of fact, and raising new issues to obscure the fundamental one.[56]

GOVERNMENT PROPAGANDA · Government-controlled propaganda, always a feature of European politics, reached its highest pitch of perfection in Germany, Italy, Russia, Spain, and Japan. There the totalitarian governments, with complete control of all methods of communication, were able to feed the populace news and fiction according to plan, and by the use of force to stifle all undesired public discussion. Each one maintains a central organ of control. In 1933, soon after coming to power, Hitler created a Ministry of Popular Enlightenment and Propaganda and placed Joseph Goebbels in charge.[57] A formidable organization was set up, with fifteen divisions and a branch in each of the twenty-two German states. The extent of its authority is shown by the names of some of its divisions: Propaganda Co-ordination, Music, Theater, Fine Arts, Literature, Home Press, Foreign Press, Films, Broadcasting, Tourist Traffic, Troops Entertainment. Working hand in hand with the Propaganda Ministry was another body headed by Goebbels, the Reich Chamber of Culture. This organization was designed to exert control over every cultural worker,

[56]H. D. Lasswell, *Propaganda Technique in the World War*, chap. viii; Institute for Propaganda Analysis, "How to Detect Propaganda," *Propaganda Analysis* (November, 1937), Vol. I, pp. 1–4. Other classifications have been made by L. W. Doob, op. cit. chap. viii; W. Albig, *Public Opinion*, chap. xviii; H. L. Childs, op. cit. pp. 89–98; C. W. Smith, op. cit. pp. 56–71.

[57]D. Sington and A. Weidenfeld, *The Goebbels Experiment* (1943), chaps. iv and v; H. L. Childs and J. B. Whitton (Eds.), *Propaganda by Short Wave* (1942), pp. 51–108.

including even the publishers, and the manufacturers of musical instruments and radio sets. Membership was made compulsory for all Germans in cultural occupations. They were organized into the seven chambers of Films, Music, Theater, Fine Arts, Literature, Broadcasting, and the Press. These two organizations together thoroughly controlled the intellectual and cultural diet supplied to the German people. Government propaganda and control of culture in Italy and Russia were on a comparable scale.

GOVERNMENT PROPAGANDA IN THE UNITED STATES · The United States Constitution, in peacetime, stands as a bar to a government monopoly or even censorship of news and opinion. In telling its story to the public, government must compete with all other interests in a free field. With the entrance of city, State, and Federal governments into the field of social services, the obligation arises to keep the people informed. Campaigns in behalf of public health and safety and of pure food and drugs are a normal part of government work. The State and Federal departments of agriculture entered the field shortly after the Civil War. During F. D. Roosevelt's first term, General Hugh Johnson, heading the National Industrial Recovery Administration, organized a propaganda campaign seldom equaled in size and intensity by any other agency. A Senate investigating committee in 1936 reported that during the year there were, from government offices in the District of Columbia alone, 4974 news releases, aggregating 7,139,457 copies, and that the mailing lists of these offices included a total of 2,280,963 names.[58] Five hundred and thirty-three films were available for public distribution. One hundred and forty-six persons were on the pay rolls exclusively for publicity work. The Government Printing Office normally distributes 70,000,000 copies of government publications, but during that year the number rose to 85,000,000.

PROPAGANDA IN A DEMOCRACY · Is propaganda a legitimate instrument of government in a democracy? The answer must be a limited Yes, since the people's interest and understanding are necessary to the success of its service functions.[59] The reports of administrative departments usually are largely factual and explanatory and are often prepared by competent scientists and writers. But the answer should be No for propaganda on controversial matters or policies not yet adopted by the legislature. Government propaganda seems to imply a lack of faith in popular government, in the ability of people to seek the truth on their own account and to know it when they find it. There is also always the lurking danger that the taxpayer's money may be used to perpetuate a selfish interest in power.

[58]Cedric Larson, "How Much Federal Publicity Is There?" *The Public Opinion Quarterly* (October, 1938), Vol. 2, pp. 636–644. In G. L. Bird and F. E. Merwin, op. cit. pp. 466–470.

[59]Walter Lippmann, in 1922, pointing to the inadequacy of the press and other existing means of news-gathering and transmission, argued for an independent scientific organization. "My conclusion is that public opinions must be organized for the press if they are to be sound, not by the press as is the case today." (*Public Opinion*, pp. 31, 32.) How the press might be induced to accept and publish the findings of such an organization was not disclosed.

That Congress sensed this danger is apparent from a statute of 1913 which forbids the use of public funds "for the compensation of any publicity expert unlesss specifically appropriated for that purpose."[60] Few such appropriations have been made, but the law has easily been circumvented by delegating the work of publicity to officers appointed under other names.

REGULATION OF PROPAGANDA · General government regulation of propaganda is just another name for government control of speech and the press. The right to attempt mass persuasion is a vital part of our established democratic system. Government regulation very properly has been directed chiefly toward keeping the channels of information and opinion free. Other legislation has aimed at aid for the electors in identifying the sources of propaganda, such as the State antilobbying laws and the Federal foreign-agents law, which require the registration of agents and lobbyists and the filing of information to show their true status. In the same interest have been investigations by legislative committees and by the Federal Trade Commission exposing behind-the-scene instigators of extensive "unbiased" campaigns of education. Obviously, the chief antidotes to antisocial propaganda are counterpropaganda and the well-informed citizen.

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## CHAPTER XI

# *Citizens' Political Associations*

WHY THE VOTERS ORGANIZE · The preceding chapters have shown how the privilege of voting has been conferred generally on all adult citizens of the United States; how, under our Constitution and laws, the ballot gives them powers vital to the liberties and fortunes of individuals, corporations, and private organizations and institutions of all kinds. They have shown also the deeply embedded sentiments and attitudes which have controlled the masses in their voting and the formation of public opinion. How do the seventy million potential voters contrive to use the immense power which lies in their hands? They all might conceivably go about their ordinary affairs three hundred and sixty-four days of the year and, without any previous consultation, take an hour off on the three hundred and sixty-fifth to look over the ballot and vote. But that is not what they do; the lone eagle is no more effective in politics than in commerce or the professions. Aristotle's characterization of man in the opening chapter of *The Politics* as a "political animal" and his denunciation of the solitary actor as the "tribeless, lawless, hearthless one," hold good for the voter.[1] To perform their political duties American voters have formed combinations of an intricacy comparable to those they have formed to manage and carry on their economic affairs. Voters combine in groups, clubs, and associations on a local, regional, or national scale. There are organizers, speakers, writers, and propagandists, job brokers, managers, canvassers, vote solicitors, and mere followers. The size of the task has produced a distinct vocation or profession, whose members are usually referred to as "politicians" or as being "in politics."[2] Associated with them in times of great activity are many part-time workers. As in industry, the vote-getting business calls for people of all talents, big and little, from the Jim Farley who can manage a national campaign to any Richard Roe who hands out candidates' cards near the voting booths. The term *statesman* is usually reserved for those whose vision and performance transcend localities and the immediate present.

GENERAL PURPOSE OF VOTERS' ORGANIZATION · The over-all objective of a voters' organization is control of the government. Such control is effected when the offices are filled with men of the organization's own choosing and policies are carried out which it has formulated. The or-

[1]Aristotle, *Politics* (Jowett trans., 1931), I, 2, p. 28.

[2]J. H. Wallis, *The Politician* (1935); P. H. Odegard and E. A. Helms, *American Politics* (1938), chaps. xiv-xvi.

ganization may be a small one, interested in only a single policy and a few offices, or it may be nation-wide in membership, with ambitions to fill all the offices and write the entire program. The national political party takes over the Federal government for a period of four years and operates it. Its men are in all the key positions, and its policies become the nation's policies. For the time being, the majority party may be said to be "the people." Its voice is the nearest to any authoritative voice which they may have. "Let the people rule" is the maxim of democracy, but the nearest approach to it is the rule of the major political party. The most promising alternative is rule by a coalition of small parties or factions; and downward steps from that point would mean the rule of one minority group backed by force. Incidentally to the one general purpose, the national political party performs half a dozen or more major political functions, which will be taken up at a later point.

## *CLASSES OF POLITICAL ASSOCIATIONS*

The associations of political significance in the United States may be classified under five headings: (1) those formed for a specific, or limited, purpose, (2) those with "good government" as a general objective; (3) those interested in research and the application of scientific methods to government; (4) those, of great number and variety, with only an incidental political purpose; and (5) political parties.

SPECIFIC, OR LIMITED, PURPOSE · Persons desiring action by government on a given subject may very well believe that an association devoted to that single purpose offers the best prospect of enlisting support. Of the political movements so engineered, many more have promptly withered away than have reached full stature. Local antislavery societies were organized before the end of the American Revolution. In 1832 the regional New England Antislavery Society was founded, followed the next year by the American Antislavery Society. In 1831 William Lloyd Garrison started his outspoken newspaper, the *Liberator*, which a decade or more later announced that the United States Constitution was a "covenant with death, and an agreement with hell." In 1840 the Liberty party was founded. The Republican party, which had absorbed most of the antislavery groups, won a national election in 1860 and was chiefly responsible for the later embodiment in the United States Constitution of the antislavery and racial-equality amendments. Two associations dating from 1869, and their successor the National American Woman Suffrage Association, organized in 1890, carried on for almost half a century a vigorous and able campaign for the enfranchisement of women by State and Federal law, ending with complete success in the Nineteenth Amendment (of 1920). Local organizations favoring the regulation or suppression of the traffic in intoxicating liquors had existed as far back as the 1820's; and they were very numerous

in the latter half of the nineteenth century, including those of local, State, and national scope. In 1893 was established the Ohio Anti-Saloon League, which two years later joined with others to form the national Anti-Saloon League. Under its skillful leadership a national sentiment was engendered which, step by step, brought the prohibition of the liquor traffic to various States and finally the adoption of the national prohibition amendment in 1920.[3]

These were outstanding associations which brought about alterations in our fundamental laws, but the list of the less conspicuous would be long and no less illuminating. Their individual proposals have found their way into innumerable political party platforms, laws of Congress, State statutes, and city ordinances. The Civil Liberties Union employs legal counsel to defend individuals in conspicuous instances of threats to the liberties guaranteed by the Constitution. The National Civil Service Reform League, instituted in 1881, with such men as Carl Schurz, Dorman E. Eaton, and George William Curtis as leaders, had as its objective the creation of a popular sentiment for a trained nonpolitical civil service for the national, State, and city governments; the national act of 1883 was largely due to its efforts. The Short Ballot Association has a program of fewer elective officials. The Single Tax League advocates the abolition of all taxes except one on the economic rent of land. The Proportional Representation League works for the adoption of a ballot providing for the single transferable vote. The affiliated Foreign Affairs Councils carry on programs of popular education with respect to American foreign relations.

GOOD-GOVERNMENT ASSOCIATIONS · Here are classed those voters' associations with the general objective of promoting efficient and honest government. Most of the larger cities have one or more, called variously "league," "union," or "association," which serve as watchdogs of the public interest. The most conspicuous and successful of those organized on a national scale is the League of Women Voters, whose independent existence dates from the adoption of the Nineteenth Amendment, in 1920. In 1938 it had thirty State leagues, with which were affiliated 533 locals. It fosters groups for the study of current civic questions, and adopts programs of action which it advocates before legislatures and administrative bodies.

RESEARCH AND TECHNICAL ORGANIZATIONS · Associations for the scientific study of problems of government have been on the scene since about 1900. The Institute of Public Administration of New York City, dating from 1906, has carried forward a large number of studies in the fields of public finance, personnel administration, legislative organization, and other subjects connected with the administration of public affairs. These associations have conducted surveys of city and State governments and Federal bureaus, which have served as the basis of reform legislation. The National

[3] P. H. Odegard, *Pressure Politics* (1928), chap. vi.

Institute of Public Administration of Washington, D.C., has covered the same general field, but with a greater emphasis on Federal administration. The Brookings Institution of the same city likewise has made many scientific studies of governmental and economic problems, later publicizing its findings for the benefit of the general public. Research bureaus in a number of the larger cities and in some universities have trained their workers and educated the supporting membership, thus serving as focal points of public opinion with respect to technical problems of government. The organizations which regularly or occasionally undertake pieces of research and publicize them must number several hundred.

ASSOCIATIONS WITH INCIDENTAL POLITICAL PURPOSES · In this category fall by far the most numerous and potent associations short of the political parties themselves.[4] Man's proclivity to organize exists in all walks of life, whether in the utilitarian or in the cultural fields; and rare indeed is the organization which does not at some time want something from the government. The most numerous associations of this sort are found in the economic field: trade, manufacturing, commerce, finance, labor, and agriculture; but the professions, women, the churches, and the nationalities are well represented. Rich, middle-class, and poor all have organizations which attempt on occasion to sway the government in some particular. Only a few of the more powerful may be noted here.

LABOR AND AGRICULTURE · In the number of potential voters involved the farm and labor associations take the lead. Every farm specialty has its organizations: livestock, potatoes, cotton, citrus fruit, wheat, and so on. Three great inclusive farm organizations, the National Grange, the American Farm Bureau Federation, and the National Council of Farm Co-operatives, in 1942 had a total membership of 4,300,000 and through their journals reached many more. The craft labor unions, organized under the American Federation of Labor in 1943, claimed a total of 6,564,141 members; its rival, the Congress of Industrial Organizations, composed of industrial unions chiefly in the fields of mining, automobile manufacturing, and steel, a membership of 5,285,000.[5] The four railway brotherhoods, independent of these two federations, comprise the best-managed and most highly disciplined labor unions in the United States. All wield power in the political field on occasions when they believe their interests to be at stake.

THE PAC · The Political Action Committee of the Congress of Industrial Organizations (CIO) grew out of a meeting of its executive committee and about two hundred leaders of its constituent labor organiza-

[4] A list of the more important associations of national scope is given in E. P. Herring, *Group Representation before Congress* (1932), pp. 276–287.

[5] *World Almanac* (1944), p. 140; C. J. Judkins, "Trade and Professional Associations in the United States," in Bureau of Foreign and Domestic Commerce, Industrial Series No. 3 (1942), p. 4.

tions in March, 1943.[6] In the July following, an organization was effected headed by a committee of six union executives with Sidney Hillman as chairman. Its primary objective was the re-election of President Roosevelt and of members of Congress favorable to organized labor. A campaign to ensure the full registration of labor-union voters was undertaken, for which the existing machinery of the unions and the shop organizations, with their files of membership, were admirably adapted. In some of the large industrial centers their success seems to have exceeded the maximum accomplishments of the Democratic and Republican party machines in their best days. At the Democratic national convention, in June, 1944, the PAC worked for the renomination of Henry A. Wallace for the Vice-Presidency; and when he lost, it successfully backed Senator Harry S. Truman as against James F. Byrnes. The PAC participated vigorously in the Presidential campaign by the distribution of literature and handbills, the enlistment of voters, and getting out the vote on election day. To it are undoubtedly due the defeat in the party primaries of some candidates for Congress and the increase of the Democratic strength in the House of Representatives. Since the PAC worked chiefly in the large industrial and doubtful States, some competent observers give it credit for the margin of Roosevelt's victory in the Electoral College.

Some interesting problems were raised by the venture of organized labor into a political campaign. Federal law prohibits both corporations and labor unions from making campaign contributions. By June, 1944, the unions had contributed $675,000 to the PAC "educational" fund. The PAC as originally organized was a committee of the CIO, and so would fall under the prohibitions of the law. To meet the situation, a formal separation was made, membership opened to any persons outside the unions, and the old organization continued under the name of National Citizens' Political Action Committee. A goal of $1,500,000 for the campaign was set. The outcome was a demonstration of the weakness of the law; for under the precedent the way was left open for corporations to join in forming "left hand" organizations of their stockholders for campaign purposes. It may be evidence also of the unsound principle of any law which seeks to restrain the legitimate activities of citizens, whether corporations or organized labor, in that most characteristic of the democratic processes, the competition for public offices.

RACIAL AND NATIONALISTIC ASSOCIATIONS · The very numerous racial and nationalistic organizations owe their origin chiefly to social, fraternal, and cultural motives. Up to the First World War the German-American Alliance was the largest and most powerful of these, but at that time it was disbanded. The various Polish national organizations have in the neighborhood of 750,000 members, of which the Polish National Alliance, with

[6] Beulah Amidon, "Labor in Politics," *Survey Graphic* (September, 1944), Vol. XXXIII, pp. 390–393, 398–399.

branches in twenty-six of the States, has 275,000. The Order of the Sons of Italy was organized in 1901 to bring together in one order all Italian societies. In 1925 it comprised more than one thousand lodges, with a membership of several hundred thousand, which further were grouped into seventeen "grand lodges."[7] The Ancient Order of Hibernians, with a membership of about 100,000, is the strongest of the Irish societies. The order of B'nai B'rith is one of a half dozen of the sizable Jewish organizations national in scope. The Japanese are highly organized, the Japanese Association, a federation of local chapters, being the chief one of political significance.[8] The League of United Latin-American Citizens, composed chiefly of Mexicans, attempts to arouse a political consciousness among its members and to show them their obligations as American citizens. The National Association for the Advancement of Colored People (NAACP) is the leading organization of America's largest minority group.[9] It combats legislation unfavorable to the race and, like the Civil Liberties Union, lends legal aid when fundamental rights are threatened. In national politics these organizations play a considerable part and in the various localities often a very great part, determining the elections for mayor and councilmen. They work within the party organizations, however, rather than as independent political bodies.

ORGANIZATIONS OF THE PROFESSIONS · Every profession and near profession has a national organization and, where the membership is sufficient, State and local organizations. While their purposes are primarily social and for professional and technical betterment, these organizations suddenly galvanize into active political units when unfavorable legislation is in the offing. Prominent among them are the American Bar Association, of 27,000 members, comprising about 20 per cent of the lawyers of the country; the American Medical Association, of 91,792 members, comprising over 61 per cent of all physicians and surgeons; the American Bankers' Association; the American Chemical Society; and the American Society of Certified Public Accountants. Engineers have their American Society of Civil Engineers and four other national organizations.[10] The most highly developed organization of teachers is the National Education Association. Its membership is divided among seventeen departments representing the various kinds of work, for example, Class Room Teachers, Superintendence, and Science Instruction. Its well-staffed national headquarters operates through several divisions. Biennial national assemblies are held, composed of delegates from the localities, at which papers are read and declarations of national policy adopted. A large number of publications, such as the annual proceedings, yearbooks, departmental

[7]F. J. Brown and J. S. Rouček, *Our Racial and National Minorities* (1937), pp. 224, 380–382.
[8]Ibid. pp. 488–491.
[9]Ibid. pp. 64, 65.
[10]E. P. Herring, op. cit. chap. x.

bulletins, committee reports, special studies, and the *Journal*, serve to educate and unify the membership. An important item in its political program is the establishment of a national department of education with its head in the President's cabinet.[11] The American Council on Education is a federation of a large number of educational institutions and societies. College and university teachers comprise also a majority of the membership in most of the scientific and learned societies.

THE CHURCHES · Religious associations are most apt to enter the political field when questions affecting moral views or established dogmas arise. No one who has served in a legislative assembly is unaware of their pressure. Typical questions which evoke their activity are those involving gambling, the traffic in intoxicating liquors, Sunday observance, marriage and divorce, the white-slave traffic, the limitation of births, the reading of the Bible in the public schools, vaccination, and the status of the parochial schools. The Anti-Saloon League drew its chief support from the Protestant churches. The Federal Council of the Churches of Christ in America, representing over twenty Protestant sects, and the National Catholic Welfare Conference are examples of associations, recruited from religious groups, which exert great political power.[12]

ASSOCIATIONS RECRUITED FROM INDUSTRY, TRADE, AND COMMERCE · Among the associations recruited from industry, trade, and commerce is found the greatest number of citizens' organizations. Those comprising the producers and distributors of a commodity or a service are called trade associations. Those of a national or international scope, according to the Department of Commerce, numbered 1500 in 1920. Pendleton Herring stated "they are found in every conceivable trade and business."[13] There are the Fertilizer Association and the Flavor Extract Manufacturers' Association. There are the National Onion Association and the National Gas Association, the National Gunners' Association and the Tap and Die Institute. Umbrellas and macaroni, soapstone and granite, silk and potatoes, pickles and ivory, oysters and radio, hickory handles and red-polled cattle: all these and myriads more have their national, international, interstate, world, American, or United States league, association, society, or federation. The White Pine Bureau, the American Hat Band Manufacturers, the Shoe League, the Pet Dealers' Association, the Pig Iron Association, and the Surgical Trade Association are all fragments of the astounding mosaic that depicts America organized. Among the more powerful are the United States Brewers' Association, the National Retail

[11]E. P. Herring, op. cit. pp. 172–178.

[12]Ibid. chap. xii.

[13]Ibid. pp. 96–100. Secretary of Commerce Herbert Hoover remarked to a conference in 1924, "You would be a good deal astonished if you looked over the great mass of legislation introduced into Congress, which would lead into business, to find how much of it comes up from the business world." (Quoted by Herring, op. cit. p. 100, from *Proceedings of the Conference on Government and Industry, Washington, D.C.* (December 10, 11, 1925), pp. 44, 45)

Dry Goods Association, the National Association of Manufacturers, the American Newspaper Publishers Association, the Tobacco Merchants' Association, and the Sugar Institute of America. These now seem to be indispensable features of American economic life. They collect statistics, establish codes of trade ethics, study employee relations, and attempt to simplify and standardize manufacturing processes, to mention only a few of their functions. The most comprehensive of all is the Chamber of Commerce of the United States, with headquarters in Washington, which is a federation of local chambers of commerce and of trade associations. Its membership in 1925 amounted to 1556, which, in turn, represented 853,616 corporations, firms, and individuals. In addition there were 18,518 associate members, comprising business firms and specific industries organized into trade associations. Many of the organizations of this association maintain strong public-relations bureaus, and rare is the one which keeps entirely out of politics.[14]

ROLE OF THE CITIZEN ASSOCIATIONS · It is plain that the American citizen does not perform his political duties as a solitary individual. Except in rare instances, he associates himself with others for that purpose. The American electorate speaks chiefly not through its individuals but through organized groups. Taken together, these groups represent the activated part of American society, that concerned with the growing of crops, the production of goods, with trade, commerce, finance, professional services, the fine arts, and the training of the young.

## *POLITICAL PARTIES*

Since the administration of George Washington the office of President and the two houses of Congress have been under the control of one or the other of two great rival voters' organizations nation-wide in the scope of their membership. This is a phenomenon in sharp contrast to the states of early modern times, in which the responsibility for the operations of the government normally rested in a hereditary ruling house and its friends or in one small dominant class. In the 1940 election 49,548,221 persons, out of a total of 49,815,312 voting, cast their votes for the Presidential candidates of these two parties. Fewer than 300,000 scattered their votes, chiefly among the candidates of four other parties, the Socialist, the Socialist-Labor, the Prohibitionist, and the Communist.[15] All these were alike in having a program, a central organization, a widely spread membership, and an ambition to capture through the ballot the chief instrumentalities of government. The major political party is easily the largest voters' association within the state, and the only one capable of representing in any fair measure the preponderant opinion and force of the electorate. The various associations described above are its lifeblood. They furnish it membership, the motives for political contest, and the materials from which

[14]Ibid. chap. v. [15]*World Almanac* (1944), p. 428.

civic issues are drawn. But not one or any imaginable combination of them would be strong enough to capture and operate the machinery of the nation's government.

NATURE OF THE POLITICAL PARTY · The political party defies simple definition. Burke's oft-quoted one is "a body of men united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed."[16] Only a brief glance at the American political party will show its partial noncomformity to this test. In the first place, it is composed of unhomogeneous groups holding widely different views. The differences between the Democratic party of Virginia and that of the great cities of the Northeast, and between the Republican party of Pennsylvania and that of Minnesota or Kansas, are wide and deep. Burke's definition very nearly fits the party at the time of its birth. The Jeffersonian party of 1800 possessed some principles general to its membership, and so did the Republican party of 1856 and 1860. But parties do not disband when their principles have been made into law. The old organization holds over into the succeeding generations, perhaps rendering only lip service to the principles on which the party originally was founded. Small political associations, such as the ones described above, characteristically have a set of principles, for this is the main reason for their existence; but they have no hope of themselves capturing the government. Some other binding force than Burke's "common principles" must be found for the millions who make up the major political parties.

Indeed, the lack of principles has brought the parties into disrepute with many thoughtful men. Since the Civil War, it is said, they have been engaged only in sham battles, with the sole purpose of controlling the offices. Writing in 1910, James Bryce said that the great parties "were like two bottles. Each bore a label denoting the kind of liquor it contained, but each was empty."

AS TRADITIONAL AND GOING CONCERNS · If without common distinguishing principles, then what cohesive element have the parties? Looked at analytically, they will be seen to have a variety of ties. Sentiment and emotion play an important part. There is the name, which itself rouses the memories of ancient battles. Each party has its array of "saints" whose virtues contribute permanently to its storehouse of good will. The Democrats may draw upon the good works of Jefferson, Jackson, Grover Cleveland, and Woodrow Wilson; the Republicans, upon the good works of Washington, Hamilton, Lincoln, and Theodore Roosevelt; and there are categories of lesser "saints" of great potency within the respective States.

[16] E. Burke, *Works* (1770), Vol. I, p. 530. Sir Henry Maine, in his *Popular Government* (1886 ed.), p. 101, laid less emphasis on the rational character of the political party. "Party is probably nothing more than a survival and a consequence of the primitive combativeness of mankind. It is war without the city transmuted into war within the city, but mitigated in the process. The best historical justification which can be offered for it is that it has often enabled portions of the nation, who would otherwise be armed enemies, to be only factions."

Each party is able to point to its achievements as landmarks in the progress of the nation, such as the calling of the masses of the people to power under Jefferson and Jackson, and the freeing of the slaves and the saving of the Union under Lincoln. Family and sectional tradition play an important part. Furthermore, political parties, like all other social institutions, are perpetuated by the momentum which they have acquired. They are going concerns with powerful internal organizations which have an interest in maintaining themselves. If issues are lacking, these organizations will find some, or what purport to be issues.

As Federations of Interests · In order to remain strong or to exist, a political party must somehow reconcile the conflicting demands of the various interest groups of the nation: wheat, corn, and cotton farmers; livestock men; the miners of coal, silver, and copper; the manufacturers of this and that specialty; the bankers; the utility concerns; and labor and management in general. No interest can get all it wants from any party. The party is best described as a federation of the various national interests, with the obligation to aid each so far as it can. Whether in a given case to satisfy, to appease, or entirely to deny is a matter for expert party management. The balance of power between the two major parties may quickly be reversed by the detachment of an interest bloc from one and its adherence to the other. Holcombe, in his illuminating statistical study *The Political Parties of Today*,[17] and Beard, in his *Economic Foundations of Jeffersonian Democracy*, showed how the various economic, sectional, and other interests in all generations have attached themselves to political parties in order to secure what they wished from government.[18] The Democratic party of the second Roosevelt put through programs dictated by its strong labor and farm elements, while business, banking, manufacturing, and employers and managers in general underwent drastic regulation. Viewed realistically, then, the political party is not primarily an association of like-minded individuals nor a collection of "empty bottles" but a federation of interests for mutual aid, masquerading in quaint garments under an ancient and honored name.

## *THE FUNCTIONS OF POLITICAL PARTIES*

The activities of our political parties doubtless would impress a visitor from a strange land as essentially a grand and concerted effort to gain control of the offices of government.[19] For this objective the parties regiment their forces, choose their captains, hang out their banners, chant their

[17]A. N. Holcombe, *The Political Parties of Today* (1924), chap. iii.

[18]C. A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), chap. vii. See also P. H. Odegard and E. A. Helms, op. cit. chaps. viii–x.

[19]On the functions of political parties cf. C. E. Merriam and H. F. Gosnell, *The American Party System* (1940), chap. xix; E. M. Sait, *American Parties and Elections* (1939), chap. viii; H. R. Bruce, *American Parties and Politics* (1927), chap. ii.

war cries, and in full panoply sally forth to the contest. All other social functions which the parties perform are by-products of the war for the one objective. Capturing and controlling 800,000 elective offices and the key appointive positions which go with them is a large task and, of course, with our loosely constructed and federated form of government, quite beyond the power of any one party. One-party control of the Federal government and of a majority of the State and local governments, however, is the common result of the quadrennial elections and is sufficient to ensure that party a general dominance of the governmental problems in that period. The party function of filling offices, and the machinery used for that purpose, will be considered in subsequent chapters; the other party functions, at this point.

THE OPERATION OF THE GOVERNMENT · The political party which wins a general election is entrusted for the time with the task of governing the country; all other party functions are merely phases of this one. The party officers, whether in public office or not, have quasi-public functions. Because of their intimate contacts with the duly installed officers of government, what the chairman of the national committee and the chairmen of the State and county central committees think and do is of concern to the entire public. It is the task of the President, governors, and other party leaders to plan programs of legislation, and of the cabinet and the board and commission heads to plan and carry out in their respective fields administrative policies consistent with the general scheme of the party. The political party, resting on the broad base of universal suffrage, must step up to the throne and discharge those duties which in earlier times were undertaken by the monarch and his privy council, and which in some countries today are performed by the dictator and his inner circle.[20] Failure so to do results promptly in the substitution of another party and its leaders; for the government will go on.

OPPOSITION TO AND CRITICISM OF THE GOVERNMENT · In free societies the party out of power is relegated to the task of criticizing the acts of the party in power and of offering opposition to such of its policies as it deems bad. In Great Britain these services are thought of such value that the party out of power is dignified with the term "His Majesty's Opposition," and its leader is paid a salary from the treasury.[21] Four contemporary states operating under dictatorships, each with a closely knitted set of doctrines,—Russia, with Communism; Germany, with Nazism; Italy, with Fascism; and Japan, a military autocracy,— have permitted no opposition party.[22] The policy has been justified on various grounds. Par-

[20] W. Wilson, *Constitutional Government in the United States* (1908), pp. 216–222.

[21] A. L. Lowell, *Government of England* (1912), Vol. II, p. 437. In Canada the leader of the opposition is paid the same salary as that given the ministers. Cf. E. M. Sait, op. cit. p. 218.

[22] H. A. Steiner, *Government in Fascist Italy* (1938), chap. iv; A. L. Strong, *The New Soviet Constitution* (1937), pp. 85–90. Citizens of the U.S.S.R. are permitted to organize in trade unions,

ticularly in Russia it is argued that society must be made over, the old contaminating doctrines and views must be eradicated, and perhaps an entirely new generation must come on the scene before the people will be able to understand clearly that their own self-interest lies in Communism. Thereafter all coercion on the part of government may safely be removed. Somewhat the same argument was put forward in Germany and in Italy; but more emphasis was placed on the duty of the abler elements of society to rule. Furthermore, it was alleged that those who opposed the ruling regime were evil-minded to a degree that made them unworthy of toleration. Men fired with enthusiasm for a cause, whether political or religious, are apt to believe that unbelievers should be brushed aside or entirely suppressed; and this is particularly true with respect to political opposition during wartime or other emergency.

In the United States ample experience both national and local has shown few, if any, instances in which free criticism has ill served the public interest, but many in which, in the light of later experience, the people and the government would have been saved grievous evils had an opposition spoken out courageously. The organized opposition of a political party is simply carrying into the realm of government the idea of free competition which supposedly dominates the American economic system. An enforced planned economy implies that someone possesses a knowledge of economics of such completeness and finality that it is in no need of reinforcement from that gained in a free field of experimentation, while a planned political organization implies the existence of a body of knowledge and a philosophy of similar sufficiency. Except for some moderation in the Civil War and the two world wars, opposition political parties in this country have steadily carried on a criticism of the conduct of affairs which has served to keep the administration alert and free from the worst abuses. The most conspicuous failures of government in the great cities have coincided with the breakdown of an active opposition party. Except for scattered periods of vigor, the Republican organization of New York City has been subservient to the Tammany machine, individual leaders often profiting at the hands of opponents; and the same relations have long existed between the two parties in Philadelphia and Kansas City, Missouri, with the public in all cases the loser.

GIVING OF UNITY AND EFFECTIVENESS TO THE GOVERNMENT · The Federal, all State, and a majority of the municipal governments of the country are fashioned on the plan of separation of powers, of checks and balances.

co-operative associations, and cultural and professional societies; but "the most active and politically conscious citizens from the ranks of the working class and other strata of the working people unite in the All-Union Communist party." (*Constitution of the Union of Soviet Socialist Republics*, Art. 126.) The right to nominate candidates for public office is restricted to "organizations and societies of the working people, Communist-party organizations, trade unions, cooperatives, organizations of youth, cultural societies." (Art. 142)

Since it is natural that no organization can function without the co-ordination of its parts, some force outside these governments had to be found to give that unity which the basic structures lacked. The political party supplied that defect, and it is doubtful whether the plan of the Fathers would be workable without it. There are no legal ties between the President of the United States and the governor of a State, but party leadership gives the President a political superiority which the law denies. During the Civil War several of the State governors were the mainstays of the Lincoln administration, raising and equipping troops, and gathering funds and supplies; and President Franklin D. Roosevelt leaned heavily on the governors, conspicuously so on a few. The Federal government's venture into the field of relief called for close co-operation with various State and municipal authorities for which there was little or no legal basis. Without the party system the Federal electoral system would be unworkable; perhaps no President or Vice-President could be chosen except in Congress. A powerful national party leadership may be efficacious to whip into line governors, mayors, and other officials, if for no other reason than that it presents a solid front against the common enemy in the contest for offices.

RAISING OF ISSUES · An examination of how the American political parties and their principles have developed, to be conducted in the following chapter, will show that political associations smaller than the major parties have carried the chief responsibility for the raising of issues, whereas the major party has reshaped and modified these issues so that they might command a majority vote of the people.[23] By this process raw issues pass through a seasoning stage and finally come to the arsenal of the grand party as fully developed policies. Without the entire machinery of the political associations (clubs, pressure groups, third and major parties) it is difficult to see how any program approaching a consensus of popular desires could be wrought. Both the party in power and the one out of power have a delicate task in choosing the appropriate issues. The first must choose a legislative program designed to ensure re-election; the latter must raise such issues in criticism of those in power as will bring about their ousting. "Feelers," "trial balloons," "flying kites," and "straw men" are tried, and an "ear kept to the grass roots." These expedients may not appeal to the person of do-or-die principle, but are effective in practice and consonant with democracy. Thus in 1900, because of the recent acquisition of the Spanish possessions, Bryan attempted to lure the voters with charges of Republican imperialism and dollar diplomacy.[24] Woodrow Wilson in 1912 made an issue of Republican fostering of monopolies and favors to big business,[25] and eight years later the Republicans, then out of power, attempted to befuddle the voters by supporting an "association" of nations

[23]H. Laski, *Grammar of Politics* (1925), p. 314.
[24]K. H. Porter, *National Party Platforms*, pp. 211, 212.
[25]W. Wilson, *The New Freedom* (1913), chap. i.

as against a "league." Franklin D. Roosevelt, in 1932, flew the economy kite by pointing to the treasury deficits, the construction of large government buildings, and the setting up of expensive boards and commissions. Four years later the Republicans sought to find issues in the President's attitude toward the Constitution and the courts, the augmentation of his personal power, and the great rise in public indebtedness, none of which caught enough wind to make the kite sail high.[26] Some critics often have accused the parties of avoiding issues rather than finding them; others, of searching for issues when there are none. The Progressive-party platform of 1912 gave the "deliberate betrayal of its trust by the Republican party" and the "fatal incapacity of the Democratic party to deal with the new issues of the time" as the chief causes for its organization.[27] The truth seems to be that by fumbling and chance the parties over the years have performed not badly in bringing vital issues before the court of public opinion.

FURNISHING A CONTINUING RESPONSIBILITY FOR GOVERNMENT · In showing its wares one of the old parties can point to the same advantages which an ancient commercial firm of honorable reputation enjoys.[28] Both have a past to live up to, and both, hoping for long-continued years of prosperity, must offer only such goods as they are willing to accept responsibility for. Past deeds of the concern and its distinguished leaders inure to the benefit of the present managers. Democrats will never exhaust the credits laid up by Thomas Jefferson, although his dogma of laissez faire as applied to economics has been deposited in the archives; and Republicans will long continue to draw upon the virtues of Abraham Lincoln although its later zeal for big business may altogether eclipse the vision of equality for the Negroes. Parties must continue also to pay for their mistakes; for the evil that politicians do lives after them. The party therefore stands somewhat as a bondsman for the performances of its representatives. Historically it cannot evade this responsibility. It offers something which an outraged public can punish or a pleased public reward. One of the difficulties with nonpartisan elections in local governments is that the penalties for bad performance can be visited only upon the few individuals who were in office at the time. For well on to three generations the Democratic party reaped the rewards of a favorable public judgment because Jefferson had called the people to power; and for a like period the Republican party reaped similar rewards because of its emancipation and union policies. The Democratic party again will either prosper or suffer greatly in the decades to come, depending on the final popular judgment of its marked innovations since coming to power.

[26]R. V. Peel and T. C. Donnelly, *The 1932 Campaign* (1935), pp. 132–133.

[27]Referring to the names *Republican* and *Democrat*, Samuel Blythe wrote in the *Saturday Evening Post*, March 25, 1922, "They are labels on empty bottles, signs on untenanted houses, cloaks that cover but do not conceal the skeletons beneath them."

[28]W. B. Munro, *The Government of the United States* (3d ed., 1935), p. 158.

THE ENLISTMENT AND EDUCATION OF VOTERS · If a party is to remain strong, it must carry on a continuous campaign of enlistment. It must receive its due share of the annual crop of young people just becoming twenty-one, and of the newly naturalized citizens.[29] The job of enlistment is carried on at the bottom of the great organization; the material for the education of the voters comes from the top. Precinct and ward workers acquainted with the neighborhoods canvass the newcomers for party membership. In the large cities the district headquarters are the centers of evangelism. George W. Plunkitt, the Tammany leader, related how he gave the youth a chance to display their talents at party clubs and picnics. "I rope them all in," he remarked, "by givin' them opportunities to show themselves off. I don't trouble them with political arguments."[30] The local party organizations take an active part in encouraging the immigrants to become naturalized. With New York City the funnel through which a large percentage of them entered this country, Tammany started early to do this as one of its routine duties. Judge Barnard, one of the Tweed Ring, is said to have naturalized 10,093 in a stretch of fourteen days shortly before an election.

Education of the voters by the parties is carried on at different levels. Much of what is done is little more than propaganda, and that of a crude caliber. Some voters' schools are devoted entirely to teaching how to mark the ballot.[31] A veteran ward worker in Cleveland has described how Negroes, recently arrived from the South and mostly illiterate, were taken through these schools by shifts and taught to mark ballots simply by pictorial memory and with a lower percentage of ballot-spoiling than in the white literate groups. On the other hand, a considerable proportion of the tons of literature of a Presidential campaign year is of a relatively high quality; radio campaign speeches must needs maintain a fairly high level in content and dignity. Newspaper and magazine articles and editorials contain much historical and technical political information. Every four years, at least, no citizen of normal sensibilities can escape the conflicting currents of an atmosphere supercharged with political ideas. The political parties are thus the instrumentalities for performing a type of civic education which no others would attempt.

INTERMEDIATION BETWEEN CITIZEN AND GOVERNMENT · Administering the government consists in the enforcement of the laws. But laws, since they are made for large numbers of people, are necessarily rigid and cause hardships in individual cases. Bureaucrats often find it easiest to apply rules as they stand, without variation. Leaders of the political party which has captured the government and filled the offices are often able to help in making adjustments, by softening the rigor of the laws' operation or

[29] E. P. Herring, *The Politics of Democracy* (1940), chaps. xvii–xix.
[30] W. L. Riordin, *Plunkitt of Tammany Hall* (1905), pp. 47–48.
[31] H. F. Gosnell, *Getting Out the Vote* (1927), chap. iv.

by having them set aside entirely. The politician, therefore, acting through the administrative officers, may exert something of an equity power, or power of discretion, resembling that of a judge. The power of the boss and the machine is in no small degree based on the function of performing this kind of service for individuals. Favoritism in the enforcement of the laws is frequent and sometimes amounts to out-and-out corruption. No departmental complaint bureau, however, has been found entirely to equal the politician in ability to cut through the procrastination, the red tape, and the impersonality of government.

SUMMARY · Americans, for the greater part, exert their control over the government not as individuals but as organized groups. There are many small organizations devoted entirely to political matters; but of much greater weight is the veritable maze of clubs, societies, and associations which represent the vital forces in American life, none of which is beyond taking time off to have its say in the programs of lawmaking or administration. Standing at the top and, in fact, encompassing all others are the political parties: two major and a variable number of third parties. The one which wins the election writes the laws and operates the administration; the others stand by as critics until the next contest. How the present political parties came into being, and the character of their traditional principles, are the subjects of the next chapter.

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CHAPTER XII

# *The Development of Political Parties*

The American political parties of today and the association, with each, of certain political principles are due to circumstances of the historic past. Clashes of interests brought into being the first parties and the statements of principles upon which each purported to stand. Some of these were mere rationalizations, to justify what had been done; others were maxims which seemed to be of enduring value and which became attached to the respective parties. In its opening years the new republic was fortunate in an endowment of gifted and high-minded leaders. Some, like Alexander Hamilton, Thomas Jefferson, George Washington, and James Madison, were conspicuous for excellence both in thought and in action, while others were outstanding in one or the other. Standing at the fountainhead of American national events, Hamilton and Jefferson, respectively, were able to enunciate policies and state principles which, broadly speaking, marked a division that ever since has existed in American political thinking. After the generation of these two men had passed from the scene, no one party was exclusively the bearer of the philosophy of either. Nevertheless, it is the accepted practice to ascribe to the Hamiltonian philosophy the Federalist, National Republican, Whig, and Republican succession of parties; and to the ideals of Jefferson the Anti-Federalist, Democratic-Republican, and Democratic parties. This is not to say that it is uncommon for a wing of one of the parties or even its leaders and platform to be found expressing fervent devotion to principles hallowed by the celebrated leader of the opposition.

FEDERALIST AND ANTI-FEDERALIST, 1787–1796 · The first political division of Americans after independence was between those who had favored separation from England and those who had not, usually called, respectively, the Whigs and the Tories. The next was the one arising from the cleavage in the Philadelphia constitutional convention of 1787 between the representatives of the small and the large States: Luther Martin of Maryland, Roger Sherman of Connecticut, William Paterson of New Jersey, and John Dickinson of Delaware being conspicuous among the former, and James Madison of Virginia, Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts among the latter. There was also an element of the liberal-conservative division in the line-up; but the campaign among the people for the adoption of the Constitution brought out two parties: that favoring it, the Federalist, and that opposing, the Anti-Federalist.

Washington was unanimously chosen President by electors who had been chosen by the State legislatures.[1]

HAMILTON AND THE FEDERALISTS · The policies of the Washington administration and the principles of the Federalist party were molded largely by the brilliant Secretary of the Treasury, Alexander Hamilton.[2] The greatest good to mankind, he thought, was to be found in a stable political order characterized by obedience to law. To establish such a regime in the United States, he would follow a program designed to attach to its government the classes of wealth and social prestige and the leaders in industry, finance, and commerce. The specific policies which he advocated and which largely were adopted included the establishment of the public credit on a firm basis by the assumption of the State debts and the funding of the entire Federal debt at par; the strengthening of the Federal government at the expense of the States, to which the establishment of a national bank and the levying of excise taxes were means; the provision of a sound currency based on gold and silver; and the encouragement of industries and commerce by means of a protective tariff and navigation laws. Hamilton's own instincts and convictions were basically aristocratic, although he recognized that these were out of line with American public sentiment. With Madison he shared the chief responsibility for the calling of the Philadelphia convention and likewise for the *Federalist* essays, written to support the adoption of the Constitution, which a critical historian has characterized as "among the few great treatises on government ever published by political philosophers or statesmen."[3] Other distinct contributions to the Federalist philosophy were made by John Adams, of Massachusetts, the second President of the United States.

JEFFERSON AND THE DEMOCRATIC-REPUBLICANS, 1796–1824 · Pitted against Hamilton was a person no less brilliant and much more versatile, Thomas Jefferson of Virginia.[4] In addition, he better understood and sympathized with the feelings of the masses. A competent student has called him "the most resourceful politician of the time." Like his chief antagonist an excellent student of history and social philosophy, he had the advantage of a considerable period of residence in France, where he had come in contact with the ideas of the French Revolution. The opposition bloc in Congress soon came to look to Secretary of State Jefferson as its leader. In a letter written in 1792 Jefferson referred to this group as the "Republican party," distinguishing it from the Anti-Federalists, whose co-operation it normally had. In 1793 Jefferson resigned from the Wash-

[1]E. E. Robinson, *The Evolution of American Political Parties* (1924), chaps. ii, iii.

[2]Ibid. chap. iv; H. J. Ford, *The Rise and Growth of American Politics* (1898), pp. 81–89; C. G. Bowers, *Jefferson and Hamilton* (1925), chap. iii.

[3]A. C. McLaughlin, *A Constitutional History of the United States* (1935), pp. 208–209.

[4]C. A. Beard, *Economic Origins of Jeffersonial Democracy* (1915); C. G. Bowers, op. cit. chap. vii; F. R. Kent, *The Democratic Party: A History* (1928), chap. ii.

ington cabinet, and during the next three years and his term as Vice-President devoted himself to the organization of the new party, which was accomplished chiefly by letter-writing and by personal contacts with leaders. The Presidential electors were still mostly chosen by the State legislatures, which, however, were chosen in most States on a fairly broad suffrage. In 1800 the party of Jefferson defeated that of Adams and began a period of dominance which was little interrupted until the Civil War.

What were the principles on which it had so successfully been built? Writing years later, Jefferson thus summarized them:[5]

> [The object of the Republican party was] to maintain the will of the majority of the convention [of 1787] and of the people themselves. We believed, with them, that man was a rational animal, endowed by nature with rights and with an innate sense of justice; and that he could be restrained from wrong and protected in right by moderate powers, confided to persons of his own choice and led to their duties by dependence on his own will. . . . We believed that men, enjoying in ease and security the full fruits of their own industry, enlisted by all their interests on the side of law and order, habituated to think for themselves, and to follow their reason as their guide, would be more easily and safely governed than with minds nourished in error, and vitiated and debased, as in Europe, by ignorance, indigence and oppression. The cherishment of the people was our principle, and distrust of them, that of the other party.

In other words, Jefferson had faith in the political wisdom of the masses, and in government based on their will, but one of small powers, leaving to all the fruits of their own labor. The creed as stated in his first inaugural address included also a strict interpretation of Federal powers and a chief dependence on the States, acquiescence in the decisions of the majority, economy in the public expense, a minimum of interference with the liberty of the individual, and a pacific and just attitude toward foreign nations. As an administrator Jefferson found that these principles could not all be followed faithfully in practice, but they acquired a formal standing as the creed of the party. Jefferson succeeded in attaching able leaders to his party, including Madison and Monroe of his own State, John Langdon of New Hampshire, Elbridge Gerry of Massachusetts, George Clinton of New York, Albert Gallatin of Pennsylvania, and Charles Pinckney of South Carolina; and an efficient organization was built in every State of the Union. The Federalist party never regained power, and by 1816 it had so dwindled in numbers and influence that it disbanded. There were now one party and many factions.

DEMOCRATIC-REPUBLICANS VS. NATIONAL REPUBLICANS, 1824–1832.[6] In 1824 John Quincy Adams was elected President nominally as a Demo-

[5] Letter to Judge Johnson, June 12, 1823, in *The Works of Thomas Jefferson* (P. L. Ford, Ed. 1905), Vol. XII, p. 253.

[6] E. E. Robinson, op. cit. pp. 79–106.

cratic-Republican, but he represented the party's conservative faction. Four years later, in a political upheaval, he was defeated by Andrew Jackson, who headed the liberal wing of that party. A much widened suffrage had shifted the center of gravity to the frontiersmen, the poor, and the small farmer and shopkeeper classes. Jeffersonian principles had been given concrete form, but their custody no longer was in the hands of the benevolent intellectuals. Jacksonian politics meant warfare against the "money" power, against internal improvements undertaken under Federal auspices, a strict construction of Federal powers, and "rotation in office"—the end of the permanent office-holding class and the recruitment of officers from laymen who were friends of the administration. Jackson made himself a leader of the masses, their direct representative and advocate. To give the new theory legal expression, he repeatedly urged a constitutional amendment for the direct election of the President by the people. Soon after the beginning of Jackson's administration the hyphenated name of the party was dropped in favor of the term *Democratic*, its official title today.

WHIG AND DEMOCRAT, 1832–1856 · Meanwhile there had developed in Congress a sharp opposition to the Jacksonian policies, under such able leaders as Henry Clay, Daniel Webster, and John Quincy Adams. These men supported the National Bank, a program of internal improvements, higher prices for the public lands, and a protective tariff. By 1834 the name *National Republican* had been dropped for *Whig*.

In the years from 1832 to 1856 these two parties occupied the center of the stage.[7] Universal suffrage, majority rule, the long ballot, and the spoils system were tacitly accepted by both. The division on the questions of tariff, internal improvements, the National Bank, and monopoly, noted above, persisted throughout. Jeffersonian principles lost something of their vitality. The issue of slavery became paramount and colored party attitudes on all others. The party of Jefferson fell under the dominance of the slave interests; and the Whigs, with a considerable membership of large plantation owners, took no decisive position on the question. Third parties absorbed those electors who desired political action against slavery. The Liberty party, formed in 1840, had for its chief tenet the abolition of slavery. In 1848 the National Free Soil party came into being, with a platform recognizing the right of the individual States to determine the question of slavery for themselves and denying the power of Congress "to make a slave" in the territories, which now had been extended by the Mexican cession. Its 1852 platform condemned the Fugitive Slave Law of 1850 and denied its binding force on the American people. The Democratic party won the elections of 1832, 1836, 1844, 1852, and 1856, with Jackson, Van Buren, Polk, Pierce, and Buchanan respectively. The Whigs

[7] R. C. Brooks, *Political Parties and Electoral Problems* (1923), pp. 52–64; E. M. Sait, *American Parties and Elections* (1927), pp. 251–254; A. C. Cole, *The Whig Party in the South* (1913); E. M. Carroll, *Origins of the Whig Party* (1925).

won those of 1840 and 1848, with Harrison and Taylor respectively; but in each instance they failed to reap the full fruits of victory because of the death of the President.

REPUBLICAN V. DEMOCRAT, 1856–1876 · In 1850 Congress passed an omnibus compromise act which repealed the Missouri Compromise and turned over to the settlers in the territories of Kansas and Nebraska the decision on the institution of slavery within their respective borders; admitted California to the Union as a free State; and enacted a stringent Fugitive Slave Law.[8] The Whig platform of 1852 declared these acts "a settlement in principle and substance of the dangerous and exciting questions which they embrace," insisted upon their strict enforcement, and deprecated "all further agitation of the question."[9] The effort of seasoned statesmen like Daniel Webster to avoid armed conflict and save the Union was decried by those who wished either a stop to the further advancement of slavery or its abolition. Early in 1854 sporadic meetings throughout the North and East spoke in favor of organized opposition to the slave system. On February 28, 1854, a mass meeting in the village of Ripon, Wisconsin, adopted a resolution to the effect that if the Kansas-Nebraska Act should pass, a new party under the name of *Republican* should be formed. A second meeting in the same village, March 20, attended by Whigs, Free-Soilers, and Democrats, organized under the name of *Republican*. In an editorial in the *New York Tribune*, Horace Greeley suggested the calling of organization meetings throughout the country and under the name *Republican*.[10]

The use of the name *Republican* by the new party was meant to suggest the rebirth of the party of Jefferson and so to attract those devoted to his principles. Its chief tenet, the nonextension of slavery in the territories, had first been put forward in a resolution which Jefferson had introduced in 1784 and which had failed by only a small margin, forbidding slavery in any of the territory outside the States where it then existed. The Northwest Ordinance of 1787 had applied that rule to the territory northwest of the Ohio River. To emphasize the connection, Republican conventions were held on the anniversary of its passage, July 13, 1854, in the States of Indiana, Ohio, Vermont, and Wisconsin.

The Republican platform of 1856 on the mooted question of slavery denied the "authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any territory of the United States while the present Constitution shall be maintained"; advocated the admission of Kansas to the Union as a free State; and denounced the administration of Pierce for the civil war existing in that territory. Declaring the intention of restoring the Federal government to the principles of Washington and Jefferson, it advocated

[8]W. S. Myers, *The Republican Party: A History* (1928), chap. iii.
[9]K. H. Porter, *National Party Platforms* (1924), p. 37.
[10]W. S. Myers, op. cit. chap. iv.

also government aid for a railroad to the Pacific, and appropriations for the "improvement of rivers and harbors of a national character."[11]

Free Soil Democrats, Abolitionists, and Whigs made up the greater part of the membership of the new party. In its first contest, 1856, it leaped into place as a major party with 1,341,264 votes, relegating the Whigs to the position of a strong third party with 874,534 votes. The Democrats polled a plurality, 1,838,169, but won a decisive electoral majority.[12]

The platform of 1860 went beyond that of 1856 in acknowledging the right of each State to determine its own policy regarding slavery; resolved that the "federal Constitution, the rights of the States, and the union of the States must and shall be preserved"; reasserted the denial of the power of Congress to establish slavery in the territories; advocated "such an adjustment of these imposts [on imports] as to encourage the development of the industrial interests of the whole country"; demanded the passage of a free-homestead act; and opposed restrictive changes in the naturalization laws or the laws according to immigrants the rights of citizens.[13] These declarations of principles and its acts during its first decade bear out Woodrow Wilson's characterization:

> The Republican party got its program from the Free Soilers, whom it bodily absorbed; its radical and aggressive spirit from the Abolitionists, whom it received without liking; its liberal views upon constitutional questions from the Whigs, who constituted both in numbers and in influence its commanding element; and its popular impulses from the Democrats, who did not leave behind them, when they joined it, their faith in their old party ideas.[14]

The Democratic party split on the slavery issue in 1860 and nominated two tickets. The Republicans, with a plurality of 40 per cent of the popular votes cast, won the Presidency and majorities in both houses of Congress. Eleven Southern States eventually passed ordinances of secession from the Union. President Lincoln, acting on the Republican pledge, embarked on the war to save the Constitution and the Union. Slavery was abolished in the seceded States by Presidential proclamation and later in all United States territory by constitutional amendment. With the death of Lincoln the radical element of the party proceeded to carry Jefferson's equalitarian principles to their logical limit in the establishment, by constitutional amendment, of Negro citizenship, Negro civil rights, and Negro suffrage. A major party had veered in one particular far to the left of the party of Jefferson and Jackson.[15]

[11]K. H. Porter, op. cit. p. 48.

[12]A. N. Holcombe, *The Political Parties of Today*, pp. 163–174; E. Stanwood, *History of the Presidency* (1884 ed.), p. 210.

[13]K. H. Porter, op. cit. pp. 55–58.

[14]Woodrow Wilson, *Division and Reunion, 1829–1889* (1893), p. 188.

[15]E. Stanwood, op. cit. p. 234; W. S. Myers, op. cit. chap. vii.

REPUBLICAN V. DEMOCRAT, 1876–1900 · Two important developments marked the United States from the close of the Civil War to the end of the century. The better agricultural lands through to the Pacific were taken by settlers and placed under cultivation. The Industrial Revolution struck the United States with full force, resulting in the establishment of factories, the intensive development of mining and railroad transportation, the growth of a numerous wage-earning class, and the progressive change of the country from a predominantly rural to an urban character. The Republican party was in power except for the two administrations of Grover Cleveland, and its policies were directed toward the encouragement and fostering of business and industrial enterprises. Throughout the period it stood for a high protective tariff and a liberal policy in the disposal of the national resources in land, minerals, and timber. With the adoption of the three post-Civil War constitutional amendments and the withdrawal of the troops from the South, the original reason for its being had passed away; and it now entered a period of maturity when, as in the party of Jefferson, the cohesive element ceased to be a single burning principle, but instead a holdover organization and a capacity to act as a vehicle for divergent interests striving to control the policies of the government. While wavering and compromising at times, as on the Bland-Allison and Sherman silver-purchase acts, the party generally supported a "sound money" policy, culminating with its enactment in 1900 of the gold-standard act. Republican dominance was made the easier because to its rival was attached the odium of the support of slavery and, in one of its wings, secession. These considerations were chiefly responsible for the long-continued Republican ascendancy; but by the close of the first decade of the new century the Civil War generation had pretty well passed away, and a new one, which knew not Lincoln or Davis, had come on the scene.[16]

REPUBLICAN V. DEMOCRAT, 1901–1921 · William McKinley was the last of the Civil War soldier Presidents. With his death at the hands of an assassin the youthful Vice-President, Theodore Roosevelt, succeeded to the leadership of the party and soon threw himself into the championing of reform issues. The country had aged to the point where such a program was logical. The day of the frontiersman was almost gone; there were large urban wage-earning classes with a rapidly increasing political power; the natural wealth of the country had largely passed into private hands with attendant gross waste; the machinery of local governments had proved unequal to the new burdens thrust upon them, and inefficiency and corruption had resulted; the management of industry had rapidly progressed from individual management of multiple small units to concentrated ownership and control; and the financing of these large projects had become centered in fewer and larger concerns. The existence of huge indus-

[16]Myers, op. cit., chaps. x, xiv; F. R. Kent, op. cit. chaps. xviii–xxvi; R. C. Brooks, op. cit. pp. 72–79.

trial concerns, with their great political power and their growing number of millionaires, was a shock to the sensibilities of a traditionally rural, equalitarian, and agricultural population.

President Roosevelt was spokesman for the conservation of natural resources; pressed the prosecution of trusts and monopolies under the Sherman Antitrust Act; insisted on a greater regulation of business, as in the passage of the Pure Food and Drug Act and the Hepburn Railway Act; and generally championed the cause of the common man. The party maintained its traditional stand on the tariff throughout this period. No great differences separated the two parties for some years. Democratic platforms denounced the Republican tariff, but not all protective tariffs. That of 1904 favored a "revision and a gradual reduction of the tariff by the friends of the masses and for the common weal, and not by the friends of its abuses."[17] Roosevelt had succeeded in winning strong progressive and liberal elements whose party allegiance normally is none too strong. In 1912 the Democrats made a bid for this element by nominating, as a reform candidate for the Presidency, Governor Woodrow Wilson of New Jersey.

Two weeks previously the Republican convention had renominated William H. Taft for President; and this nomination had been followed immediately by a secession of the Roosevelt-Progressive delegates, who united with others to form the new Progressive party. For the campaign the Republican party had the unique experience of being relegated to the place of a third party. With three tickets in the field, the Democrats won 42 per cent of the popular vote and 81 per cent of the electoral.[18]

The chief domestic issue again had been the regulation of big business —a New Freedom, as Wilson phrased it, for small and middle-sized businesses. The Federal Trade Commission and the Clayton Acts were the answer in legislation. These and the Federal Reserve Act constituted the chief domestic achievements of the Wilsonian regime, which had to expend its energies on problems growing out of the First World War. Wilson's prominence in the peace negotiations and his personal leadership in the formation of a League of Nations brought new issues into the field.

REPUBLICAN V. DEMOCRAT, 1920 TO THE PRESENT · Fundamental economic and social stresses, extending throughout America and the world generally, have dominated the political scene since 1920. Some were created entirely by the First World War, others were merely accentuated by it, and still others were tendencies which long had been at work and now appeared above the surface. The war had called for a vast increase in American production.[19] Large areas of American land in the semiarid zones had been broken up and planted to wheat and rye. The shortage

[17]K. H. Porter, op. cit. p. 247.

[18]E. Stanwood, *A History of the Presidency, 1897–1916*, p. 302.

[19]Chap. xlvii; Louis Bean, "Tides and Patterns in American Politics," *American Political Science Review* (August, 1942), Vol. XXVIII, pp. 637–655.

of meat had led to a great increase in American herds of cattle and sheep, and in the production of hogs and their provender, corn. Cotton culture had spread to Oklahoma, New Mexico, and Arizona. Likewise the production of coal, iron, steel, lead, and copper had been greatly increased. The demand of our allies for all these products had been made effective by American financing. Now, with the war at an end, impoverished Europe was unable to purchase the American goods which it still sorely needed. Industry lay prostrate in most of the continent of Europe. In all European countries production had been diverted from normal peacetime channels. These countries had seen their merchant fleets destroyed or put to wartime uses. Their currency and financial systems were askew. Disturbed political conditions, growing worse rather than better throughout the period, stood in the way of the resumption of normal world trade.

With the sharp fall in foreign demand for American goods in 1919 and 1920 and the resultant collapse in prices, American agriculture and business were in distress. Beginning in 1921, however, they had become adjusted to the lower price level, and a general period of prosperity began which lasted until the stock-market crash of 1929. Europe's purchasing power had been maintained by great loans from American individuals and banks. Stated in other terms, American products were sent to Europe and paid for by other Americans who lent the money. When, in 1929 and 1930, it became apparent that these loans could not be repaid and that not even the interest could be met, the whole world postwar trade structure toppled. Again, prices of agricultural and manufactured products sank to new depths, production was sharply curtailed, widespread unemployment ensued, and great financial distress encompassed the laboring class and cut deeply into the politically powerful middle class. This, in brief, was the setting in which the political programs and policies of the two parties were formed.

In the 1920 campaign the Democrats advocated American entrance into the League of Nations; while the Republicans cautiously countered by favoring "an association of nations," but not the one sponsored by the Democrats.[20] Otherwise no great issue separated the two. Both expressed sympathy for the farmer in his plight and for the laborer. War weariness and the dissatisfaction of some nationalities with President Wilson's attitude toward their claims in the peace conference were responsible for a great surge of voters toward the Republican ticket, which polled the largest majority hitherto attained since the inauguration of universal suffrage in Jackson's day. By 1924 the League of Nations issue had been dropped by both parties. The Republicans "stood pat" on their traditional platform because of the return of prosperity, urging the voters to "keep cool with Coolidge." Senator Robert La Follette, Sr., launched his reform third party and won the electoral votes of his home State, Wisconsin.

[20]K. H. Porter, op. cit. pp. 414–416, 449–452.

In 1928 prosperity was at a still higher tide. Prohibition was perhaps the dominant issue in the popular mind; but neither party took a stand in opposition, although the Democratic candidate for President, Alfred E. Smith, made a personal statement in favor of the repeal of the Eighteenth Amendment. The Republican ticket, headed by Herbert C. Hoover, won with a popular majority of 21,391,993 votes as against 15,016,443 for his Democratic opponent.[21] The national economic collapse took place less than eight months after Hoover's inauguration.

By 1932 the full impact of the depression had been felt, and the party in power was bound to be held responsible. Franklin D. Roosevelt, the Democratic candidate for President, held forth a program to bring employment to labor, raise farm prices, aid small business, and furnish direct relief from the Federal treasury for the needy. His party won a great victory: the electoral votes of forty-two of the States, totaling 472 out of the 531, and 57.2 per cent of the popular votes. The program and policies of the succeeding four years showed an intent to build a new party under the name of the old. The extensive program of legislation, which promoted the organization of labor, gave subsidies to the farmers, and furnished employment to millions of workers (both ordinary and white-collar) on government projects, served to bring together the small-income masses under the aegis of the Democratic party. A greater feeling of unity among these diverse elements was fostered by consistent attacks on the "economic royalists," the name applied to capitalists, the banking interests, and industrial leaders and managers, and by a program of rigid regulation of mining, manufacturing, trade, and commerce. Prosperity had returned to the country as a whole, and in spite of the greatly increased debt the masses of voters had not suffered the inconveniences of a heavier taxation. Roosevelt easily won re-election in 1936, with the electoral votes of forty-six States, totaling 523, and 60.7 per cent of the popular votes. The war in Europe dominated all domestic issues in the 1940 and 1944 elections. In the former neither candidate squarely faced the issues of the war. In the latter the Democrats made the retention of Roosevelt's leadership in the prosecution of the war and the negotiation of the peace the paramount issue. Roosevelt won his third and fourth terms by somewhat reduced majorities.[22]

PARTY PRINCIPLES TODAY. THE DEMOCRATS · Are the two major American parties divided by clearly distinguishable principles? Their programs as shown in the preceding chapter, except for short periods in their life histories, have been determined more by the character of the interest groups which have constituted them than by the stock of principles peculiar to each. Such principles as exist can be discovered only by examining both the acts and the words of the party leaders. Both parties

[21] E. E. Robinson, *The Presidential Vote, 1896–1932*, p. 46.
[22] *World Almanac* (1945), pp. 747–748.

agree substantially in supporting the main features of the national constitution and the greater part of its historic interpretation: the separation of powers, the federal system, judicial review, and the popular basis of government, including universal suffrage (except for Negroes in the South). Both profess to stand for the welfare of the masses and against special privilege, as indeed have the parties outwardly in all modern civilized states. The Democrats, however, have been more pronounced in their condemnation of the practices of business and the industries and have sponsored more restrictive legislation concerning them. Franklin D. Roosevelt's "forgotten man" speech of his first campaign served to carry over the Jeffersonian championship of the masses into the current Democratic party. Subsidies to the needy and to certain interests, such as the farmers and the silver miners, the mortgage moratorium, the railroad retirement act, credit agencies for easy money, the devaluation of the currency, and the abrogation of the gold clause in contracts seem to indicate generally a decreased respect for the institution of private property and contract obligations. The President's attack on the Supreme Court, while aimed at specific personnel, was such a blow at the institution of judicial review as long had been advocated in principle by several minor political parties. The disappearance of judicial review would imply the omnipotence of the two political departments of the government: whatever the majority wanted, as expressed by Congress and the President, would be valid law. The aggrandizement of Federal at the expense of State power, the making of vast public improvements at national expense, and the extension of government regulation into an ever-widening field, were all applications of Hamilton's principles. The Tennessee Valley and other power enterprises and the entrance of government on a large scale into the banking and credit field marked the abandonment of the party's historic aversion to anything smacking of state socialism. The high and sharply progressive income taxes on individuals and corporations were evidence of an equalitarian and leveling attitude.

THE REPUBLICANS · Principles are the most obvious asset of a minor party, but a major party in power must show them by word and by act. A major party in opposition, however, is in a negative position. Policies of the government are opposed as a routine matter, and others may be put forward simply as a test of public sentiment. Because the opposition party has no responsibility for the operation of the government, there is no opportunity to judge it by its deeds. Republican rule from 1921 to 1931, when the Republicans lost control of Congress, coupled with pronouncements of leaders in the Presidential campaigns of 1936, 1940, and 1944 and in Congress, are the best materials by which to judge that party's principles. Differences between the two parties consist more in the degree in which they would act than in absolute principle. Up to the time it lost power, the Republican party had maintained a legislative program of

regulation of business; whether the Democrats, if in power during that period of prosperity, would have gone beyond it, is left to conjecture. The Republicans adhered to the old policy of a high tariff, which the Democrats later maintained except as modified by special agreements with individual nations. Their objections to Federal legislation at the expense of the States has been based on its content rather than on any adherence to States' rights. Judicial review of legislation after the manner established by John Marshall is doubtless a tenet which would keep the party from any such attack as that of President Franklin D. Roosevelt, irrespective of the character of the Supreme Court. The maintenance of a currency based on the gold standard, the balancing of public income and expenditures, the rejection of government spending as a means to promote prosperity, and a sharp curtailment of relief organizations are policies in accord with Republican principles. Stoppage of government advance into the field of business, if not a curtailment of what already has been established; not laissez faire, but a recession from the present level of governmental regulation of business enterprise; not rugged individualism, but more reliance on individual enterprise and less on social control, probably represent the Republican views. The Hamiltonian concept of the supreme value of law and order, as contrasted with the gains to be made by rapid innovation, is still deeply ingrained.

This brief summary of the programs and policies of the great parties indicates their functional place in the scheme of American government. Their virtue lies chiefly in size and comprehensiveness. To win elections, a party must be strong over a considerable part of the country; its widely distributed strength makes it worthy to speak for the nation. The great parties shy away from issues which have not been tested before the public; for promptitude in assuming a stand might result only in breaking the party into fragments. It is noteworthy that in three great constitutional conflicts, those over slavery and disunion, over suffrage for women, and over prohibition, no major party was willing to assume sponsorship of the issue until solution by other means was near. Party leaders choose to champion those issues which divide the faithful least.

THE ROLE OF THE MINOR PARTIES · The minor parties historically have played a leading part in the initiation of new issues. They may owe their origin to the idea of some great thinker, like Henry George with his theory of the single tax; or changed social conditions may beget remedies, panaceas, and spokesmen, which win followers and organization. When both Democratic and Whig parties sought to sidetrack the slavery issue, it was taken up in 1840 by the new Liberty party and in 1848 by the National Free Soil party; and in 1856 its central issue was taken over bodily by the new major Republican party. Two other minor parties before the Civil War were the Anti-Masonic, organized in 1828 on the issue of the suppression of secret societies, and the Know-Nothing, which attained con-

siderable political strength in the early 1850's on the platform of opposition to the influence of naturalized citizens and Roman Catholics in politics. Neither party had an issue which took root and grew, and both disbanded after a few years of success in the election of local officials.

THE LIBERAL REPUBLICAN PARTY · This was the first in line of those strong third parties which have always been in evidence since the Civil War.[23] Headed by men of high caliber noted for their devotion to the public weal, it may be said to have represented the militant idealism of the Republican party which had accounted for its original organization and the freeing of the slaves. Among these men were the distinguished newspaper editors Horace Greeley, Samuel Bowles, Whitelaw Reid, Joseph Pulitzer, and Murat Halstead; the poet William Cullen Bryant; the statesmen Charles Sumner, Lyman Trumbull, and Charles Francis Adams; and Carl Schurz, liberal German émigré of the Revolution of 1848 and champion of civil-service reform. In 1872 it nominated Horace Greeley for President and Governor B. Gratz Brown of Missouri for Vice-President. The party was a protest against the administration of President Grant, which it accused of corruption, inefficiency, usurpation of powers, and the fostering for its own political advantage of the hatreds and resentments of the Civil War. Among its proposals were a more lenient policy toward the South, the removal of all disabilities imposed on account of the Civil War, the establishment of the merit system in the civil service, and the denial of further land grants to the railroads. Although the Democratic party nominated no candidates of its own and endorsed the Liberal Republican ticket, the combination carried only six States,—mostly border States, for there were still carpetbag governments in the deep South,—with a total of 2,834,125 popular and 66 electoral votes. The new party promptly disappeared, but its members might well have claimed later as its fruits the withdrawal in 1877 of troops from the South and the enactment in 1883 of the Civil Service Act.

FARMERS' PARTIES · Until the beginning of our industrial revolution at about the time of the Civil War the United States was a rural country, and all its parties were in a broad sense farmers' parties. It has been seen, however, that the commercial, trading, and financial interests were strong in the Federalist-Whig succession of parties, while the parties of Jefferson and Jackson were almost altogether dominated by the agricultural and rural elements of the population. Since shortly after the Civil War there has always been some sort of agrarian party in the field. The reactions and proposals of the farmers' parties were entirely responsive to existing American conditions. The visible enemy was assailed in the persons of those who lent money at 10 to 15 per cent; the railroads which exacted high rates and gave rebates to favored customers; the manufacturers who charged exorbitant prices for farm machinery; the stock and grain buyers and meat

[23] E. D. Ross, *The Liberal Republican Movement* (1919).

packers, who controlled the prices of farm products; the great trusts and combinations, which set the prices of goods which the farmer must buy; and middlemen in general. But when the farmer struck his blow, he was not conscious of participation, according to the Marxian imagery, in a world-wide assault of the proletariat against the capitalists. He was only making a field day of it against his immediate antagonists or would-be oppressors. Only in the late 1920's did any perceptible number of farmers see themselves in the Marxian picture.

THE GRANGER PARTIES · The collapse of the inflated farm prices of the Civil War period was the chief cause of the awakening of political activity among farmers. Cheap money, meaning higher prices for farm products, and lower railroad rates were the two chief items in their platforms. Much of the impetus for political organization came from the National Grange, or Patrons of Husbandry, which, beginning in 1867, had a membership of a million by 1874.[24] Various "antimonopoly," "reform," and "independent reform" parties sprang up in about a dozen different Middle Western and Western States. In 1873 and 1874 they were successful in electing three United States Senators as independents, and a considerable number of members of State legislatures. Of more permanent influence was the legislation for the establishment of State railway commissions and the regulation of railroad rates and practices, which were the forerunners of the Federal Interstate Commerce Commission Act of 1887.

THE GREENBACK PARTY · The local Granger parties quickly dissolved or merged with other groups to form the Greenback party.[25] During the Civil War the hard-pressed government had raised funds by the issuance of irredeemable paper money. This had speedily decreased in value; that is to say, had inflated prices. After the war the issues were gradually canceled as they came into the Treasury; by this process the currency was contracted and prices and wages were lowered. The debtor classes, particularly numerous among the farmers of the West, now found themselves required to pay debts contracted when money was "cheap" with money that had become "dear." The Greenback party advocated the reissuance of the original greenbacks and such added quantity as would be sufficient to raise prices and wages and help to finance the government by replacing the interest-bearing bonds. The Greenback party nominated candidates for the Presidency in 1876, 1880, and 1884, and at one time had thirteen representatives in the lower house of Congress. The cry for cheaper money, which the party voiced, was partly answered in the Bland-Allison and Sherman silver-purchase acts of 1878 and 1890 respectively. In 1888 a portion of its membership merged with other elements to form the Union Labor party. This party advocated the abolition of all taxes and the imposition of a tax on land values, according to the prin-

[24] F. E. Haynes, *Third-Party Movements since the Civil War* (1916), chap. vi.
[25] Ibid. chaps. ix–xi.

ciples of Henry George; the issuance of a paper legal-tender currency; and government ownership of the railroads and telegraphs.

THE POPULIST PARTY · Of all the minor political parties the National People's, or Populist, party, organized in 1890 to voice the discontent of farmers and laborers, takes the first place for fertility in issues later taken over by the major parties.[26] In the platform of 1892 it denounced the two old parties for their struggles for "power and plunder" and for their intent "to drown the outcries of a plundered people with the uproar of a sham battle over the tariff, so that capitalists, corporations, national banks, rings, trusts, watered stock, the demonetization of silver, and the oppressions of the usurers may all be lost sight of." It demanded that the powers of the government should be expanded "as rapidly and as far as the good sense of an intelligent people and the teachings of experience shall justify, to the end that oppression, injustice, and poverty shall eventually cease in the land."

It proposed (1) an expanded currency through the issuance of legal-tender paper currency, and the free coinage of silver and gold at the ratio of sixteen to one, until the amount should reach $50 per capita; (2) a graduated income tax; (3) the establishment of postal savings banks; (4) government ownership of the railroads, telegraphs, and telephones; (5) the reclaiming for actual settlers of land granted to the railroads by the government; (6) the restriction of immigration as a protection to the American wage-earner; (7) the shortening of the workday for labor; (8) the outlawing of the Pinkerton detective system employed by corporations; (9) authorization of the initiative and the referendum; (10) a constitutional amendment limiting the President and Vice-President to one term; (11) the direct election of United States Senators; (12) the denial of any subsidy or national aid to any private corporation.

THE NONPARTISAN LEAGUE · For several decades the farmers found their chief expression through the liberal wing of the Republican party, and when disappointed there they became one element in the short-lived Progressive party.[27] The next purely agrarian party was the Nonpartisan League, a dues-paying organization which appeared in North Dakota in 1915.[28] It won the control of the State government in 1916 and again in 1918, and enacted an extensive program of legislation. Soon the organization had spread to other States, including South Dakota, Colorado, Montana, Idaho, and Minnesota, and it assumed a national character, with headquarters at St. Paul, Minnesota. Its objective, of course, was the amelioration of the farmer's lot. It advocated the State ownership and operation of grain elevators and warehouses, flour mills, packing houses, cold-storage plants,

[26] F. E. Haynes, op. cit. chap. xv; J. D. Hicks, *The Populist Revolt* (1931); K. H. Porter, op. cit. pp. 166–169.

[27] B. P. De Witt, *The Progressive Movement* (1915).

[28] E. Gaston, *The Non-Partisan League* (1920); C. E. Russell, *The Story of the Non-Partisan League* (1920); E. M. Sait, op. cit. (1939), pp. 169–177.

and a central bank; State aid for the marketing of farm crops; State insurance of crops; the exemption of farm improvements from taxation; and other regulatory laws. Much of this program was enacted into law. In the 1918 elections it chose members of the legislature in four States in addition to North Dakota.

The plan of the League was to act as a pressure group, securing the nomination and election of its members within either of the major parties. However, this plan was thwarted in some instances by Republican-Democratic fusion, which forced the League into the open. The failure of the Bank of North Dakota, uneconomical administration of some of the other State enterprises, and the termination of the administration of Governor Frazier by use of the recall all contributed to the rapid disintegration of the League. Its political power had virtually ceased by 1924.

THE FARMER-LABOR PARTY · The idea of uniting the farmers and the laborers in one political party has often awakened the ambition of organizers. The National Labor party was organized at Chicago, on November 22, 1919, at a meeting made up chiefly of labor-union delegates.[29] The name was changed to "Farmer-Labor" at the regular convention in 1920, and a statement of principles dominantly Marxist in character was adopted. These principles embodied a co-operative commonwealth controlled by the farmers and laborers; that is, a system of state socialism, including the ownership and operation of all utilities, basic industries, and banking and credit institutions. Its candidate for the Presidency in 1920 won a quarter of a million votes, scattered chiefly in seventeen States. Friction with the Communists soon greatly weakened the party's strength, but it remained in the field. The Farmer-Labor party of Minnesota, which has controlled the State government most of the time since 1922 and has elected two United States Senators and several Congressmen, has generally remained aloof from the national organization of the Farmer-Labor party.

THE PROGRESSIVE PARTY · Theodore Roosevelt, supported by the majority of liberal Republicans, attempted to win the Republican nomination for President in 1912.[30] When Taft was renominated, several hundred seceding delegates adjourned to a near-by building and took preliminary steps for the formation of a new party. In response to a nonpartisan call, delegates met at Chicago on August 8, 1912, perfected an organization, and nominated Roosevelt for President and Hiram Johnson of California for Vice-President. Thus was born the short-lived Progressive, or "Bull Moose," party. Unlike the Greenback, Populist, and others, it was not primarily a class party. Although against big business and special privilege, it was dominated by elements of the middle and professional classes who had certain concrete reforms in mind. In the character of its leadership

[29]N. Fine, *Labor and Farmer Parties in the United States, 1828–1928* (1928), pp. 377–397.
[30]B. P. De Witt, op. cit. chap. iii.

and ideals it most nearly resembled the Liberal Republican party of forty years before. The chief general objective of its various proposals was to make possible the will of the people. Within the parties the leaders, bosses, and machines had defeated the will of the people; to remedy this the nomination of candidates and the choice of party officials were to be taken from the conventions of delegates and committed to a direct vote of the people in the so-called "direct primary."[31] The legislatures and elective officers were to be made more mindful of their campaign pledges by the adoption of the initiative, the referendum, and the recall. The influence of the vested interests in the upper house of Congress was to be destroyed by the direct election of United States Senators. Popular rule in the States and the municipalities was to be fostered by the adoption of municipal home rule and the short ballot. An extensive program of social legislation, including the abolition of child labor, a minimum wage, the eight-hour day, and industrial-accident compensation, was advocated, and, to make sure of less obstruction by the courts, an easier method of amending the Constitution. The election showed that no new party had been recruited; only that the Republican party had been split. Taft and Roosevelt together polled 50.5 per cent of the popular vote, as compared with the 51.6 per cent which had elected Taft in 1908; while the Democratic candidate, Woodrow Wilson, with his plurality of 41.8 per cent, swept the Electoral College. The Progressive party never again put a ticket in the field, but strong elements of it merged with the La Follette movement in 1924.

THE CONFERENCE FOR PROGRESSIVE POLITICAL ACTION · The first meeting of this organization, which had been formed on the initiative of the railroad unions, was held early in 1922 and included delegates from the railroad unions, the needle trades, the miners, State federations of labor, the Socialist party, the Farmer-Labor party, the Nonpartisan League, and various independent State parties and farmers' organizations.[32] Delegates from the Workers' party (Communist) were not admitted. By the time its nominating convention met at Cleveland, Ohio, July 4, 1924, the scope of the organization had been widened. Robert M. La Follette was named for President and authorized to choose his running mate. The platform declared the paramount issue was "to break the combined power of the private monopoly system over the political and economic life of the American people." The demand for industrial socialization was confined to the railroads and water power. Among other demands were those for surtaxes and excess-profits taxes on "swollen incomes"; the abolition of judicial review and of injunctions in labor disputes; and the popular election of Federal judges. The "mercenary system of degraded foreign policy" was denounced, and demands were made for a revision of the Treaty of

[31] B. P. De Witt, op. cit., passim; K. H. Porter, op. cit. pp. 334–349.
[32] N. Fine, op. cit. chap. xiii.

Versailles, the negotiation of treaties to outlaw wars, the abolition of conscription and drastic reduction of armaments, and a public referendum on peace and war. La Follette carried his own State of Wisconsin and ran second in eleven others, receiving a total of 5,000,000 votes. However, the Conference contained no element of cohesion, particularly in the face of "Coolidge prosperity," and it ended with a sine die vote in February, 1925.

SOCIALISM · Organizations on a local scale, based on the philosophy of Karl Marx, had appeared during the Civil War. These were chiefly in the nature of labor unions and of associations with incidental political activities. The impulse and general guidance for socialist organizations throughout the world was furnished by the International Workingmen's Association, popularly known as the First International, formed by delegates from the various European countries at London in September, 1864.[33] It was actually a federation with which socialist and labor organizations of the various countries, if conforming to its program, might affiliate; and until its dissolution in 1876 it held occasional international conventions for purposes of organization, propaganda, and the formulation of policies. The first American political party of this kind was the Social Democratic Workingmen's party of North America, organized in 1874, whose title in 1877 was simplified to Socialist Labor. At first it stayed outside the political arena, devoting itself to organization and propaganda; but soon it entered local election contests and became the center of radical workingmen's political activities for two or three decades. It was estimated that during this period fully 90 per cent of the members and nearly all the leaders were foreign-born. Its general demands included the class war, in order to attain a classless society; the establishment by the workers of "the co-operative commonwealth," in place of "the present state of planless production, industrial war, and social disorder"; and the abolition of private ownership of property, which is "the obvious cause of all economic servitude and political dependence." The chief items of the immediate program were Federal ownership of railroads and all other means of transportation and communication; municipal ownership of public utilities; public ownership and scientific management of forests and other natural resources; a greater reliance on income and inheritance taxes; and compulsory public education, to include free meals, clothing, and books where necessary.

In 1897 the Social Democratic party was launched at Chicago. Its organizing genius was Eugene V. Debs, out of whose American Railway Union the membership was chiefly recruited. At a convention at Indianapolis, Indiana, in July, 1901, the Socialist Labor and Social Democratic parties were officially merged, although one wing of the latter continued,

[33]M. Hillquit, *History of Socialism in the United States* (1906); M. Hillquit, *Socialism in Theory and Practice* (1909); H. W. Laidler, *Socialism in Thought and Action* (1920); O. D. Skelton, *Socialism: A Critical Analysis* (1919); N. Fine, op. cit. chap. vii.

perpetuating the old name. The name chosen for the united groups was "Socialist party." Under the able tutelage of Debs the new party increased its membership from fewer than 100,000 at the beginning to about 900,000 in the Presidential campaign of 1912; and it elected many of its members to office as mayors, councilmen, and State legislators. The party, true to its international viewpoint, opposed our entry into the First World War, and was nearly wrecked by the clash with nationalism and its own newly developed left wing. The first platform of the Socialist party, formulated in 1901, stated as the final objectives the transformation of the system of private ownership of the means of production and distribution into collective ownership for the entire people, the overthrow of the capitalist class by the workers, and the establishment of a classless society in a co-operative commonwealth. Its immediate program was the public ownership of all means of transportation and communication and all other utilities, and of all industries controlled by monopolies and trusts; the progressive reduction of the hours of labor and the increase of wages; social insurance of all kinds; the establishment of government work projects; free education for all, including free books, clothing, and food where needed; equal rights for men and women; and the adoption of the initiative, referendum, and recall.

Until 1934 the Socialist party had been dominated by its moderate wing. The co-operative commonwealth was to be obtained by the use of the ballot and other peaceful means of evolution. The events following the depression, however, brought a change. The masses perhaps had become more receptive to extreme measures, and the New Deal program had come near fulfilling the demands of the Socialist platform. Henceforward there was a sharp swing to the left. The dictatorship of the proletariat was not mentioned but was broadly hinted at, and the general strike was threatened as a means of carrying the "revolutionary struggle into the camp of the enemy." In the depression year of 1932 the Socialists polled 884,781 votes. The effects of the New Deal program are shown by the drop of the Socialist vote in 1936 to 187,720, in 1940 to 99,557, and in 1944 to 80,518.[34]

COMMUNISM · The Communist is the most exotic of all American political parties. Controlled by the Third International (or Comintern), seated at Moscow, until the dissolution of the latter in 1943, it was given little freedom of action.[35] The communists historically have been the extreme and uncompromising left wing of the socialist movement. Having the same ultimate aim as the Socialist party, they have been more forthright in their proposed methods of action, which include the general strike, the use of sabotage in its various refinements, and, where practicable, the direct use of force. The aim is the forcible overthrow of capitalism, the dictatorship of the proletariat, and the establishment of the workers' state. With

[34] E. M. Sait, op. cit. pp. 284–286; *New York Times*, January 19, 1945, p. 14.
[35] N. Fine, op. cit. chap. xi; E. M. Sait, op. cit. pp. 290–296.

such a program the party can hardly stay within the bounds of legality in any country. In March, 1919, the Third International was organized at Moscow, and soon issued a twenty-one-point document mandatory for all parties as a condition of affiliation. Among the requirements were a clean break with "reformism" of the type of the old Socialist parties; the cleansing of their own officers and members of all compromisers, including all "petty bourgeois"; vigorous and systematic propaganda in the army and among the trade unions and the farmers; the hindrance of the transportation of munitions of war for use against the Soviet Republic; the change of name to "Communist Party of ——"; and obedience to the decisions of the congresses of the Third International and of its executive committee. The Communist International, it was asserted, "had declared war upon the whole bourgeois world and all yellow social-democratic parties."

The left wing of the American Socialist party attempted to seize control of the party machinery; but, not succeeding, in 1919 it joined with other groups, which, after disagreements, formed two parties, the Communist and the Communist Labor party. Prosecution by Federal, State, and local authorities sent some of the leaders to prison, deported others, and ran the organizations underground. In December, 1921, the Workers' party became their successor and received recognition from the Third International; but in 1929 it ventured to change the name back to "Communist."

For years these parties had preached the orthodox revolutionary doctrines of Marx and Lenin. As stated in the party manifesto of 1930,

> There is no way out except the creation of a revolutionary democracy of the toilers, which is at the same time a stern dictatorship against the capitalists and their agents. There is no way out except by seizing from the capitalists the industries, the banks, and all of the economic institutions, and transferring them into the common property of all, under the direction of the revolutionary government. There is no way out, in short, except by the abolition of the capitalist system and the establishment of a socialist society.[36]

In 1935 the Third International staged a remarkable volte-face: the basic policy of no opportunism, of no compromise or collaboration with the enemy, was dropped in favor of a united "popular front" against war and fascism. There was ample reason for the change: the rise to power of Hitler, the destruction of the Communist party in Germany, and the threat of its military power. The Third International had become little more than the right arm of the Russian Foreign Office. Stalin had grasped much earlier than the leaders of the democracies the full peril of the Hitler regime. Popular fronts were attempted in all countries where the communists had representation, the most successful being the one formed in France, with Léon Blum as prime minister. Military aid was given to

[36] E. Browder, *Communism in the United States* (1935), pp. 13–20.

the Spanish Loyalists against the Fascist and Nazi powers. The American Communist party promptly hewed to the new line. Its new constitution and by-laws commended the ideals of the tainted bourgeoisie (Paine, Jefferson, Jackson, and Lincoln) and the bourgeois document the Declaration of Independence, and stated that the party "defends the United States Constitution against reactionary enemies, who would destroy democracy and all popular liberties." While nominating candidates of its own in furtherance of the popular-front program, it gave counsel to noncommunists to support the "middle-of-the-road" program of the New Deal in 1936 and 1940 against the "reactionary" and "fascist" Republicans. The party had attempted to secure American aid for the Spanish Loyalists, had stopped its bitter denunciation of Germany after the nonaggression pact between Russia and Germany of August, 1939, and had opposed all American aid to Great Britain; but after the German attack on Russia it took the lead in advocating our entrance into the war. The Communist party had traded places with the Socialists, abandoned its purist attitude, and become the party of opportunism and moderation.

In addition to its unusual character as the American arm of an international society, the Communist party is unique among parties in its conception of its mission. Few American parties have been so insignificant or humble as not boldly to proclaim their hope of becoming a majority party. The Communist party, on the other hand, frankly recognizes its small chance of winning by the ballot, and attempts to work through all sorts of other organizations, preferably without being suspected. Its leaders are much preoccupied with considerations of "tactics" and of "strategy." For instance, one of its favorite projects of recent years was the organization of a Farmer-Labor party, quite outside the bounds of the Communist party but with some of its members in key positions. It achieved its aim to be a compact, militant, and disciplined organization whose strength is not measured by its numbers.

SUMMARY OF THIRD PARTIES · (1) This short sketch of party development in the United States leaves no doubt of the great part played by the minor parties in the invention and popularization of issues. What was proposed by the Liberty, the Greenback, the Farmer-Labor, the Populist, or the Socialist party appeared shocking, ugly, or revolutionary when in their hands, but when taken over by the Republicans or Democrats was given the accolade of respectability and decency. A member of the minor party not only may not be throwing away his vote but in the long run may even exert a much greater influence on the country's destiny than if associated with the victorious major party. (2) The Federal electoral system is a standing discouragement to the organization and growth of new political parties, because a party must secure a plurality of the votes cast in a State in order to register in the Electoral College. The Socialist party, with its considerable support in several elections, has never chosen

a Presidential elector. La Follette's party in 1924 received 4,822,856 popular and 13 electoral votes, while the Democratic candidates, with 8,386,503 popular votes, won 136 electoral votes. (3) This handicap usually impels forceful reform leaders to work within the machinery of the two major parties rather than to hazard the task of forming a new one, with the result that the basic two-party system has been maintained, subject to the fitful prodding of the minor parties as they rapidly come and go.

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CHAPTER XIII

# *American Political Parties: Composition and Organization*

Both the Democratic and the Republican party leave the latchstring out so that anyone who will may enter and sign the membership book. If the passing citizen sees nothing to attract him through the open door of these stately mansions, there are a half dozen or more cottages down the road where he will find a welcome, even though there he may be more carefully scrutinized and required to pay a modest guest charge. If still he has found no company to his liking, he is free to recruit one from the broad reaches of the land, if he can, and with its aid to erect a modest shack. In reality, the method by which the citizen enters a political company is not nearly so discriminating as indicated. His parents may have been life members, and, before them, his grandparents and great-grandparents, and he may have followed them as a matter of course. He may have joined in order to be with his friends and associates or members of his race or religion, because he anticipated profitable business dealings with its members, or because there was no other organization of the kind in the section. Finally, he may have been attracted by the superiority of its principles and program of action. On the other hand, he may have decided to make a commitment to no organization, remaining free to lend a hand in times of excitement to such a one as seems best. What are the bases of party allegiance in the United States? They are multiple, and compounded of varying ingredients in individual cases. The Kentucky mountaineer, the Kansas farmer, the Wall Street banker, the Rhode Island mill worker, all may belong to the same party but each for a different reason. The composition of the respective political parties and the chief influences which determine it are considered in the succeeding sections.

## *BASES OF ALLEGIANCE AND COMPOSITION*

Political Principles · A portion of every political party is made up of those who have joined the party on the reasoned conviction of the superiority of the principles for which it stands. In the early stages of the major political parties and in all minor ones so long as they remain small, the percentage of such persons is undoubtedly substantial. But as parties age, become large, and comprehend diverse elements, numerous other reasons for party allegiance crowd into the background that of devotion to principle. Persons of an inquiring or reformist type of mind, philoso-

phers, and a considerable number of new voters are apt to search for a rational party allegiance, but all in all they must make up a relatively small portion of the total party membership. The case for principle, however, is not so bad as it may seem on the surface. After all, it is generally recognized that the two major parties agree in their support of the major principles of the present American frame of government, and the bulk of citizens may feel reasonably content in either. To change from one to the other may involve the sacrifice of a few principles, but to change from either to a revolutionary third party may involve the sacrifice of many.

HEREDITARY TIES · A very large percentage of a party's membership is due to parental influence. That the child of Democratic parents normally becomes a member of their party is almost a truism in the light of what is known of the educational influence of the family. W. B. Munro and C. E. Merriam, from tests made over a long number of years, estimated the percentage of hereditary members at between 65 and 85 per cent.[1] The fact, however, is not so significant as it seems when considered by itself. The vote of the child may coincide with that of the parent less because of family influence than because the two belong to the same social class, are maintained by the same economic interest, live in the same geographic section and on the same side of the railroad track, and are of the same race and religion. It is perhaps more accurate to say that children follow the politics of the family for about the same reasons that the family chose that particular party allegiance.

TRADITION AND HISTORICAL SENTIMENT · Tradition, historical sentiment, and the mores always have played and will continue to play an important part in determining party membership. Families long settled in a community, whose members have participated in the conquest of the wilderness, served in some great cause, and through generations witnessed the growth of the region will feel strongly attached to that party which seems to embody best the ideas and sentiments of the evolutionary social process. Newer immigrant stock likewise will look for party characteristics which link best with their experiences in the old country. Communities isolated from the swifter currents of social life, like the Appalachian Mountain region and the entire South until after the First World War, are able to hand down party as well as other loyalties from generation to generation without disturbance. Those in the whirl of commerce, such as the great cities of the Northeast and even the smaller industrial cities, find the past rapidly fading, tradition broken or indistinct, and party loyalties dependent upon group interests or considerations of reason. So "waving the bloody shirt" became a vain thing in all but a few back regions of the North with the passing of the Civil War veterans; but appeal to memories of that struggle remain full of power in every State of the Old South.

[1]C. E. Merriam and H. F. Gosnell, *The American Party System* (1940), p. 107; W. B. Munro, *The Government of the United States* (1931), p. 537.

SECTIONALISM · There are a few distinct sections in the United States in which the party allegiance of a person born there is largely predetermined. The most conspicuous, of course, is the Solid South. Since the restoration of self-government in 1877, five States, Alabama, Georgia, Louisiana, Mississippi, and South Carolina, have never failed to cast their Presidential votes for the Democratic candidate; four others, North Carolina, Florida, Texas, and Virginia, voted for the Republican Presidential candidate only in the Hoover-Smith contest of 1928; and two others, Kentucky and Tennessee, deviated from the Democratic path on only two occasions. As explained in another connection, the completeness of the Democratic monopoly is due largely to the color question; for anything like an even division of the white voters between two parties would lead to a bid for the Negro vote. Differences of opinion on State and local issues are settled in the primary elections of the Democratic party. But in national questions the result is a foregone conclusion, to which the election of 1928 is the exception which proves the rule.

But if the South is the outstanding example of sectional party allegiance, some lesser ones are found in the North and East. New England may be said to have been solidly Republican until the debacle of 1932, although always with a strong opposition party. Covering a wider area, eight States, Massachusetts, Rhode Island, and Vermont, and Pennsylvania, Iowa, Michigan, Minnesota, and Oregon, had never voted Democratic in a national election since the Civil War until 1928; and four others, Ohio, New Hampshire, Illinois, and Wisconsin, only twice. Vermont remains the only one never to have deserted the Republican party. That there are sectional feelings of political significance in the Middle West, the Far West, and the East is shown by the care usually taken to match a Presidential candidate from one section with a Vice-Presidential candidate from another, and by making a geographical distribution of cabinet and commission appointments. Until the overturn of 1932 it could be said that New England, Pennsylvania, and generally the States of the Northwest Territory and of the prairie regions, from Kansas north, were dependably Republican.

RACE · Political parties founded on race are familiar to the people of Europe, where Czechoslovakia, Yugoslavia, and Poland were clear examples of the instability which such parties give to states. During the first hundred years under the Constitution the original colonial stock and its descendants were easily able to maintain the cultural pattern which originally had been established here. Four chief non-British races were present during that period, the Irish, the Germans, the Scandinavians, and the Negroes; but none in sufficient numerical strength to act as a unit politically, even if it had so desired. The Irish, with no language difficulties, quickly made themselves at home in the political setup; the Germans and Scandinavians settled largely on the land and were subjected to the strong

assimilative influences of the frontier; the Negroes, for the greater part of the period, were almost completely debarred from political activity. During the next twenty-five years great numbers of people from central, southern, and eastern Europe, chiefly Slavic, Italian, Jewish, and Hungarian, poured into the country. Because they settled in compact colonies in the cities and because their culture was more resistant to the American type than that of the older immigrants, they presented for the first time the phenomenon of cohesive nationality and group voting. The American two-party system and the legal discouragements to the founding and the successful operation of minor parties, explained in a previous chapter, have served well to keep parties based on races out of the picture. The two major parties have performed effectively in putting the immigrant citizens through the political mill, and the various races for their part have soon produced leaders with a quick grasp of the American political viewpoint.

THE NEGROES · Until the first New Deal administration, Negroes were almost all Republicans. This was the party of Abraham Lincoln, the Emancipator, whereas the Democratic party, ruler of the South, was responsible for Negro disfranchisement, segregation, and other social discriminations. For a decade or so the Negro colonies in more than one Northern city furnished the dependable block of votes which often was the difference between Republican success and defeat. Even in the election of 1932 they mostly remained with the Republican party, but in the Congressional elections of 1934 the desertions became large. The poll by the magazine *Fortune*, which was remarkably accurate for the national popular vote, found that in 1936 more than 80 per cent of the Negroes favored the re-election of Roosevelt.[2] In his careful study of Negro politics in the Chicago area H. F. Gosnell estimated that 95 per cent of the Negroes had voted for Harding in 1920 and only slightly fewer for Coolidge in 1924, whereas Hoover received only about 80 per cent, both in 1928 and in 1932.[3] The migration to the Democratic side thereafter threw about half the Negro vote to the Democrats, which evidently was considerably below the national average. In 1934 Arthur W. Mitchell, in a Chicago district, defeated Oscar De Priest, to become the first Negro Democratic Congressman in the history of the United States. The shift of the Negro vote was a strong element in the 1936 defection of the State of Pennsylvania from the Republican column, the first since the founding of that party, and it was a powerful influence in both 1936 and 1940 in the States of New York, Ohio, Illinois, Michigan, Indiana, and Missouri. For the shift in Negro party allegiance in Chicago, Gosnell listed six chief reasons, which undoubtedly hold in general for the entire country. These were the liberal relief policy of the Democratic administration; urbanization, which tended to break down the old attitudes of the Negroes fixed by the Civil War and rural

[2] *Fortune*, July, 1936, p. 85.

[3] H. F. Gosnell, *Machine Politics: Chicago Model* (1937), pp. 28–31, 264.

setting; dissatisfaction because the Republicans had not done enough for them; the more liberal policy of the Democrats, now dictated more by Northern than by Southern leadership; the new class consciousness fostered by radical propaganda; and the protection of the Negro underworld by the Democratic city machines.[4] Other important factors were expert management by the Democratic national and State organizations, aided by the huge expenditure of Federal funds, and the realistic attitude of some Negro leaders who saw that their disfranchised brothers of the South might be greatly aided by Northern Negro influence within the national party organization.

The Negro never has attempted a separate party organization, knowing that it would be doomed to failure from the start. His position among the minority peoples of the United States is unique. There is no home government across the seas to beckon for his aid or to divide his loyalty, nor a perceptible native culture to make him resistant to American institutions. In language, religion, and general ideals he merges with the American environment. Chiefly with respect to color and tradition is he set apart.

THE IRISH · The heaviest immigration before the Civil War was the Irish. Settling chiefly in the cities, Irishmen soon showed their skill in political organization. By 1820 they had captured Tammany Hall, which for nearly a century and a quarter afterward was headed by a succession of Irish bosses. In the decades following the Civil War they were the mainstay of the Democratic party, whose prestige in the Northeast had suffered greatly as a result of the war.[5] An observer writing in 1894 listed sixteen large American cities as under the control of Irish political machines. Devotion to the liberation of Ireland acted as a political bond, and President Cleveland's sharp interchanges with the British were attributed to a desire to hold the Irish vote. The heavy immigration of other stocks after 1900 forced the Irish to yield part of their political power in the cities, particularly to the Jews and the Italians, but they continued generally to hold the upper hand. Of course, large numbers of Irish are Republicans, and they have furnished some leadership to that party; but the predominance is the other way.

THE GERMANS AND THE SCANDINAVIANS · The Germans have furnished the largest single non-British element of the present population of the United States. Quick absorption into the scheme of American culture, largely because of cultural and racial similarities and the large proportion of isolated rural dwellers, served to minimize their influence as a distinct group.[6] The earlier arrivals were attracted to the party of Jefferson and

[4]H. F. Gosnell, "How Negroes Vote in Chicago," *National Municipal Review* (1933), Vol. XXII, pp. 238–243.

[5]C. E. Merriam and H. F. Gosnell, op. cit., pp. 91, 92.

[6]A. B. Faust, *The German Element in the United States* (1909), Vol. II, Chap. IV; A. B. Faust, "German-Americans," in F. J. Brown and J. S. Rouček, *Our Racial and National Minorities* (1937), pp. 166–188; R. D. Smith, "Immigration and Government," ibid. chap. xviii.

of Jackson; but their hostility to slavery and their interest in free homesteads led them largely to Whig and Republican affiliation, a move which was hastened by the influence of the liberal exiles of the German revolution in 1848. German solidarity for the new party during the Civil War was a decisive influence in St. Louis and was important in other cities. Carl Schurz, a German immigrant, one of the founders of the Republican party, and an advocate of civil-service reform and of "sound" money, attracted other German-Americans to the Republican party. The German element is probably still predominantly Republican, although the German Catholics have tended to follow the Democratic line. It has been seen that Germans organized the first Socialist groups in the United States.

The Scandinavians, also easily assimilable, settled in large numbers in the old Northwest, where they generally joined the Republican party, which had an overwhelming predominance there. They took over control of the party in Minnesota and shared its control in the Dakotas and Wisconsin. Later in the last century, when big business increased its hold on the Republican party, they began that long career of insurgency which has lasted to the present time. Usually working under the name of the Republican party, they finally emerged as the present Farmer-Labor party, which has elected a Scandinavian governor of Minnesota, two United States Senators, and several members of the House of Representatives.

THE ITALIANS · The bloc of five million first- and second-generation Italians constituted the largest single distinct nationality group in the United States in 1944. They settled largely in colonies in the cities, constituting a racial group which, with the sharp difference between the Latin and the American culture, served to retard their assimilation. However, the second generation entered eagerly into American life and made great strides in conforming to American nationality.[7] Strong continued interest in the homeland was a deterrent to their participation in American politics. Their chief affiliation originally was with the Republican party, the ruling power in most of the States and cities where they had settled. The exception was New York, where they became powerful in the Tammany machine. With the rise of Democratic power in the North, they went over in large numbers to that party, particularly in Pennsylvania, New York, and New Jersey. Some of the second generation showed a tendency to insurgency by affiliating with third-party movements. Fiorello La Guardia, mayor of New York City, for instance, was at various times a Socialist, Republican, Progressive, New Dealer, and finally a member of the American Labor party, which formed an alliance with the Democratic party.

THE SLAVS · The Slavs are the most numerous of the recent immigrant groups, but belong to a number of distinct and rival nationalities.[8] Their

[7]F. J. Brown and J. S. Rouček, op. cit. p. 650.

[8]W. S. Sayre, "The Immigrant in Politics," in F. J. Brown and J. S. Rouček, op. cit. pp. 656–658.

political history bears much resemblance to that of the Italians. Settled in colonies in the large cities, they suffered a partial isolation from the American community and maintained a strong interest in the politics of the home country. At first they tended to affiliate with the Republican party, but after 1932 went over very largely to the Democrats. Anton Cermak, a Czech, was elected in 1931 Democratic mayor of Chicago, and members of the Slavic race became influential in the Democratic organizations of Illinois, Michigan, and Pennsylvania.

THE JEWS · The Jewish immigrants also are concentrated chiefly in the cities, but, coming from many different countries, they have imported no political ties to rival the interests of their adopted country.[9] The largest concentration is in New York City, where they constitute about 30 per cent of the population; but they are in great voting strength in a dozen more of the largest cities. There are no reliable statistics to show their political affiliation, but it is evident that they long were pretty well divided between the two major parties, and that since 1932 they have been strongly inclined toward the Democratic party. They too have given leadership to the city party machines; for instance, in New York and in Cleveland, where one of their members, Maurice Maschke, was long the Republican boss. Their strong drift to the Democratic party is shown by the election of Jews as governors of two large States, Herbert Lehman in New York and Henry Horner in Illinois, and by the appointment of a number of the race to high positions in the Franklin D. Roosevelt administration.

RELIGION · America's two-party system has been perhaps the best guarantee against parties founded on religion. Until 1900 the country at large and all the States were too largely Protestant to provide any basis for parties formed on religion; and now, even if there existed reasons for such a political cleavage in the few States where the proportions are close, the incongruity of such a local demarcation with the national parties would preclude it. The Know-Nothing party, which developed after the high immigration of 1848 and following years, was an anti-immigration and anti-Catholic party; but after winning a number of local elections it disappeared from the scene. The resuscitated Ku-Klux-Klan, which flourished during the early 1920's, supposedly had a program directed against Jews, Catholics, and Negroes. Exerting much influence in State and local elections for a few years, it quickly disappeared under the disapproving frown of American public opinion. Although neither of the major parties can be called the favorite of Protestant, Catholic, or Jew, it does not follow that the religious factor does not enter into the composition of local party machines and into local political contests. In the national election of 1928 the Democratic candidate for the Presidency, Alfred E. Smith, was opposed by many because of his adherence to the Roman Catholic faith; this and his antiprohibition stand lost him five Southern States, Florida, Virginia,

[9] H. Schneiderman, "Jewish Americans," ibid. pp. 406–425.

Tennessee, Kentucky, and Texas. On the other hand, two traditionally Republican States of large Catholic population, Massachusetts and Rhode Island, voted for him, the only two outside those of the solid South. The comparative absence of politics based on religion is one of the happiest auguries of American political life.

ECONOMIC CLASSES AND GROUPS · As Madison pointed out, the conflicting desires of various economic interests are an important factor in political party contests. The job of providing food, shelter, and clothing is, after all, man's first care, and it is to be expected that he will associate himself with others similarly situated in order to facilitate the attainment of this materialistic purpose. A. N. Holcombe showed, in his volume *The Political Parties of Today*, how throughout history agriculture and its different branches, commerce, and business have expressed their aims and obtained their ends through the organization and control of political parties.[10] Generalization as to the economic groupings which make up the two major parties today is hazardous, but some attempt may be made.

Since the Civil War, leaders in banking, commerce, and manufacturing outside the Southern States have been preponderantly Republican, though princes of industry of Democratic affiliation have been numerous enough. The corn-and wheat-growing States of the Middle West have been more strongly Republican than Democratic, although the parties are not unevenly divided in a few States. The allegiance of small businessmen as a class cannot be determined, but generally is sectional.

Labor has been perhaps more largely Democratic than Republican, although its affiliation has varied with region and neighborhood (thus Pennsylvania, with its large industrial population, remained faithful to the Republicans until 1936). It was a basic tenet of Samuel Gompers, president of the American Federation of Labor, that labor would accomplish more by remaining aloof from the political parties, by endorsing local candidates here and there, and by exerting pressure on officers and legislators as the opportunity offered. But by 1936 the Democratic party had succeeded in enlisting the overwhelming support of organized labor. William Green, for the American Federation of Labor, and John L. Lewis, for the Committee for Industrial Organization, declared and campaigned vigorously for the Democratic ticket. Lewis's United Mine Workers raised a campaign fund of $500,000 for that purpose, and a Labor's Nonpartisan League, headed by a prominent Democratic leader and backed by the two labor federations, gave the Democratic party its support. In 1944 the League was succeeded by the Political Action Committee of the Congress of Industrial Organizations, which gave highly effective aid to the Democratic ticket. The farmers of the Middle Western and prairie States, who in the two previous elections had generally supported the Democrats, in 1944 had shifted to the Republican side.

[10]A. N. Holcombe, *The Political Parties of Today* (1924), chap. iii.

ORGANIZATION OF THE POLITICAL PARTIES · American political parties have a more complete organization than those of any other country in the world. This is a natural outgrowth of basic conditions: First, the enormous size of the country and the wide divergences in economic conditions, populations, and historical backgrounds, which require intensive organization in order that the parties may not fall apart into regional blocs. Second, the loosely federated government requires a strong outside force to give it unity in purpose and action. Two jurisdictions cover the same soil, the Federal and the State, with constant chances of conflict. The Federal agencies are built on a theory of antagonism, or checks and balances, with the President against Congress and (within the latter) with the House against the Senate. All the States have decentralized governments, with great independence of city, county, and township governments. The political party represents an attempt on a huge scale, by numerous persons, to capture the 700,000 or more elective offices of the country and to dominate the choice of several million more in appointive offices. Needless to say, this undertaking cannot be accomplished without a comprehensive nation-wide organization of great power.

The organization of political parties naturally falls into two parts: (1) the formal, or legal—that aspect which is defined in the statutes of the States and in the rules and by-laws of the party itself; (2) the informal, or extralegal, consisting of those units, groups, and offices which have grown up by custom and practice and which directly reflect the personalities and ambitions of individual leaders.

## *THE FORMAL PARTY ORGANIZATION*

The supreme governing body of the political party is its national convention, which meets quadrennially. Its crowning function is to nominate the party's candidates for President and Vice-President, a function which will be viewed in detail in a later chapter. Suffice it to say here that the convention may lay down the tenets of the party; designate what group or organization is the legitimate section of the party within each State; determine its own size and composition, including the delegates and the number to which each State is entitled; and of course formulate its own by-laws and rules of procedure.

The permanent organization of the two major parties is a series of committees arranged in hierarchical form, broadly based on the voting precincts, and extending upward through the wards, towns, townships, and cities, counties, Congressional districts, and States to the National Committee itself.

THE NATIONAL COMMITTEE · Whereas the life of a national convention is only a few brilliant days in four years, there is always a national committee in existence. Its members are formally elected for four-year terms

by the national convention upon recommendation of the respective State delegations.[11] The rules of both parties specify that in so doing they shall be bound by State laws, if any, or by the instructions of the State party organizations. In some States the choice is actually made by the State central committees; in others, by the State party convention; in a few, by the party primary election. The national committees have maintained the right to expel members who in the ensuing campaign or later fail to support the party nominees or who otherwise show disloyalty to the party. The Republican National Committee is composed of fifty-three men and fifty-three women, one from each of the forty-eight States, Alaska, the District of Columbia, Hawaii, the Philippine Islands, and Puerto Rico. The Democratic National Committee has the same composition, with the addition of representatives from the Canal Zone and the Virgin Islands.

The national committee acts for the national convention in the interim, but only as an agency to carry out the powers conferred. Its first duty is to provide a Presidential campaign organization and the means for financing it. It meets in December or January preceding the Presidential election, issues the official call for the convention, and names the city where it is to meet. It is in session again shortly before the convention for the purpose of passing on the contests of rival delegations. The Democratic committee may set the number of representatives for the territories, and both are given from time to time other special duties, such as that of the Republican committee in 1920 to fix the representation for the respective States.

THE NATIONAL-COMMITTEE ORGANIZATION · The national committees are too large for effective work, and consequently their work is mostly delegated.[12] Each has a corps of officers which varies from time to time. The usual ones are the chairman, one or more vice-chairmen, treasurer, general counsel, secretary, and an executive committee. Then there may be a director of publicity, a director of research, and during the campaign a variety of special committees, such as those on finance, new voters, foreign-language groups, and speakers. Both parties now maintain headquarters at Washington throughout the quadrennium.

By all odds the most important party officer is the chairman of the national committee, who actually is its executive officer. He is always named by the newly chosen candidate for the Presidency, and holds over until his successor is chosen in the same way four years later. He has the great task of organizing the machinery for the Presidential campaign, raising funds, planning strategy, establishing a national campaign headquarters, and in general acting as his party's field marshal for the campaign. Factional rifts and local snarls come to him for settlement. James A. Farley, Democratic chairman for Franklin D. Roosevelt's first two terms,

[11] *Republican National Convention, Official Report of the Proceedings, 1940,* pp. 344–349.
[12] E. Sait, *American Parties and Elections* (1939), pp. 360–393.

remarked in his reminiscences that when such clashes come, the chairman's place is "in the middle. His job is not to take sides or to encourage factionalism but to promote harmony, teamwork, and united action in the interests of party success at the November balloting."[13] Occasionally the chairman is in charge of the issuance of a party journal or he may act as critic of the administration, if in opposition. After the overwhelming defeat of Alfred E. Smith for the Presidency in 1928, John J. Raskob, the Democratic chairman, organized at headquarters a formidable research and publicity staff, including a well-known journalist of a caustic pen, for the purpose of maintaining an opposition to the Hoover administration and gathering material for the next election. The task was effectively discharged and was made all the easier by the onset of the great depression. Finally, the chairman acts as a sort of job broker for the candidate, contingent of course upon success in the election. Usually the chairman of the successful party is named Postmaster-General, where he is in a position to make good many of his campaign promises. Farley, for instance, retained the chairmanship both of the Democratic National Committee and of the New York State Democratic Committee during his eight years as Postmaster-General in the first two Franklin D. Roosevelt administrations, and in those positions was admirably situated for his duties as patronage secretary for the administration.[14]

National chairmen have played conspicuous parts in American party life, especially Matthew Quay in the Harrison-Cleveland contest of 1888, Marcus A. Hanna in the campaigns of 1896 and 1900, Vance McCormick in the second Wilson campaign, and Will Hays in the campaigns of Harding in 1920 and Coolidge in 1924. Because of the great increase in the number of appointive offices attendant upon the New Deal program and the great expenditure of public funds, Farley wielded an unprecedented power. The chairman's contacts made in all parts of the country during the campaign are indispensable to the party, and reward with a cabinet position is almost inevitable. By the same token, the chairman may be valuable to private industry as public-relations, or contact, man. Will Hays, for instance, resigned his office of Postmaster-General to accept the very lucrative position of "czar" of the motion-picture industry.

CONGRESSIONAL AND SENATORIAL COMMITTEES · Next are the Congressional and Senatorial committees, which are organically independent of the national committee but in fact are generally subsidiary to it. In 1866, when the bitter contest between President Johnson and Congress threatened the party with disaster in the ensuing campaign, the Republican

[13]J. F. Farley, *Behind the Ballots* (1938), pp. 356–357.

[14]Farley wrote, "I usually leave Washington Friday night and spend Saturday, Sunday, and sometimes Monday in the New York offices of the Democratic National Committee" (ibid. p. 366). "Hard work has never been particularly distasteful to me, but now and then I'm inclined to agree with those folks who assert no individual should be allowed to hold the dual roles of Postmaster General and Chairman of the Democratic Committee" (ibid. p. 365).

members of the two houses chose a committee to work for the re-election of their own members. This Congressional Campaign Committee, as it was called, was made a permanent fixture; but after 1916, when Senators were to be elected by the people, a Senatorial committee was established, and the old committee became exclusively the agent of the House caucus.[15] The Democrats soon followed the Republicans in both instances. The Republican House committee is composed of one representative from each State having members of that party in the House, nominated by the State delegations, respectively, and elected by the party caucus. The Democratic committee is the same except that the chairman is empowered to appoint a woman member for each State. Both Senatorial committees are more informal: the Republican committee is elected by party members, its chairman required to be a Senator not up for election that year; the Democratic is appointed by the floor leader of the Senate.

These committees are for terms of two years and are created for campaign purposes entirely. Their chief contribution is in the off-year elections between Presidential campaigns, when the national committee is relatively inactive. Although largely dependent upon the latter for funds, they may occasionally run counter to the plans of the national chairman, and may even find themselves at cross purposes with the incumbent of the White House, who may be desirous of punishing party members who have failed to follow his program.

THE STATE CENTRAL COMMITTEE · At the top of the State party machine is the State central committee.[16] The national electoral system, which is responsible for the basic strategy of winning State pluralities, serves to give the State party organizations enormous importance. The State central committee is a miniature of the national one, with about the same corps of officers and the same general duties. An important difference between the two is that the State committee is subject to legislative regulation, while the national committee is entirely free. Choice of members varies from State to State and may be either determined by law or left to the party by-laws. The chief methods used are the direct primary, State or county conventions, a council of party candidates, or the chairmen of local party committees. The tendency is toward requiring a certain number of women, sometimes an equality, for each committee. In a few States the central committee numbers several hundred persons, in which case the control falls to the executive committee. In the South, where the primary vote is the real election, party machinery is closely regulated by law. The chairman is important during the campaigns, but seldom has a position analogous to that of the national chairman for the reason that the leadership is in the extralegal party machines of the cities and counties, or of the State as a whole. The State committee generally works in co-operation with the national committee and in subordination to it, although there is

[15]E. Sait, op. cit. pp. 361, 362. [16]Ibid. pp. 405–410.

no legal basis for an inferior position. In a few States it is empowered to make rules for the regulation of local party organizations, but generally its power to discipline and to control has been much weakened by the direct primary.

THE CONGRESSIONAL-DISTRICT COMMITTEE · The Congressional-district committee has lost much of its importance since the advent of the direct primary. It formerly called the district delegate convention which nominated the candidate, chose delegates to the national convention and members of the State central committee, and made a declaration of principles. The committee took charge of the Congressional campaign, working, of course, in collaboration with the local committees and organizations. Today, in the direct-primary States, its part in the campaign is relatively small. Its members are elected in the primary or serve ex officio, as in Ohio, where it is composed of the chairman of the county committees included in the district, and in Indiana, where it is composed of the county chairmen and vice-chairmen.

THE COUNTY COMMITTEE · All the 3000 and more counties of the United States have party committees except in urbanized counties, where the city committee dominates the scene. These committees are generally vigorous, even though weakened by the direct-primary system.[17] The county, outside New England, is a convenient unit for the purpose of party organization: in rural counties the "courthouse gang" is the party's strongest local unit, and even in the cities the county courthouse tends to be the center of things political. The county committees are variously constituted, the ordinary committee being composed of representatives from the voting precincts of the municipalities, from the villages, and from the townships. Usually the committees are too large for efficient work, but their work is vigorously carried on by the chairman, the secretary, and an executive committee. The Democratic committee of New York County, for instance, has over 6000 members, and the party committees of Cuyahoga County, Ohio (Cleveland), have 1200. In rural counties, where the membership is often not over twenty, the full committee is much less of a figurehead.

THE PRECINCT AND OTHER LOCAL COMMITTEES · The voting precinct is the protoplasmic cell of the political leviathan. This is the point at which the party members have a direct influence on party organization.[18] In the days before the direct primary they met in a mass meeting to make nominations and to send delegates to ward and county conventions. Here at the source was fought the battle for the control of the party machine. Today the party usually is represented in the precinct by a committeeman, sometimes by a committee. The committeemen together may form the city

[17] E. Sait, op. cit., pp. 394–398.

[18] Ibid. pp. 399–404; F. R. Kent, *The Great Game of Politics*, passim; C. E. Merriam and H. F. Gosnell, op. cit. pp. 142–146.

or town committee; those within the ward, the ward committee. In rural areas the townships and villages are the voting precincts unless too populous, and each has a committeeman or committee. In the precincts and wards, more than at any other level, the legal and the informal organizations of the parties merge into one. "It is efficient organization in every little ward and precinct that determines national as well as local elections," Kansas City boss Tom Pendergast told an interviewer. "It boils down to the wards and precincts."[19] Much more important for the student of American government than a knowledge of the planned legal organization of the political parties is an understanding of the highly personalized forces which master it, of their methods of operation, and of the nutriment which sustains them.

## *THE INFORMAL PARTY ORGANIZATION*

The political party's system of pyramided and interlinking committees is its visible structure, which has received its form from custom and the hands of party conventions and managers and State legislators. Paralleling it at every point is one which no mind conceived and no man's hand fashioned: the maze of political associations of every conceivable form and purpose, whose ties are not written rules but the common bonds of human personality. The approach to its understanding lies through a study of qualities of leadership and types of leaders, of the motives which impel men to band together for political purposes, of the great social interests which organize to control the government in some respect or altogether, and of those features of government for whose control men organize intensively.

PRELIMINARY DEFINITIONS · The art of politics has been practiced by more thousands of persons than any other profession or near profession, and yet it has not developed a vocabulary of technical terms comparable in size with that of the smaller learned societies. There are sound reasons other than that the art of winning votes is not based on an exact science, among them being the sufficient one that the politician is dealing with masses of people who must be appealed to in a language common to all. However, there are a few terms on which something like general agreement exists, and which, if noted by the student, will simplify succeeding discussions.

The ancient Greek philosophers used the term "politician" to designate a person who was versed in the theory and skilled in the art of government, and in this sense the word has commonly been employed in European countries of recent times. In the United States the term is applied to one who is engaged chiefly in the operation of party affairs, and who usually is the holder of a party or government office or a seeker after such. Politics

[19]R. Coghlan, "Boss Pendergast," *The Forum* (February, 1937), Vol. XCVII, p. 70.

with him is a profession and his chief livelihood.[20] The term carries the connotation of emphasis on techniques rather than on public policies, of skill in appeasing and handling people, in constructing and operating vote-getting organizations. "The organization" refers to those men who compose the management of the party in the place in question: the members of the party committees, and the unofficial leaders and party workers. An "organization man" is one who belongs to this coterie or, if not a participant in party management, is well known as a regular supporter of the party organization. In contrast to him is the "independent," or Mugwump, who is an avowed party adherent but reserves the right to ignore the organization decisions whenever he believes it wise to do so. In the national field Senators Robert M. La Follette, Sr., George W. Norris of Nebraska, and William Borah of Idaho, Republicans, fell into this category. "Leader" is the term used to designate that person who is most potent in guiding the organization of which he is a part. Party workers publicly so refer to that person whom the public calls a "boss." So William Murphy of Tammany Hall or "Ed" Vare of the Philadelphia Republican machine was either a "leader" or a "boss," according to who was speaking. "Boss" is more correctly used for that political leader who employs the autocratic power which he has built up, by whatever means, for purposes of personal profit to both himself and his associates, who typically subordinates the general party good to the illegitimate gains of himself and his aids. The "machine" is really a specialized type of "organization." Sometimes the two terms are used interchangeably; but more often "machine" designates an organization which is the personal property of a certain politician, and connotes its use for ends not altogether legitimate. A "ring" is a small number of the insiders of an organization or machine who use their positions for purposes of illegal profit. Their activities, legally speaking, may amount to a conspiracy. Rings famous in their day were the Tweed Ring, of New York City; the Gas Ring, of Philadelphia; the St. Louis Ring, broken up in the early years of the century; and the earlier Whisky Ring, which operated on a national scale. Rings dealing in intoxicating liquors or otherwise aiding in the evasion of the laws existed in large numbers during the prohibition era. The definition of "statesman" as "a dead politician" is not entirely without merit. Sometimes during election contests the name "statesman" is assumed by the run-of-the-mine Senator and Congressman, but this is usually too much for the American sense of humor. The best usage reserves the term for those men in public life who have shown disinterestedness, a grasp of affairs distinguished by farsightedness, courage

[20]H. F. Gosnell, op. cit.; C. E. Merriam, *Chicago: A More Intimate View of Urban Politics* (1929); P. Odegard and E. A. Helms, *American Politics—A Study in Political Dynamics* (1938); S. P. Orth, *The Boss and the Machine* (1919); J. T. Salter, *Boss Rule Portraits in City Politics* (1935); J. T. Salter, *Pattern of Politics* (1940); J. Wallis, *The Politician* (1935); H. Zink, *City Bosses in the United States* (1930).

in the face of opposition, and the ability to lead men in the direction of a goal which has been set. Not many politicians in any generation measure up to this standard, and of these qualities the masses in the long run are very good judges. The hurried building of memorials and erection of statues in honor of a dead politician do not suffice to give him a niche in Walhalla.

THE NATIONAL PARTY ORGANIZATION · No two informal national party organizations are alike, for the personalities which mold them are never the same. At no time in our history could one have seriously been designated as a "machine," a "gang," or a "ring." When such time comes, American democracy will have approached its end. Strangely enough, Americans will tolerate municipal governments and even occasionally State governments of the boss type, but resent with the greatest feeling any attempt to carry the system into the national field. Mark Hanna was commonly referred to by party opponents as the national "boss" during the McKinley administration, but historical facts show that he never approached that status.[21] A lifelong personal and political friend of McKinley, his counsel probably carried more weight than that of other important party leaders; but the judgment was always that of the President. The fortunate truth is that the office of President is too large to tolerate outside dictation. Its incumbent has attained the highest honor which any American could wish. Even a weak President would lose so much more than he could gain by accepting a role secondary to that of some other person that he would be foolish to submit to such a position. The traditions of the office buoy him up, and standing in the limelight of publicity, he knows that he is expected to lead and rule.

Of what may the national Democratic party organization, for instance, be said to consist at any given moment? If the party is in power, the organization typically will include the President as leader, two or three outstanding members of the cabinet, a half dozen or so outstanding Senators and as many Congressmen, the chairman of the national party committee and a dozen or so of its abler members, and a handful of non-office-holding party men prominent because of wealth or group leadership. The party organizations of Andrew Jackson, including his "Kitchen Cabinet," of Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Warren G. Harding, and Franklin D. Roosevelt would pretty well follow this description. If the observant citizen, before the reorganization for the wartime emergency, had been asked concerning the make-up of the Franklin D. Roosevelt administration, he would at once have thought of the President, perhaps Secretaries Ickes, Wallace, and Hopkins of the cabinet, men of the House and Senate holding the key committee chairmanships (such as Ways and Means, Judiciary, Finance, and Foreign Affairs), the Vice-President, the president pro tempore of the Senate, the Speaker of the

[21] H. Croly, *Marcus Alonzo Hanna, His Life and Work* (1912), pp. 188–189, 297–301.

House, the floor leaders, a constantly changing coterie of "expert" advisers, and the governors of three or four States. The composition of the opposition party's national organization normally differs little from that of the party in power, the chief difference being that the leadership is ordinarily in the hands of an ex-President or defeated candidate for the Presidency, the chairman of the national committee, and the ranking party members of the Congressional committees.

The functions of this national organization, if the party is in power, are to give direction and policies to the administration, to co-ordinate and work with the lower units in the hierarchy of party powers, and in general to maintain harmony. If the party is out of power, its functions are to formulate policies, maintain a running criticism of the party in power, and attempt to weld an effective machine out of its numerous smaller units.

THE STATE PARTY ORGANIZATION · At this level are fewer statesmen, more leaders, and an occasional boss. Generally, the smaller the territorial unit the more compact and the better disciplined the party organization is likely to be. The classical example of State boss control is Pennsylvania, which was ruled for well over sixty years by a succession after the royal manner. It began during the Civil War with Senator Simon Cameron; next came his son Don, who ruled from 1877 until 1885; then Matthew Quay (1885–1904); and finally Boies Penrose (1904–1924). After that time, although there were pretenders, no man was strong enough to ascend the Republican throne, a fact which mattered little because the power to govern would have disappeared with the New Deal conquest of 1936, Nearly as famous was the Conkling-Platt machine, which ruled New York for nearly forty years. Robert M. La Follette, Sr., at the beginning of the century, led a popular movement which broke up a State-wide boss and machine system, only to establish one of his own, more lasting and complete in its dominance, but based on progressive principles. A. C. Townley and his agrarian league ruled North Dakota with irresistible force for a few years during the period of the First World War; but perhaps the terms "leader" and "organization" apply better both to his movement and to La Follette's. It remained for the depression era of the 1930's to exhibit a State machine whose perfect flower might well have produced a mutation hitherto unknown in America, the one-party dictatorship of Huey P. Long in Louisiana.

Although a number of States have been ruled by such machines, the number today is smaller than might be popularly thought. State bosses work against several difficulties which tend to make their reigns weak and short. First, the State administrations are highly decentralized; the governor's powers are strictly limited; his cabinet may be altogether or in part popularly elected and independent of him; and the State's population may be so grouped as to create rival local machines which will not adhere to an overlord. The State of Ohio, with heavy concentrations of popula-

tion in the two regions of the Great Lakes and the Ohio River, has never had a state-wide boss and machine. The States of Missouri, New Jersey, California, and others offer similar discouragements to ambitious bosses. The movement for the augmentation of the governor's power which has proceeded far in such States as New York, California, and Illinois will undoubtedly offer a large field for bossism.

A typical State party organization would normally include the governor as leader, although sometimes the real leader remains in the background; the chairman of the State central committee and several active members of it; a half dozen or so State senators and representatives, including the floor leaders and leading committee chairmen; and several city and county organization leaders. Probable, too, are a United States Senator and two or three Congressmen (according to the size of the State); the members of the party national committee; perhaps a few Federal office-holders such as district attorneys, the collector of the port, and the postmaster of a populous city; and an occasional prominent layman representing labor or industry.

LOCAL PARTY ORGANIZATIONS · The county, township, village, city, and their subdivisions the ward and the precinct all furnish the bases for party organizations and machines, many of which are simple in structure and relatively inactive, and many others the reverse. In some instances these organizations may be said to be the property of one person, whose energy, organizing ability, and personality are responsible for their existence; others more nearly represent the general party interests of the district. Some idea of their large number may be seen from the estimated total of 125,000 voting precincts in the United States.

In all except those counties which are entirely absorbed by the municipality, as in New York City, county organizations exist which may or may not include the various municipal organizations. The party organization of the typical rural county centers round the county office-holders. If the boss system is absent, the leadership falls to some party member among the office-holders. Local residents who hold State or Federal offices are usually influential members. Often some person has attained a position of leadership for the whole county, although this position is strictly qualified and tenuous in the ordinary rural county.

The municipal party organizations are by far the most closely knit of all in the national party. If the boss system is absent, leadership is with some party member of note, such as the mayor, an ex-mayor, or a Federal official. Other members of the organization are drawn from all sorts of office-holders or aspirants to public office, members of the council or commission, administrative chiefs, election commissioners, ward leaders, members of the party prominent in State and national councils, and resident members of the party's county and State central committees.

## *THE BOSS SYSTEM*

One of the most striking phenomena of American political life is the disappearance, in some places, of the system of free voters' co-operation under leadership and its supplanting by coercion of voters and the domination of the boss. This grew apace with the urbanization of the country. Checked or overthrown in some places, the boss system appeared in others. Boss and machine rule of a community is simply an indication that the community has been unable to maintain responsible popular government. The boss supplants the responsible representatives of the people in ruling, not the people themselves; for they never rule directly.[22] The growth of the boss system follows well-known natural laws. Air pressure tends to obliterate a vacuum; tares spring up when the corn does not sprout; and the rule of one man ensues where the people fail to use their political powers wisely. Among primitive peoples, and even those halfway up the scale of civilization and beyond, one-man rule seems best to fit the political needs. Looked at from the viewpoint of political ecology, the boss is an organism which has come into being in response to the elements of a particular environment. These elements vary somewhat, but usually include a large mass of not very well-informed voters; a relatively large class of the needy; a population nonhomogeneous racially; special interests, whether of labor or of capital, which place their own claims above those of the community; and indifference, complacency, and indolence among the educated, the upper middle, and the wealthy classes. This is the soil and climate which produced, for instance, Richard Croker, boss of Tammany Hall in the 1870's, whom William Allen White had in mind when he said:

> The thrush, the oriole, the bird of paradise, are esteemed by society, while the unlovely hell-diver is despised. Nature has no favorites. All her creatures are equally beloved; in God's kingdom all the subjects are of royal blood. The earthworm is as useful as the lion; the amoeba has full fellowship with man. . . . We forget that the hell-diver does Nature's work in the mud, which is as honorable a station as the arbor—even if to our finite eyes the arbor may seem more beautiful. So when a man rises full of power, all daubed as to plumage with the muck of the marsh, we measure him by the oriole. When Richard Croker appeared in the eighteen-eighties in New York politics, men gasped and tacitly wondered why Croker could not be like Charles Eliot. Whereupon his critics began to throw rocks at the Croker bird, because he was an ugly bird and had low moral sense.[23]

BOSS AND LEADER · Because the American bosses with their machines bear many resemblances to the dictators of Europe and their one-party

[22]One of the earliest objective descriptions of the American boss system was that of James Bryce in his *American Commonwealth* (1889), Vol. II, chap. lx.

[23]From William Allen White, *Masks in a Pageant* (1928). By permission of The Macmillan Company, publishers.

auxiliaries, they are naturally of great interest to the student of our political institutions. Democracy implies government by leaders, for the masses cannot rule directly; it implies also a constant interaction between leaders and people so that one side is constantly influenced by the other in one great effort of co-operation. There is a reciprocal leading and following between the two. The boss, on the other hand, rules by domination. The office-holders fear losing their jobs; the property-owners, inspections and higher assessments; the needy, the loss of relief checks; professional and businessmen, various annoyances and reprisals. The politician, Woodrow Wilson pointed out, is a man who manages the party machinery outside the official field of government, while the true leader or statesman is one who leads public opinion and immediately directs executive and legislative policy.[24]

The boss system exists side by side with universal suffrage, excellent public-school systems, colleges, and universities, numerous well-stocked libraries, widely used radios, and huge newspaper and periodical circulations. How has it come about?

THE FOUNDATIONS OF THE BOSS SYSTEM · Reformers have often acted on the assumption that if the reigning boss were deposed, government would be restored to the people. While this might be true in a few marginal cases, generally, if fundamental conditions remained the same, the only result would be the changing of one boss for another. Some of these conditions are the following:

1. In most communities too many duties of government are imposed on the electors. The voter may be confronted with a ballot bearing from fifty to a hundred names, practically all of persons who are strangers to him. He may be confronted with from six to two dozen questions requiring his judgment on technical matters of law, government, and finance. County, city, and State, school district, park district, and sanitary district ask his judgment on men and affairs, perhaps not once in two years but several times in one year. His political party asks his co-operation in its nomination of candidates for office, and in Presidential years he is expected not to let the heat of the national campaign dull his electoral judgment on matters of the State and localities. The burden is much too great for the majority of voters, and the result is their abstention from voting or their blind acceptance of the instructions of the party bosses. Of course, what constitutes too great a burden on the voters up to a certain point is relative to the character of the electorate in question. The placing of heavy duties on an electorate based on universal suffrage means their ultimate discharge by leaders, whether genuine or false.

2. The citizen's job of obeying the laws may be as onerous as his part in choosing those who make and enforce the laws. The State and municipal

[24] W. Wilson, *Constitutional Government in the United States* (1911), pp. 214–215.

statute books were heavy with statutes regulating the affairs of his daily life in great detail even before the Federal government entered that field on a large scale. Even the better situated find it difficult to keep abreast of all such obligations. The mechanical application of the laws, whether in the courts or in the administration, always produces individual hardships. The wealthy and the informed may be able to take care of themselves, but the poor, the ignorant, and the aliens unacquainted with our none too simple institutions may find themselves the victim of bureaucratic tyranny. The boss and his henchmen supply the poor man's need for an intermediary. The pushcart peddler annoyed by the policeman, the drunk needing a friend at court, or the unemployed a job, the alien applying for his first papers, the aged wishing to be placed on the pension roll, the speeder seeking court leniency, the criminal awaiting bail—these are the boss's clients. The powerful individual, the industrial concern, the department store wishing speedy or favorable action on the part of government, may find a short cut through the red tape by way of the boss's office.

3. Various aspects of the organization of our governmental structure, particularly that of the separation of powers and the Federal-State dualism, are discouragements to speedy and efficient governmental action. If government is denied the right to act as a unit by the principles of its organization, it is natural that a power outside should arise to supply the need. The full-fledged machine is able to help its clients, whether action is needed from the executive, the legislature, the courts, or all of them.

4. Conditions within an electorate may decrease individual independence and encourage an emphasis on questions heavily charged with emotion which distract attention from proper issues in public affairs. Among these conditions are the existence of a large number chronically at the poverty line or economically dependent; a nonhomogeneous population whose racial antipathies can easily be exploited by politicians; and organization on religious lines.

5. The electors in general may be indifferent or indolent or may have a low sense of civic responsibility. Their virtual resignation from the office of governing leaves the task to someone else, and the boss and his henchmen are the residuary legatees of all such delinquents. There is not a city or State in which the electorate, if willing and well led, could not rid itself of its bosses, rings, and machines. The theory of democracy envisages a people willing to do this very thing, but preoccupation with business, professional, and workaday duties keeps the voters from such political exertions. As in the autocracies of Europe, the tendency is for a division of labor in which the job of governing is left to those who make governing their profession.

THE SUSTENANCE OF THE BOSS AND THE MACHINE: THE SPOILS OF OFFICE · Public offices, with their salaries and perquisites, constitute the chief

means of rewarding faithful party workers.[25] Job brokerage, whether he likes it or not, is the party manager's first duty. The legitimate party organization dispenses offices not only as a reward but for the purpose of producing unity and loyalty in the administration. The boss fills the offices with men who will faithfully protect him in all his operations. All positions in his area, city, county, State and Federal, are, if possible, under control so that there may be no attacks from within. The boss's hours are occupied largely with dispensing offices, granting favors, and settling disputes. Offices are created where none had been needed before, and forces of existing offices increased in order to make more places. In campaign years a levy on office-holders of a percentage of salaries, usually 5 per cent, is a common practice. Birthday parties, flower funds, policemen's balls, and the like are means used by the boss to part the office-holder from some of his salary.

CONTRACTS AND PURCHASES · Control of the patronage is of value to the party boss not only because it enables him to maintain a standing army of workers who represent voting power, but because through them he may control the acts of government in ways profitable to himself. The manipulation of purchases and contracts has long been one of the most lucrative sources of machine revenue. The huge road-building programs, the construction of public buildings, street repair and cleaning, and the furnishing of supplies to public institutions all offer opportunities for profits to the party leaders. There are many means of avoiding the usual legal requirement of awards to the "lowest and best" bids. Specifications may be so worded that only the favorite can comply with them; "best" may be given arbitrary interpretations; lenient inspection may be given to the work of favored contractors or a liberal allowance may be made for extras so that a large profit is made; or inspection of the outside contractor's work may be so meticulous that he is financially ruined or unwilling to bid again on government work; pay checks for the outsider may be so slow in coming through that he is put to a financial loss; or he may experience inexplicable labor trouble and sabotage. The boss or members of the ring may operate businesses which, because of the connection, may deal with the city at a large profit. For instance, the late boss of Kansas City owned the Ready-Mix Concrete Company, which was reputed to have sold most of the concrete used in that county both to the government and to private concerns; and he owned a liquor company which sold to the protected saloons. Boss Murphy of Tammany was the chief owner of a trucking and excavating concern, whose function was to get at large figures work contracts which

[25]There is an excellent summary in C. E. Merriam and H. F. Gosnell, op. cit. chaps. ix–xii. Cf. also R. C. Brooks, *Corruption in American Politics and Life* (1910); D. Loth, *Public Plunder: A History of Graft in America* (1938); L. Steffens, *Autobiography* (1931); Lexow Committee, New York State Senate, *Report* (1895); W. Chambers, *Samuel Seabury: A Challenge* (1932); W. A. White, *A Puritan in Babylon* (1938); W. L. Riordin, *Plunkitt of Tammany Hall* (1905).

then were sublet to others who actually did the work.[26] Testimony in a State Senate investigation of road-building in Ohio in 1937 brought out that the State had overpaid for road materials in one biennium to the amount of $1,000,000. The story, at its best, is not a bright one, but the chief encouragement is that because citizens are more alert than formerly and administrative methods have improved, the malpractices in this field have decreased.

THE MULCTING OF CORPORATIONS AND INDIVIDUALS · One-man control of all branches of a government gives the holder a vast power over the business concerns within its jurisdiction. Inspectors may issue orders for the installing of expensive fire exits and health devices, the orders, upon proper payments, then being rescinded; property and plants may be overassessed or underassessed; streets may be unlawfully occupied; work interfered with by petty annoyances; and purchases required to be made from concerns owned by politicians. The News York legislative investigation of insurance companies in 1905–1906 brought out that the three largest companies of the State had allotted ten of the larger States among themselves for the purpose of fighting "strike" bills and securing favorable legislation affecting the insurance business, the remaining States being left to the joint care of all three. The "legal expenses" item for this legislative watching for one year was $740,972.62.[27] Investigations of the Illinois legislature occasioned by the corruption attending the election of William Lorimer to the United States Senate revealed that for several years there had existed a legislative jack pot, put up by various corporate and other interests which might benefit or be injured by State legislation. Estimated as high as $900,000 for one session by competent authorities, it was distributed at the close of the session among those who had voted "right."[28]

CONTRIBUTIONS FROM LAWBREAKING AND THE UNDERWORLD · One of the paradoxes of politics is that, beyond a point hard to fix, the more numerous the laws against wrongdoing the more wrongdoing flourishes. Laws forbidding the sale of wine in an Italian district, the carrying of firearms in a mining camp, or the operation of roulette wheels in Reno, Nevada, would be devoid of force; but in each place they would offer an opportunity for corrupt officials, if such existed, to force, on pain of prosecution, contributions from those breaking the laws. The statute-heavy criminal codes give the spoilsmen opportunities which they are not slow to take. Establishments for gambling and prostitution, in many cities with even a mild type of boss rule, are subject to periodical police raids, and the fines collected amount to a sort of tax for the support of government. But more often these establishments are one of the main sources of machine revenue. Werner stated that Tammany as far back as 1844 had levied on prostitu-

[26]G. Myers, *History of Tammany Hall* (Rev. Ed., 1917), pp. 301–318.
[27]C. E. Merriam and H. F. Gosnell, op. cit (1929, ed.), pp. 113, 114.
[28]Ibid. pp. 115–117.

tion as a source of revenue, and the Lexow and Mazet investigations of 1895 brought out that such levies had been reduced to a system.[29] The annual party and police revenue in New York City from this source was estimated in 1894 by the foreman of the grand jury as $7,000,000; a reliable estimate for Chicago in 1911 was $3,000,000. Pickpockets in a city may be allotted precincts in which they will not be molested unless their operations receive public attention; likewise protection or immunity may be provided for dispensers of drugs. Gambling—high-class, quiet places with an air of dignity for the wealthy, quarters in run-down streets for the poor, and numbers games for the Negro districts—offers rich sources of income for the protecting boss-run governments. The manufacture and sale, under protection, of intoxicating liquors, both unlawful throughout the United States for a period of thirteen years, yielded machine revenues far beyond anything which had previously been dreamed of.

CONTROL OF PUBLIC PROPERTY AND SERVICES · Public property may be used in a variety of ways to aid friends, punish enemies, and bring in monetary income or assets of good will to the machine. Although steadily improving statutory regulations governing the custody of public funds have greatly cut down this source of revenue, opportunities still exist for the enjoyment of income from the deposit of surplus funds and occasionally for the misappropriation of the principal. During the first half of the last century it was the custom in England and the United States for the fiscal officers, such as paymasters, to receive a specified percentage of the principal of funds handled, as well as such interest as they might be able to collect, and the latter item was widely permitted by law until the end of the century. Special privileges in the use of the streets and of the parks and other recreational areas are among the usual spoils offered. The organization may use its influence to place people on the relief rolls or work agencies. A few years ago the National Security Board suspended Federal grants to the Oklahoma pension scheme until the rolls should be purged. The incident which precipitated the downfall of the Long machine in Louisiana was the discovery that State materials, workmen, and trucks had been used in the construction of a house for one of the machine's lieutenants.

CHARACTERISTICS OF THE BOSS · What are the abilities which make it possible for a man to become the uncrowned ruler of city, county, or State? All too few careful studies of individual bosses have been made.[30] Naturally the boss will have many personal qualities common to all leaders of men, no matter at what level. He must have an expert knowledge of the

[29]M. R. Werner, *Tammany Hall* (1928), pp. 54–59, 373–420.

[30]G. Myers, op. cit., passim; W. L. Riordin, op. cit.; S. P. Orth, op. cit. (1919); A. H. Lewis, *Richard Croker* (1901); H. Zink, op. cit.; W. B. Munro, *Personality in Politics* (1924), chap. ii; E. B. Logan, *The American Political Scene* (1936); D. T. Lynch, *Boss Tweed* (1927); M. R. Werner, op. cit.

facts pertinent to his job, as well as sound and shrewd judgment within the field of things with which he deals; he must evoke the respect of his colaborers for his courage, judgment, and all-round efficiency, and show that he will deal fairly with them all, according to the standards of the realm in which they move. Personal magnetism may be an asset, but the reputation for careful calculation and successful manipulation is more important. Some bosses have possessed charm and grace, but more have had personalities which would not take with the voters in general. They are political businessmen, who organize well and manage the inner circles, leaving the attracting of voters with oratory and political showmanship to the lighter sort.

Popular stereotypes of the boss were established principally by the Nast cartoons of Tweed and the newspaper accounts of Croker. Both were heavy, thick-set men of well over two hundred pounds in their prime. Tweed was of a jovial disposition, with free and easy manners; but Croker, a prize fighter who had fought his way up as a gang leader, was of a dour, repellent appearance, in every way fitting the popular conception of what such a boss should look like. William Allen White referred to him as "a slow, emotionless, presimian hulk of bone and sinew—a sort of human megatherium, who had come crashing up from the swamps splashed with the slime of pre-Adamite wickedness . . . a primitive man with a simple mind, to which the spectacle of the shifting vitascope of modern life was as meaningless as the figures of the kaleidoscope."[31] George B. Cox, boss of Cincinnati for many years, according to Munro was a man of "fine presence, reticent, unobtrusive, self-effacing, quick in his decisions, and unwavering when he made up his mind."[32] "Abe" Ruef, of San Francisco, was described as "ambitious, clever, energetic, desiring to make a place and an honorable name for himself in the world's affairs." He was vain of his appearance and had his hair curled at the barber's. "Chris" Magee, of Pittsburgh, was a man of charming personality combined with great shrewdness and excellent business ability. His partner, William Flinn, was rough and grasping.[33] Tom Pendergast, late boss of Kansas City, physically was a typical American boss, "a wrestler's corded neck set firmly on a huge torso," but in disposition cold and repellent.[34]

A surprisingly large proportion of the grade "A" bosses were breadwinners at an early age because either of the father's death or of the family's poverty, and there is near uniformity in their lack of schooling beyond the elementary grades. Of twenty bosses studied by Harold Zink, thirteen had never gone beyond the grammar grades, three graduated from college or professional school (one was an honor student), while one,

[31]W. A. White, *Masks in a Pageant* (1928), p. 26.
[32]W. B. Munro, op. cit., p. 60.
[33]Ibid. p. 61.
[34]R. Coghlan, op. cit. p. 67.

"Colonel" Edward Butler, alternately Democratic and Republican boss of St. Louis, never had attended school.[35]

Many occupations are represented in the list of prominent bosses. Fernando Wood, first of the Tammany "kings," was a cigar-maker; Tweed was a chairmaker; "Honest John" Kelly operated a grate-setting and stonecutting shop; Richard Croker worked for a while as a railroad machinist and steamboat engineer, was a rough and ready pugilist, and began his political career as an attendant in the court of Judge Barnard, one of the Tweed Ring. Charles F. Murphy worked in a shipyard and a wire factory, and, when he had saved enough, opened and ran a saloon, which soon became a success and was known as "Charlie's Place." "Ed" Vare was a vegetable hawker; "Doc" Ames, a surgeon; Flinn, a contractor; and the two Camerons, Mott, Quay, Penrose, Cox, and "Abe" Ruef were lawyers.[36]

## *ILLUSTRATIVE BOSSES AND MACHINES*

Since the industrialization of America a considerable number of its cities of 300,000 population or over have been at various times under boss and machine rule. This represents a local and temporary breakdown of popular government, for which reason it is of the greatest interest to the student of our political institutions. Case studies have been made of a few boss-machine systems in an attempt to discover the reasons for the existence of these systems, their forms of organization, the techniques of their operation, and the qualities of their leaders. Short accounts will be given of five of these systems, three of which were city machines and two State machines. Tammany Hall of New York City and the Platt machine of New York State, both at their peak late in the last century, are included because they developed the types of city and State machines, respectively, to which all others later tended to conform; the Kansas City Pendergast machine, a nineteenth-century Tammany type, because of its development and success in the twentieth century. The two others, the Louisiana machine of Huey P. Long and the Jersey City machine of Frank Hague, are significant because in State and city respectively they seem to have carried the boss system to its perfection and well into a phase not heretofore attained in America. Unlike the older machines, force and intimidation were not confined to covert use against individuals but were used with quasi legality in the name of the government and good order; the brokerage system of special favors to individuals was broadened to include works and services for the benefit of the poor and sometimes of the public in general; class appeals to the masses were made, particularly in Louisiana, and were implemented by heavy levies on big business and corporations.

[35]H. Zink, *City Bosses in the United States* (1930), pp. 10–11; W. B. Munro, op. cit. pp. 64–65.
[36]H. Zink, op. cit. pp. 35–36.

Great public debts were piled up, taxes were increased, and a show was made of placing their burden on the few. In all five cases the boss had to solve the problem of making adjustments with the larger political units of which his realm was a part: the State authorities in the case of the city machines, and the Federal in the case of the State machines. Only the Jersey City machine flourishes today. That of Platt long ago ceased to exist; the removal of Long in 1935 by assassination and of Pendergast in 1939 by trial and imprisonment changed the form if not the existence of their organizations; and Tammany, out of power after Fiorello La Guardia was elected mayor in 1933, became greatly weakened.

TAMMANY HALL · Tammany is the name both of a political club and of the Democratic organization of New York County.[37] The Society of Saint Tammany, or the Columbian Order, was founded in 1789, as was said at the time, "on the true and genuine principles of republicanism," with the objects of "the smile of charity, the chain of friendship, and the flame of liberty." Its early membership, drawn from the working class, soon developed hostility to the aristocratic reigning Federalist party of the city. The society had an organization and ritual based on Indian forms. The membership was divided into three classes, sachems, warriors, and hunters, grouped into thirteen tribes each headed by a sachem; and there was a Grand Sachem over all. The society made much of patriotic occasions, appearing in Indian dress for the parades of the Fourth of July, Columbus Day, and the reputed birthday of their patron saint, the Indian chief Tammany. It soon was in politics, with Aaron Burr the first of its members to hold high national office. William Mooney, its founder, was superintendent of the city almshouse until removed in 1809 for padding his expense accounts. In 1837 the Collector of the Port of New York, Samuel Swartout, a Tammany man and close friend of Aaron Burr, fled to Europe when it was discovered that he had borrowed $1,225,705 of government money; he was soon followed by another Tammany man, William M. Price, United States district attorney, whose accounts had been found short in the amount of $72,124.

By 1854, when a Tammany leader Fernando Wood for the first time was elected mayor of New York City, the organization had developed those political techniques which became its settled practices: the enrollment of the poor in the party ranks, the control of elections by force and fraud if necessary, collections from the underworld on one side and from business on the other as the price of favors and protection; the giving of aid and charity to the needy, the selling of offices, and the garnering of graft. The officers of the society and of the Democratic party organization were either identical or interlocking. Rule was by a succession of men who literally fought their way to headship. In 1863 Fernando Wood was demoted by election to Congress. Under William M. Tweed, who followed him, the

[37] G. Myers, op. cit., passim; M. R. Werner, op. cit., passim.

reign of unrefined graft gave Tammany a notoriety never afterward equaled. Tweed gave way in 1874 to "Honest John" Kelly, who ruled until 1886; then came Richard Croker (1886 to 1902). After a few months of Lewis Nixon, Charles F. Murphy took over in a quiet and unobtrusive way and became perhaps the most successful of all Tammany bosses. Since his death, in 1924, no one has been able to organize the discordant elements into a compact fighting unit. Changes in population, the decrease of Irish and the increase of Jewish, Italian, and Negro voting strength, as well as the new spirit of the times, had altered the political picture. After Olvany (1924 to 1929) John F. Curry re-established for a few years an old-time Tammany regime; but the hostility of the Franklin D. Roosevelt administration and the emergence of the leadership of Fiorello La Guardia, erstwhile Republican and Socialist, backed by a fusion group, left Tammany without patronage and the other means of sustaining itself.

ORGANIZATION · The territorial basis of the Tammany organization is the district, in which members of the lower house of the State assembly are elected.[38] In each of these twenty-three districts the party voters choose a district general committee. Composed now of a man and a woman from each precinct, this is the governing body within the district. It nominally chooses the district leader, secretary, and treasurer; but the process is not so simple as that. These districts have been the scenes of the grimmest of battles, and victory goes to the strongest in a contest for survival. Boss of the district is the highest point in the Tammany organization which most men can attain, and it is reached only after success in building a following and patronage from the precinct up. Such names as those of the two Sullivans, Big Tim and Little Tim, George W. Plunkitt, Tom Foley, and William S. Devery suggest leaders who ruled their principalities like feudal lords. The district general committees have subcommittees on various subjects, such as finance and legislation; and the leader sponsors district social clubs, sometimes based on racial lines, and often named for revered Tammany leaders.

The smallest unit of the machine is the voting precinct. The captain is appointed by the district leader and has a corps of workers, or "heelers." The chief duty of this organization is to bring out the votes, watch over affairs of concern to the party, and report to the district leader.

At the top is the general committee of the county, made up of the combined memberships of the twenty-three district committees, totaling over 11,000 persons. This, of course, is a paper committee, and its work is performed by an executive committee of the district leaders. This is the one which, beginning with "Honest John" Kelly, has chosen the leader or boss of Tammany Hall and the Democratic organization of New York County. Of course, as in the assembly districts, the choice is really the

[38] M. R. Werner, op. cit. pp. 292–293.

ratification of a de facto leadership already attained by a strong personality. The general committee organizes with a chairman, secretary, treasurer, and a set of subcommittees. The actual boss may or may not hold an office in the central organization.

METHODS OF WORK · To "Honest John" Kelly goes the credit for the establishment, after the debacle under Tweed, of an orderly system of party government and machinery for the winning of elections. It was a feudal system, with one supreme boss to whom the district bosses, supreme in their respective fiefs, owed allegiance. Candidates for elective office were compelled to contribute to a general campaign fund, and holders of appointive offices had to give a share of their salaries. A committee took charge of all elections, furnishing speakers, canvassers, and gangs, where necessary, to carry recalcitrant precincts. Under the Kelly and Croker regimes the Monday before election was "Dough Day," when the money was distributed for use in the election. With a city-wide organization, effective in every precinct, the election authorities under its control, and a sympathetic police, Tammany was well fortified for election-day activities. After the winning of an election the new mayor-elect was presented with a list of names, made up by the boss and his district leaders, covering all the important appointive offices in the city.

Tammany aimed to keep its place in the affections of the poor through a variety of services: the finding of jobs, help in the courts, care after disasters, the furnishing of food and clothing, picnics and outings, and holiday dinners. George W. Plunkitt, long leader of the Fifteenth District, thus announced his tactics:[39]

> If a family is burned out, I don't ask whether they are Republicans or Democrats, and I don't refer them to the Charity Organization Society, which would investigate their case in a month or two and decide they were worthy of help about the time they are dead from starvation. I just get quarters for them, buy clothes for them if their clothes were burned up, and fix them up till they get things runnin' again. It's philanthropy, but it's politics, too—mighty good politics. Who can tell how many votes one of these fires bring me? The poor are the most grateful people in the world, and, let me tell you, they have more friends in their neighborhood than the rich have in theirs.

The Republican or reform tickets which occasionally won New York City elections, such as that of John P. Mitchell in 1914, lacked the organization and technique for ministering to the poor, and rule naturally gravitated to the Tammany organization. "Why, it is that very crowd of which we are speaking," Boss Croker explained to the English journalist W. T. Stead. "The minority of cultured leisured citizens will not touch political work—no, not with their little finger. All your high principles will not induce a mugwump to take more than a fitful interest in an occasional election. The

[39]W. L. Riordin, op. cit. pp. 51–52.

silk-stocking cannot be got to take a serious hand continuously in political work. They admit it themselves. Everyone knows it is so."[40] Of the civil-service-reform movement, which threatened to impair the working of the Tammany system, George W. Plunkitt remarked: "I see Thomas Jefferson lookin' from out of a cloud and sayin': 'Give him another sockdologer; finish him.' And I see millions of men wavin' their hats and singin' 'Glory Hallelujah!' "[41]

Beginning with the reign of "Honest John" Kelly, Tammany gradually tempered its methods to suit the change in conditions. The leaders became wealthy, as they had since its early days, but, as Plunkitt explained, through "honest graft": using inside information as the basis for the making of investments, the secret purchase of lands needed by the city and their sale at a large profit, the organization of companies which would profit from city contracts, dabbling in utility companies, and the like. During the Murphy regime, party income from gambling and the underworld undoubtedly remained large. The party kept its reputation as the friend of the poor, to whom Tammany leaders were knights as noble as any Robin Hood, who robbed the wealthy (in this case the corporations and business) in order to help the poor. The government services steadily improved after the turn of the century, not because of Tammany's desire but because of an enlightened public demand. Tammany, as explained by a publicist, was in effect a governing syndicate which, because of the inability of the democracy to govern itself, had stepped in to perform that service; and for that service it collected from the taxpayers generally and from the wealthy, and collected well.[42] Croker, as further quoted by Stead, touched this very point:

> There is no denying the service which Tammany has rendered to the Republic. There is no such organization for taking hold of the untrained friendless man and converting him into a citizen. Who else would do it if we did not? Think of the hundreds of thousands of foreigners dumped into our city. . . . There is not a mugwump in the city who would shake hands with them. They are alone, ignorant strangers, a prey to all manner of anarchical and wild notions. Except to their employer they have no value to anyone until they get a vote.[43]

And it may be added that Tammany has fostered the nominal antagonism of the poor against the rich, a thing entirely consistent with a capitalistic system in which the poor hope some day to become rich. Tammany has dealt with the privileged, not attempted to destroy them, as the friendly co-operation of the famous names of New York's wealthy under the Tweed,

[40]W. T. Stead, "Mr. Richard Croker and Greater New York," *Review of Reviews* (London) (October, 1897), Vol. XVI, p. 345.

[41]W. L. Riordin, op. cit. p. 166.

[42]View stated by D. G. Thompson in his *Politics in a Democracy* (1893) and quoted in C. E. Merriam and H. F. Gosnell, op. cit. (1929 ed.), p. 413.

[43]W. T. Stead, op. cit. p. 349.

Kelly, Croker, and Murphy regimes amply attests. Its proletarianism is not derived from the Marxian philosophy.

BOSS PLATT'S NEW YORK MACHINE[44] · In the case of the State machine one hears much less of the manipulation of the voters and back-alley politics. This is because the State machine is primarily a federation of local machines, although it does have a clientele of its own in the offices of the central State government. Other than these the chief favors it has to dispense are favorable State legislation, judicial decisions, and administrative acts. It deals primarily with the big interests and the powerful in general. Its members inevitably must work as members of the national party organization, where the glare of publicity strikes them, and must be able to lead as well as to coerce. Persons of the Croker and Pendergast type are not well fitted for the job of State boss, although the job might fall to them for a while. Boies Penrose, the Pennsylvania boss, came of a good family and was a university graduate. The father of Thomas C. Platt was a lawyer and sent his son to Yale for a year. Top members of Platt's machine were generally men of education and middle-class background. One, William Barnes, Jr., was a high honor graduate of Harvard University and owner of two newspapers. The chief of staff, Benjamin B. Odell, Jr., had spent three years in Columbia University and was engaged in various business enterprises. Chauncey M. Depew, an associate of the machine, was a man of culture, known nationally as a polished speaker. Platt, while boss, was president of the United States Express Company and served a term as United States Senator, while Depew was President of the New York Central Railroad and a United States Senator.

The organization of the Platt machine was roughly hierarchical.[45] A group of men known as Platt's "Sunday School class" met with him at the week end in the "Amen Corner" of the old Fifth Avenue Hotel. Some came regularly, others from a distance as they could. At this conference was planned the grand strategy of the party. Speaking later, Depew said: "Here were made governors, State senators, and assemblymen, supreme-court judges, judges of the court of appeals, and members of Congress. Governors thought the capitol was at Albany, but really took their inspiration and the suggestions for their policies from the Amen Corner." The next stratum in the hierarchy was composed of men who had won the leadership in ill-defined regions of the State, and below them came in succession the various levels of the regular Republican party organization: the county leaders and their organizations, and those of the cities, towns, and villages. This pyramid, with Platt at the apex, was able to nominate for the legislature and State offices men who would listen to his counsel and instructions.

The naming of the speaker of the lower house of the legislature came to be Platt's annual task, while the choice of the president pro tempore of the

[44]H. F. Gosnell, *Boss Platt and His New York Machine* (1924). [45]Ibid. chaps. iv and ix.

upper house and that of the chairmen and members of the standing committees of both were matters for the deliberations of the "Sunday School." In the same way the slate of nominees for State offices, including the lieutenant governor, the presiding officer of the senate, was made up; and of course the chief appointments of these officers were legitimate party spoils. As a United States Senator, Platt had the dispensing of the major portion of the large Federal patronage of New York State and City.

The Platt machine probably had little to do with the distribution of the spoils of the local governments, but this was firmly in the hands of its constituent local organizations. Aside from the large State and Federal patronage, its chief spoils consisted in the passage of bills which the great utility, railroad, and insurance interests desired, and the defeat of others which they disliked; the awarding of contracts for State work and the selling of materials; and the throwing of business to law firms affiliated with the organization. Platt was not accused of personal dishonesty, but he did not question the methods used by his subordinates so long as they obtained results.

THE PENDERGAST KANSAS CITY MACHINE · The Kansas City Democratic machine of Boss Thomas Pendergast used almost all the methods perfected by Tammany in the last century, but seems to have added little in the way of new ideas.[46] Pendergast had served an apprenticeship with his older brother, James, a saloon-keeper and boss of the First Ward, and soon began his office-holding career, including the offices of alderman, county sheriff, and street commissioner. His reign was at its zenith in the 1920's and 1930's and was ended in 1939 by a Federal prison sentence. Two events planned with good intent turned out to his great advantage. The first was the adoption of the reformer-sponsored city-manager plan, whose principle of centralization enabled Pendergast's council and manager to rule without annoying checks and balances from any other source. The second was the relief and work program, carried through with large Federal funds, which made possible the adornment of the city with a magnificent center of city and county buildings, relieved the local finances, and gave employment to large numbers of workers.

The methods of the machine included the firm control of elections, with fraud, intimidation, and force wherever necessary. For instance, in 1937 Kansas City, with a population of 415,000, had 268,000 names on the voters' registration books, an enrollment larger than its total number of persons twenty-one years of age and older. There were 21,073 registered in the First Ward, whose total population was 19,923. City supplies were purchased without bidding, and members of the machine organized con-

[46]Irving Dilliard, "Missouri's Boss Pendergast," *The Nation* (December 19, 1936), Vol. CXLIII, pp. 728–730; R. Coghlan, op. cit. pp. 67–72; J. Beatty, *American Magazine* (February, 1933), Vol. CXV, pp. 30–31; *Literary Digest* (August 15, 1936), Vol. CXXII, pp. 4–5; *Newsweek* (August 15, 1936), Vol. VIII, p. 19; ibid. (March 31, 1938), Vol. XI, pp. 10–11.

cerns to sell to the city. The boss himself was the owner of a cement concern which sold in the county a large portion of all such material used by government or private individuals; he owned also a liquor concern which enjoyed large sales and could have monopolized the local market. The city was "wide open," and the underworld activities were protected by the police. The revocation of business permits and the raising of property assessments were used to intimidate persons who began to protest against the regime.

The machine was in control of the entire city, county, and district governments; and, like its prototypes of the earlier years, it found itself forced in self-protection to grasp for power in the wider realms of the State and the nation. Although successful in electing members of the State legislature, judges, governors, various other State officers, and an occasional United States Senator, it was in these broader jurisdictions that the danger lurked. The local Federal district attorney had been appointed upon the recommendation of an unfriendly Senator; and a governor, reluctantly endorsed as a candidate in 1936, failed to consult Pendergast on appointments. Federal prosecutions for vote frauds convicted several hundred machine workers; and on April 7, 1939, Pendergast was indicted for failing to make proper income-tax returns. One item specified was a $315,000 pay-off by fourteen insurance companies for a settlement of $9,500,000 of their money impounded by the courts in a dispute over increases in fire-insurance rates. Although he already had agreed to make restitution of back taxes in the amount of $372,808, the trial went forward, and he was convicted and sentenced to fifteen months' imprisonment. The resignation of the city manager and the prosecution of other high members of the machine marked its downfall, or at least its radical reorganization.

THE FRANK L. HAGUE NEW JERSEY MACHINE · Frank L. Hague passed through the characteristic stages in attaining his political maturity.[47] Beginning with election as constable at the age of twenty-one, he had held in succession the offices of deputy sheriff, leader of the Second Ward, sergeant-at-arms of the New Jersey House of Assembly, custodian of the city hall, street and water commissioner, and, after adoption of the commission form of government in 1913, member of the city commission. By virtue of this office he was director of public safety for four years, and thereafter mayor. He was chosen as Democratic national committeeman for New Jersey in 1919 and vice-chairman of the national committee in 1924. Reaching out into State politics, he elected three Democratic governors in succession, and aided in the election of one or more friendly Republican governors, various other State officers, members of the State supreme court, and several United States Senators.

The Hague machine followed the orthodox pattern established by the earlier boss system: the control of elections by whatever means are re-

[47] This account follows that by Dayton D. McKean, *The Boss, The Hague Machine in Action* (1940).

quired, the buttressing of precinct and ward organizations by social clubs, levies on office-holders, the mulcting of business concerns, and the lengthening of the pay rolls. The chief departure from the old pattern is the assumption of dictatorial powers and techniques. A Tweed, Cox, or Croker lurked behind the established government, corrupting and causing dereliction of duty in whole or in part. Hague, on the other hand, became the legal chief executive, backed by a strong and well-disciplined police force and several thousand city and county officers ready to give him instant obedience.[48] Shaped primarily to screen the basic objective of spoils, a set of measures was followed which developed into something of a rounded program. These may be summarized as four chief policies: (1) the free spending of public funds, (2) the provision of conspicuous welfare services for the public and for the poor in particular, (3) the abrogation of the constitutional rights of freedom of speech, the press, and assembly, and (4) the setting up of an official "enemy" (in this case the Communists), to serve as a political rallying point and a blind for the persecution of enemies of the machine.

The taxing power of city and county was used to take from the people a substantial slice of their current income; and the municipal and county credit was drawn upon to mortgage future income. According to the *Municipal Yearbook*, Jersey City's tax rate of 25.6 mills (expressed in terms of the true valuation of the property) was higher than that of any other city of comparable size; that of Indianapolis, for instance, was 9.75; Kansas City, 11.25; Louisville, 14.28; and Rochester, 15.96.[49] Its per capita debt, $172.33, also was the highest, those of Indianapolis, Kansas City, and Rochester being $74.21, $109.70, and $154.04 respectively. The salary scale for officers and employees also was higher than that of any city comparable in size. If we take the police force as an example, the minimum salary of a patrolman was $3000, which was 50 per cent higher than that in the city next highest in the population class and double that in Kansas City; while the salary of the chief was $9000, as compared with $4050 for Louisville and $4800 for Indianapolis.

The Jersey City Medical Center is the spectacular welfare institution which serves to give the Hague regime an aura of benevolence.[50] This excellent institution, composed of seven skyscrapers, the highest in the city, was created at a cost estimated at between $25,000,000 and $30,000,000. The greater part of the funds was borrowed, including $6,370,000 from the Federal Public Works Administration, which was accompanied with an outright gift of $4,000,000. The salary scale is at a height comparable

[48]Ibid. chap. i.

[49]*Municipal Yearbook* (1940), quoted in ibid. pp. 249–253. The total rate, adding county and all other levies, for Jersey City was 48.38 mills; Indianapolis, 24.08; Kansas City, Missouri, 28.39; Louisville, 25.76; and Rochester, 32.55.

[50]D. D. McKean, op. cit. pp. 166–182.

relatively to that of the police department. The annual pay roll is in excess of $2,500,000, and the total charge of the institution on the city and county budgets, counting interest, is over $4,500,000. The cost per bed is about double that of the two large privately operated hospitals. Private and public hospitals of the county together provide one bed for every 135 of the population, although the rate generally set as satisfactory is one for every 250. The population of the city in the 1930–1940 decade decreased from 317,000 to 310,000, while that of the entire county decreased 40,000. Respecting the receipt of Federal funds, Mayor Hague in 1936 told an audience, "We have had $500,000 a month to give food to our hungry and work for our idle." The Works Progress Administration spent, through the years 1935 to 1939, the sum of $47,003,759 in Hudson County, which, with other grants, increased the total of Federal funds received to about $65,000,000.

The suppression of constitutional liberties, not confined, as in other boss-governed areas, to an occasional bothersome individual but as a considered policy, was another of the Hague contributions to the technique of machine government.[51] This consisted chiefly in the denial of the use of halls, streets, or parks for meetings and parades; the seizure of persons by the police without warrant and their deportation; the censorship of publications by forbidding their sale at newsstands and on the streets; and the intimidation of newspapers by various means at the disposal of the city government. A city ordinance forbids the owner of a hall to lease it for any public meeting at which anyone shall speak advocating the overthrow of government by force or without a permit from the chief of police. Another forbids "public assembly in or upon the public streets, highways, public parks or public buildings" without a police permit, for which permission may be denied when proper "for the purpose of preventing riots, disturbances, or disorderly meetings." The many denials of permits to political groups for meetings was climaxed in 1938 when Norman Thomas, candidate of the Socialist party for the Presidency of the United States, was seized by the police as he was about to make a speech without a permit in Journal Square, taken in a police car, and forcibly placed on a ferry boat bound for New York. Several years of exclusion of organizers of the CIO was ended in 1939 by a United States Supreme Court decision.[52]

The official "enemy," in whose name an indefinite variety of persons and organizations may be prosecuted, suppressed, or deported, is the Communists. Included in this category were the Socialists, the I. W. W., the CIO, and persons in general who were friendly to Russia or wished to overthrow the government by force. "This is one of the real American cities of the nation," the mayor told a home-town audience. "This is America; the communists must be smashed." Testifying in court, the mayor said

[51] D. D. McKean, op. cit. pp. 231–241.

[52] *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939).

that persons bringing such an attitude to America "should be driven back; not go back, be driven back." As to the native-born of that state of mind, "We ought to establish a camp in Alaska . . . and house them there, away from the American people."[53]

THE HUEY P. LONG LOUISIANA STATE MACHINE · The Long and Hague machines, the one with a State basis and the other with a city-county basis, represent the most extreme development of such an organization.[54] In both, dictatorial methods were used, and the power of the boss was for a time absolute. The two schemes of control were about the same: legislation for the poor; the spending of public funds on a large scale, emphasizing public improvements, but in Long's case, with less attention to direct relief; a concentration of powers in the boss's hands by legal means; the control of elections; the constant and even ostentatious use of military force; and the establishment of an official "enemy."

Huey P. Long came from a poor family of the hill country, was unable to attend college, but found one year in law school sufficient to enable him to pass the State bar examination. His ability to lead the masses was nothing short of genius and was compounded of many elements, including shrewdness, cleverness, and a mastery of the poor man's language, as well as invective, innuendo, and a showmanship which at times was sheer buffoonery. Platt, the boss of the New York machine described above, was plodding, meticulous, cautious, and devoid of social imagination. Long was brilliant, swift, devoted to short cuts, and fertile in alluring issues. Platt's talents were those of a calculating manager of politicians and their clients; Long's, those of a popular leader, or demogogue. Platt had served a thorough apprenticeship in the party organization from the lowest rounds up; Long precociously skipped all the lower grades to soar at the age of twenty-four to the elective office of member of the State Public Service Commission. His second try was for the office of governor, which missed; but his next attempt for the same office succeeded when he was thirty-five.

The governorship was Long's vantage point for the welding of that dictatorial power which was not attained until he had left the office. In 1932, with his term of governor but half over, he was elected to the United States Senate, but refused to qualify for the office until the hostile lieutenant governor should be got rid of. This accomplished, one of his faithful stooges was installed in the governor's chair, and Long took his seat in the Senate. For three more years he ruled the State, transforming its government by legal forms into a despotism sometimes benevolent. After his death by assassination in 1935 the machine held undisputed sway with an ever-deepening venality. In the summer of 1939 there broke against it a storm

[53]D. D. McKean, op. cit. p. 276.

[54]For Huey P. Long and his regime cf. C. Beals, *The Story of Huey P. Long* (1935), and H. T. Kane, *Louisiana Hayride* (1941).

occasioned by the publication of photographs showing the unloading of State building materials from State trucks at the site where a house for one of its members was under construction. Soon great defalcations by the president of the State university were discovered, and he became a fugitive from justice. The governor resigned, and Earl Long, brother of the machine's founder, took his place. At the end of his four-year term in 1940, during which prosecutions had gradually disintegrated the organization, he was defeated for renomination in the primary by a reform candidate, who then announced, "We are back in the Union now."

Long's social program, which was held out to the poor and very largely fulfilled, included the improvement of the public schools, the provision of free textbooks, the building of a network of highways and toll-free bridges, lower utility rates, more adequate charitable institutions, and a college education for every boy and girl who might want it.[55] The symbol of the machine's benevolence and power, the counterpart of Hague's Jersey City Medical Center, was the State university. A magnificent physical plant was erected, including the Huey P. Long Field House (costing $1,000,000), and medical buildings and a hospital at New Orleans, and its faculty was strengthened. Long lost no time at the beginning of his term as governor in inaugurating a huge spending program. Bond issues of $32,000,000 and $68,000,000 were authorized for hard-surfaced roads, bridges, ferries, schools, fish hatcheries, zoos, and parks, and $4,000,000 for a new State capitol. New Orleans, after falling under Long's domination, engaged in a similar program and was greatly aided by $23,000,000 in Federal grants for eight large housing projects. The machine was fond of a show of force in the shape of an enlarged National Guard and a State police, which could be increased at the will of the governor. Long himself was everywhere accompanied by a bodyguard.

The legal basis of this one-man rule was ample, freely given by a legislature often called together on short notice at the boss's whim.[56] Control of the elections everywhere was ensured by the creation of State election commissioners, who appointed special deputies in every county. The appointment of every police and fire chief was placed under the control of a State civil-service commission, and the governor was given the right to call out the militia at will. The removal of the assessment of property for purposes of taxation from the local authorities and its transference to the State tax commission, and the authorization of the State attorney-general to supersede the district attorneys in any case whatsoever, placed the property and freedom of the citizens at the mercy of the machine. The law transferring the regulation of public utilities from the municipalities to a State commission, and another subjecting the appointment and tenure of every teacher of the public schools to a State "budget" commission, were not only patronage grabs but blows directed at local self-government and

[55] H. T. Kane, op. cit. pp. 273 ff. [56] Ibid. chap. ix.

the freedom of teaching. Legislative procedure was "simplified" by the reference of every bill to one committee controlled by picked men; and Long, while Senator, attended legislative sessions and openly gave orders.

The boss of a State machine must of necessity have many contacts with the national party organization and with the national government (if his party is in power). The relations in this case were generally unsettled and stormy. The Roosevelt administration was not very old before Long became its bitter critic; and the national party leaders seem to have looked with some fear upon his bid for a national following.[57] Federal patronage was given to Long's opponents, large sums of PWA money earmarked for Louisiana were withheld, and its WPA was operated under an organization independent of the State machine. After Long's death and after the machine had dropped its opposition to the administration, its patronage rights were recognized, the criminal prosecutions of some of its members for income-tax evasions were dropped, and Louisiana received its due share of Federal funds. Late in the Earl Long administration, however, a special representative of the United States Department of Justice instituted new investigations and prosecutions which were influential in the machine's downfall.

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CHAPTER XIV

# *Nominations for Elective Office*

*Election* is the choice of a public official by the votes of a constituency of citizens. *Nomination* is the proposal of the name of a person to another body, usually the people, for possible choice for public office. The making of nominations is one of the steps in the process by which democracy performs its task of controlling the government. Much depends on its proper discharge; for at the final election nothing is left to the electorate except a choice between two men, which might amount only to the necessary approval of one of two mediocrities or worse. If the six million voters of New York, for instance, went to their November election to choose a governor, with no nominations having been made nor any other previous understandings comparable to nominations, they would scatter their votes among hundreds of persons, and the one receiving the highest number would owe his choice to a small minority. Everyone is familiar with the practice common to clubs and societies by which the president is authorized by the membership to appoint a nominating committee which brings in a slate of officers, which then normally is elected by a single vote. Do the "people" rule in this case? The president is their duly chosen agent, and the committee appointed by him is theirs once removed. But subject to a general responsibility to the club members, enforced by a possible overturn of its nominations and rival nominations from the floor, the committee actually does the job of electing. No such scheme of self-perpetuation and delegation of power would be proper in the nomination of persons for public office where the interests of the entire community are at stake and the voting constituency may number in the thousands or millions.

The making of nominations in the United States is very largely in the hands of the political parties, either through formal recognition or through the influence of the organization leaders behind the scenes. Winning a nomination recognized by law entitles the victor's name to a place on the printed ballot at public expense. State ballot laws invariably allow room for a "write-in" of unnominated persons, but rare indeed are the instances where such persons win an election.

DEFINITIONS · The present nominating system of the United States is the result of a long evolutionary process. Some confusion may be escaped by a preliminary definition of terms pertinent to it. *Caucus* during colonial and Revolutionary times was applied to a meeting of an irregular group of men, usually leaders, before election time to plan control of the election. The term is supposed to be derived from an Algonquin Indian word mean-

ing "to talk." During the early national period, after politics became more democratized, it was applied to a mass meeting of party voters in a ward, precinct, or district; later it was applied particularly to the meeting of party men and leaders in Congress and the State legislatures, and this today is its most general use. The respective party "caucuses" in Congress and the State legislatures are the governing bodies of the party there. *Primary* for a long time was used interchangeably with *caucus* to designate the mass meeting of voters of a party for the purposes of making nominations and electing delegates to party conventions. *Primary* was descriptive, in that it referred to the meeting of the party voters in their original capacity, as assemblies of the first instance. With the coming of the "direct primary" system, which is simply an election held within the party according to laws of the state, the word *caucus* has been confined principally to its later meaning.

NOMINATIONS BY CAUCUS · The caucus, conference, "committees of correspondence," delegate convention, and direct-primary methods of making party nominations have existed in varying degree side by side throughout most of our national history, but each has had its period of dominance.[1] In the two decades preceding the Revolution it seems that in the localities secret and unorganized caucuses met to decide on support for candidates or make informal nominations. By the outbreak of the war these in many instances had become open, and during the war they spread to all the States. The legislative caucus first made its appearance in Rhode Island in 1790, when candidates for governor and lieutenant governor were named by party members of the legislature. By 1796 this method had become established generally in the States. In 1800, through Alexander Hamilton, the caucus for the nomination of Presidential and Vice-Presidential candidates made its appearance in Congress. Members of each party met, usually in the legislative chamber, made their selections, and then announced them to the party by proclamation. The legislative-caucus system of nominations was consistent with the state of parties and the suffrage of the times. Travel was difficult, communication slow, suffrage restricted, the Presidential electors were chosen by State legislatures, and the participation of the masses in politics otherwise was small. The men in the legislative bodies represented the party as well as could be expected at the time. But when in 1824 the Congressional caucus passed over the name of the popular hero Andrew Jackson, the extension of the suffrage had made the time ripe for an attack on "King Caucus." In 1828 the king was dead, but no new king was reigning. Candidates for the Presidency were placed in nomination by caucuses in the State legislatures.

NOMINATIONS BY DELEGATE CONVENTIONS · During the quarter century when the legislative caucus for national and State office nominations was dominant, elements had been combining to form the institution of the

[1] F. W. Dallinger, *Nominations for Elective Office* (1897), pp. 3–32.

delegate convention.[2] As elective offices became more numerous the duties of the caucuses or mass meetings increased. Where the unit was a county or a Congressional district, the number of inhabitants and the distances rendered the caucus inadequate. Two devices were used to supplement the local caucuses. "Committees of correspondence" made up of representative men of the communities sent circulars to leaders in various counties or adjoining districts or units to give and ascertain information on candidates. Secondly, the "conference" system became common. County caucuses appointed conferees who made findings on candidates for the Congress and State-wide offices and submitted these to the county meetings for ratification. A third device was the "mixed" legislative caucus. Beginning in 1817, party legislative caucuses were made more representative by the addition of lay party members from those counties or towns which had no party representatives in the legislature. It was only a step from these to the idea of a State party convention composed of party delegates from the various voting constituencies.

The "representative caucus," as the convention was called, came first in the cities and counties. Delegates were chosen by caucuses or mass meetings in wards or townships, as the case might be, to meet to make nominations. As early as 1788 a few isolated attempts had been made to bring together delegates from the entire State to nominate candidates for Congress and the Electoral College. These grew in frequency year by year, but met irregularly and had no fixed organization, and their decisions often were ignored. In 1823 the first State convention of delegates all chosen by the people in local caucuses met at Philadelphia; and by 1832 these conventions had entirely supplanted the legislative caucuses. In September, 1830, a national convention of Antimasons was held in Philadelphia, which was followed by another one the next year in Baltimore, composed of delegates apportioned among the States according to their representation in the House of Representatives. The National Republicans held a convention at Baltimore, December 12, 1831, with delegates from seventeen States, and nominated Henry Clay for the Presidency. A Democratic national convention likewise met at Baltimore, May 21, 1832, and went through the foreordained job of nominating Jackson for a second term.[3]

ORGANIZATION AND WORKING OF THE CONVENTION-CAUCUS-PRIMARY SYSTEM · For well-nigh seventy-five years the political parties made their nominations through a series of local caucuses and a hierarchy of delegate conventions which had become solidified into a well-wrought system. As the new century approached, however, changes had begun to appear which within a few years brought about the downfall of the system. Since

[2]Ibid. pp. 32–48; E. C. Meyer, *Nominating Systems* (1902).

[3]Jackson was nominated in 1928 by the legislature of Tennessee, seconded later by various legislatures and caucuses. E. Stanwood, *History of Presidential Elections* (1884), pp. 96, 97.

the principal features of this system are necessary to the proper understanding of the present one, a brief outline of it will be given here. Its essential was the delegation of power by the party voters of the precinct.

THE CAUCUS, OR PRIMARY · At the bottom were the caucuses, or primaries, mass meetings of the voters, which were the founts of popular power. Beginning here, delegates were chosen from one level for the next, ending finally in the national convention of the party. Each convention made nominations for the offices of the unit which it represented.

The nominating process started with the primary assemblies of the voters, a sound democratic practice at that point, but at its higher levels was carried out by conventions chosen by representative conventions, which left the influence of the party voters remote. The primary was used by the parties in precincts, wards, assembly districts, townships, and villages. It always performed two functions and sometimes a third: it made the party nomination for the elective office or offices of that jurisdiction, and it chose delegates to the convention for the larger unit just above it. The occasional third function was the adoption of resolutions on the leading questions of the day. All the party voters resident in the district were in theory entitled to attend the caucus, although sometimes the party rules permitted its members to refuse participation to those whom they did not consider good party men. Polling lists made up by the local party committee excluded men who had not supported the party nominees at the last general election. In practice, only a small percentate of the party voters attended the primaries. Usually delegates to two or more conventions were chosen at a primary, which might be of the city, county, assembly district, Congressional district, or State.

The caucus continued to work reasonably well in sparsely settled communities until the end, but in regions which were rapidly becoming urbanized it had grown unwieldy and had fallen under boss and machine control. In the large cities the primaries were often held over saloons and pool halls, in rooms so small that only the chosen few could enter; the "gang" arrived early and took possession of the rostrum, conducting the business without opposition; the polling lists were made up arbitrarily, and, if this was not sufficient, "strong arm" men stationed at the door kept undesirables from entering. Outside the populous areas where such practices were tolerated, the caucuses lent themselves readily to manipulation: the population was now too great for this "town meeting" example of pure democracy to work.[4]

COUNTY AND CITY CONVENTIONS · The caucuses, or primaries of party members, had set the nominating process in motion; thereafter it was carried through to completion by the delegate conventions. Usually within a few days or two weeks at the most after the caucuses the city or county convention was held upon the call of the chairman of the proper

[4]F. W. Dallinger, op. cit., passim.

local committee. It first chose a temporary chairman, who appointed a committee on credentials, which made up the permanent membership roll of the convention. Thereupon a permanent chairman, secretary, and sergeant-at-arms were selected, and the convention was ready for work. In the county convention there were four duties to perform: to make nominations for the various county offices, such as those of sheriff, treasurer, and recorder; to elect delegates to the Congressional-district and State conventions; to elect the party committee for the county; and to draw up and adopt a set of resolutions on the issues of the day.

CONGRESSIONAL DISTRICT CONVENTION · Delegates to the Congressional-district convention were sometimes chosen entirely in the party primaries, sometimes by the county and city conventions, and sometimes by both the conventions and the primaries. This convention had only one nomination to make, the candidate for Congress. In addition it usually had all the other functions of the county conventions: electing two delegates to the national convention and a variable number to the State convention, and a district party committee. The resolutions drawn up often covered only a few topics representing chiefly the matters which the candidate planned to stress in the campaign.

THE STATE CONVENTION · The composition of the State conventions was regulated by the party rules. In the rural States it was likely to be based chiefly on counties, with some representation from the Congressional districts; in the more thickly populated States the cities were likely to be represented directly. The State convention was the most imposing party gathering except the national convention. The attention of the State was riveted on it. Here were gathered its most powerful party leaders. And here the chief prizes within the gift of the party were handed out: the nominations for governor and all other State offices, and, if it was a Senatorial year, official or unofficial decision on that highest of all State party prizes. In Presidential years the succeeding State conventions offered the opportunity through their platforms for a continuing castigation of the opposing party. Naturally, too, they were the centers of planning for the forthcoming Presidential nomination, and the hatchery of favorite-son candidates. Fights were waged by the followers of each of the various Presidential candidates to obtain a delegation instructed for him. Instruction might serve two purposes: to give the delegation leader authority to fight for a candidate if one was actually in the running, or, if not, to enable him to bargain effectively with the heads of other delegations.

THE NATIONAL CONVENTION · The national convention had all the functions of the lower ones except the choice of delegates, and others of its own besides. With only two candidates to name, this function was in the spotlight of national attention. Since it is the one feature of the old nominating system which has remained largely unchanged, its further consideration will be left for a succeeding section.

## *THE PRESENT NOMINATING SYSTEM: THE DIRECT PRIMARY*

The direct primary is an election, conducted by the regular authorities of the State, at which the members of the political parties may ballot to perform the functions of the old conventions. The chief exception is the adoption of resolutions, or a platform, which in the nature of things can hardly be done by balloting. But the primaries do nominate the party candidates, elect the party officers and committees, and choose the delegates to the national convention and to the State convention, if such exists.

Several features of the direct primary deserve notice. First, the primary is not a caucus, or mass meeting, of the voters: they come in singly throughout the day and cast their ballots in secret, as at the final election. Second, with some exceptions in the South, it is no longer merely the instrument of the political party, to be used when and as the party wishes, but a creature of the law. Third, it leans to the Rousseauan theory of political individualism, connoting the innate capacity of men as individuals to think, form judgments, and act rationally on public questions. Fourth, by the same token it envisages a lesser role for the party leader; one of the main arguments for its adoption was the probable elimination of the boss and his machine.

GROWTH OF THE DIRECT PRIMARY · The direct primary was a long time on the way, not vitally affecting the nominating system until near the end of the last century.[5] The parties themselves had been gradually changing their primaries or caucuses from mass meetings, which transacted their work in a few hours, to elections conducted entirely under party auspices, so that members could come at their pleasure throughout the day and vote by ballot. The idea first spread rapidly throughout the Middle West and the South. In 1866 California had passed a law "to protect the Elections of Voluntary Associations, etc," which was wholly optional in operation; and New York soon followed with one to protect the primaries and primary delegates against "bribery, menace, or other corrupt means or attempt to influence in his vote or deter him from voting." Until the end of the century, legislation mostly took the form of corrupt practices acts; regulations for the administration of the primaries, the count of the votes, the footing of the expenses, and the choice of party officers; and the definition of those eligible to vote in the primary. Two thirds of the States, particularly in the Middle West and the South, had legislated on the subject; but much of the legislation was cautious, optional, and applicable to localities.

Wisconsin in 1903 passed the first State-wide direct-primary law. This law was mandatory and surrounded the processes with the same safeguards as those of the regular elections. The movement spread rapidly, until by 1917 all but four States had adopted laws covering some of the State offices. Thirty-two of these had mandatory laws covering all the State offices, and some had laws covering the offices of the localities. Sub-

[5]C. E. Merriam and L. Overacker, *Primary Elections* (1928), chap. v.

sequently four (Idaho, Kentucky, New York, and Indiana) restored the convention for certain offices. Because of the South's one-party system the direct primary presents some special problems for the States there. Four of these States made their primaries optional with respect to the State offices and members of Congress, while five left the conduct of the primaries to the party officials operating under party rules, which removed them technically from the classification of direct primaries. Another innovation was the second, or "run-off," primary, in which only the names of the two standing highest for each office in the original primary appear on the ballot, made necessary because the primary there was equivalent to an election. Those adopting it included all the Southern States, except Virginia and Tennessee and the newer one, Oklahoma. Texas in the 1920's experimented with laws excluding Negroes from the Democratic primaries, but after several rounds with the United States Supreme Court lost the decision in 1944.[6]

ASPECTS OF THE DIRECT PRIMARY · The well-rounded direct-primary system includes its conduct by the regular election officials and the payment of its costs from the public treasury, the general application of the State corrupt-practices code, ballots of the type used in the regular elections, and the use of registration lists. The legal adoption of such shifting and changing voluntary institutions as the political parties, and the definition and regulation of their sphere of action, are not without their difficulties. Some of the problems and how they have been met will be described below.

WHAT IS A POLITICAL PARTY? · Since the ballots of most primary systems must make provision for party headings and columns, a mode of determining what constitutes a party must be established. If every organization making such a claim were admitted, the ballot would be hopelessly long and the expense of its manufacture prohibitive; but, on the other hand, democratic theory requires that each political association of significance should be given an opportunity to present its candidates to the electorate. In the very nature of things, the direct-primary system tends to perpetuate existing parties and discourage the formation of new ones. Statutes do not indulge in philosophical definitions. Any organized group of voters which at the last general election polled a certain proportion of all votes cast is entitled to have its column of aspirants on the ballot. The percentage required ranges all the way from 25 per cent in Alabama and 20 per cent in Kentucky to 5 per cent in Florida, 3 per cent in Illinois and Pennsylvania, and 1 per cent in Maine. New York recognizes any group as a party which cast 10,000 votes for governor at the last election. Some State statutes permit newly formed parties to go on the ballot upon presenting petitions signed by a designated percentage of the voters, usually ranging from 3 to 5 per cent.

[6]*Smith* v. *Allwright*, 64 Supreme Ct. Rep. 757 (1944). For a discussion of the Texas "white primary" laws cf. supra, Chapter VI, pp. 20, 21.

PLACING THE NAMES ON THE BALLOT · An aspirant may have his name placed among the contenders on the ballot by filing a declaration of candidacy and a petition signed by a specified minimum of the electors of the district. From 1 to 4 per cent of the party voters is the usual requirement. If the candidacy is for a State office, there usually is a requirement for a minimum of signers from a certain percentage of the counties. The law sets the dates within which the petitions must be signed and filed. Election officials, State or county as the case may be (town officials in New England), are required to pass on the legal sufficiency of the petition: whether it is in due form, and whether it has a sufficient number of signatures of persons entitled to sign. Electors may sign only one petition for one office, but if more than one place is to be filled, as many as there are places. It is seen that at this point party control entirely breaks down. The leader or boss may not prevent the name of a rank independent from going on the ballot if the aspirant can secure the required signatures. Party favorites, of course, have certain advantages; for instance, the organization may take charge of securing signatures to the petition.

WHO IS A PARTY MEMBER? THE CLOSED AND THE OPEN PRIMARY · Only the tried and true party members were permitted in the original mass-meeting primaries, and sometimes not even all of them. The original purpose of the direct-primary laws was to regularize the nominating devices which the parties had invented and preserve them as party instruments. In time this conception became somewhat blurred. The various primaries as constituted today fall into the two classes of open and closed. No party test is required in the former. The voter is handed the ballots of all parties. He marks one in secret, folds the blanks, and deposits them in a separate box. The clear inconsistency of this type with the principle of party government was an influence in its abandonment by 1933 except by two States, Wisconsin and Montana. Since that time California, Minnesota, and Washington have adopted wide-open blanket primary laws. That of the last-named State declares it to be the purpose to permit any registered voter to vote for his choice in the primary regardless of party affiliation. There is no party column, but the names are printed on the ballot under the heading of the office, with the party designation after each name. The California law permits a person to run for nomination in more than one party; Hiram Johnson, for instance, was the nominee of both Republican and Democratic parties for the United States Senate in 1938.

The closed primary sets up some sort of test of party allegiance, which may have reference to the past or the present or the future.[7] Some States require proof of previous registration as a member of one party; others, that the voter, upon applying for a ballot at the election, make a declara-

[7] J. R. Starr, "The Legal State of American Political Parties," *American Political Science Review* (June, 1940), Vol. XXXIV, pp. 439–455; C. A. Berdahl, "Party Membership in the United States," ibid. (February, 1942), Vol. XXXVI, pp. 16–50; ibid. (April, 1942), pp. 241–263.

tion of party allegiance. If this declaration is challenged by an elector, the voter may be required to take an oath that he voted for a majority of the candidates of his party at the last general election. Since the ballot is now universally secret, such a declaration is no more weighty than the character of the person. Sometimes the law requires a declaration of intention to support a majority of the party's nominees at the forthcoming election. In summary, it has been found impossible effectively to confine participation to party members. The secrecy of the ballot and a desire not to offend possible converts stand in the way. A heated primary fight between two contenders in one party has the same attraction for bystanders as any other fight, and some are sure to slip in to deliver a blow. Such flexibility ought to be possible as would permit individuals to change their party allegiance but exclude those who wish to come in only for the battle then in progress.

MINORITY CHOICES · By leaving the race for nomination open to anyone who meets the usually easy minimum of required signatures, the direct primary fosters the long ballot. In the 1940 primary of Cuyahoga County, Ohio, for instance, the Republican voters had to choose from one hundred and twenty names for the eighteen seats of the lower house of the State legislature. Since the expensiveness of "run-off" elections precludes their general adoption, the result is that nominations often are made by less than a majority of those voting. One of the favorite tactics of the boss is to encourage the entrance of many aspirants, thereby scattering the votes so that those of the regulars are sufficient to carry through the organization candidate. Most of the States provide that a plurality, no matter how small, is enough to nominate. In Iowa a candidate must receive 35 per cent of the party vote. Washington requires 10 per cent; two or three other States, 5 per cent. From studies made in fourteen States over a period of ten years Merriam concluded that the votes in the primaries had been in excess of 50 per cent of those cast in the corresponding elections. It was pointed out that these figures understated the effective use of the primary, since the percentage of votes cast for the majority-party candidates usually ran much higher and because the totals cast in the final election are normally swelled by the independent vote.

PERSISTENCE OF THE CONVENTIONS · While the direct primary is the typical method of making nominations today, the delegate convention has more than held its own in its diminished territory during the past decade. The States of Connecticut, Rhode Island, and New Mexico use only the caucus and convention system of making nominations, and Utah uses it for all except cities of the first and second classes, while five Southern States and Delaware are free to use either the convention-caucus or the direct-primary system. Seven other States (Idaho, Iowa, Indiana, Maryland, Michigan, New York, and South Dakota) combine the two systems, generally leaving the nomination of State-wide officers to the State convention. In Iowa a hierarchy of conventions make nominations where can-

didates have failed to receive more than 35 per cent of the votes cast in the election. About a dozen other States have conventions which serve as party conferences and draw up platforms but make no nominations.

PRE-PRIMARY CONVENTIONS · In the early days of the direct primary, observers pointed out that what would destroy the boss and the machine might also weaken legitimate party leadership.[8] No longer might the party present a rounded slate of candidates for governor, other State officers, and United States Senator, planned with the object of making a good fighting front. To remedy this defect, Governor Charles E. Hughes of New York in 1910 suggested a pre-primary convention to make recommendations, and Massachusetts in 1932 adopted such a law. The party convention meets before the regular primary, makes nominations for the State offices, and the names of those nominated are placed at the top of the column of the primary ballot with the inscription "Endorsed for the nomination by —— party convention."[9] Both Colorado and South Dakota had previously experimented with the plan.

THE PRESIDENTIAL PRIMARY · The performance of the two major party national conventions in 1912, the Republican resulting in the split of the party and the Democratic dragging through forty-one bitter ballotings, brought many predictions that by 1916 all delegates would be instructed by State primaries.[10] Some were as sanguine as Senator Jonathan Bourne, of Oregon, the father of the Presidential-primary idea, who predicted that the conventions of 1916 would be the last held to nominate Presidential candidates. At last the people would have the choosing of their candidates, and there would be the end of sham battles; but many foresaw that this would necessitate a second, or run-off, primary. Beginning with Oregon in 1910, twenty-six States by 1915 had adopted some form of the Presidential primary. Repeal and unfavorable decisions of the courts have since reduced the number to eighteen.

A primary election ballot may provide more than one means by which the voter may show his preference for a Presidential candidate. He may indicate his choice directly by placing a cross before the name of a candidate; indirectly by voting for the list of delegates pledged to support the candidate; or he may vote for both the candidate and his list of pledged delegates. Names of the Presidential candidates are placed on the ballot by petition, although some States require in addition a formal declaration of candidacy on their part. Space is reserved on the ballot for the write-in of other candidates and lists of delegates.

PROBLEMS OF THE PRESIDENTIAL PRIMARY · The legal difficulties in the way of the Presidential primary are great. The Constitution knows no

[8] C. E. Merriam and L. Overacker, op. cit. pp. 148, 149.

[9] L. Overacker, "Direct Legislation in 1932–1933," *American Political Science Review* (April, 1934), Vol. XXVIII, pp. 265–270.

[10] L. Overacker, *The Presidential Primary* (1926), pp. 10–22, 310–314.

such thing as Presidential elections or nominations, only the choice of electors, who are to be appointed "in such manner as the legislature thereof [of each State] may direct." The States unquestionably may legislate to regulate the manner of the election of delegates to the national conventions, but may the States exert control over the extraterritorial acts of delegates sitting in a national convention? If so, for how many ballots could they hold their delegates to their instructions? Should the delegates be apportioned among districts for election or offered as a slate for the State at large? Could they be prohibited from voting for any candidate who had not entered the primary of their State? Even if there were no question of constitutionality, any national primary law which could be obtained would probably be inadequate; for it would require a uniformity and rigidity of party practices which the various States and regions would scarcely tolerate.

The present partial primary system based on independent State laws has shown some conspicuous weaknesses. Aspirants for the Presidential nomination are naturally reluctant to risk their prestige early in the struggle by entering primaries in States where they are little known, or to risk offending the local organizations by so doing. The bitterness in such State primary contests as that between Alfred E. Smith and William G. McAdoo jeopardizes the chances of success in the November election. The spirit of the direct primary is easily violated by running favorite sons, who, although little hopeful of receiving the final nomination, hold the block of votes for trading purposes. Thus, in the 1940 Republican convention, on the first ballot the eight votes of South Dakota went to Governor Bushfield; the eighteen votes of Kansas, to Senator Capper; the twenty-two of Iowa, to Hanford MacNider; the thirty-three of Massachusetts, to Joseph W. Martin; the ten of Oregon to Senator McNary; the thirty-eight of Michigan to Senator Vandenberg; the fifty-two of Ohio, to Senator Taft; and the seventy of Pennsylvania, to Governor James. The party managers still had an abundance of material for bargaining.

THE 1920 REPUBLICAN CONVENTION · By 1920 no adverse public judgment had yet been formed against the practicability of the Presidential primary. It was evident that this would be a Republican year, and three men of high achievements entered the primaries in good faith and waged vigorous campaigns, General Leonard Wood, Senator Hiram Johnson of California, and Governor Frank Lowden of Illinois. Of the 3,186,248 votes piled up in the primaries in twenty-one States, these three received, respectively, 710,863, 965,651, and 389,127.[11] On the first ballot in the convention their combined vote was almost two thirds of the total. Attempts to get one or more to withdraw were futile, probably made the more difficult because their votes had been won the hard way by campaigning

[11] *Proceedings of the Republican National Convention, 1920*, p. 220.

in the primaries. Finally, in the late hours of the torrid night of the fifth day, in a smoke-filled hotel room, a compromise was made in favor of Senator Warren G. Harding of Ohio, a man unknown nationally, who throughout the balloting had held little more than the favorite-son votes of his own State.

The effect of the decision on the members of the party at large, who had been keyed up by the vigorous primary campaign, was depressing, but it was disastrous to the prestige of the primary system, which no State subsequently has adopted. It was now seen that only an enforceable national statute bringing all States into the system could bring about direct nomination by the voters. That the primary has demonstrated its worth in many of the States is conceded, both as an educational device and in its influence on the final nominations. Smith and Hoover in 1928, and F. D. Roosevelt in 1932, entered the conventions with such formidable numbers of votes picked up in the primaries that they could not well be denied the nomination. But Willkie's success in the 1940 Republican convention against other aspirants who had won a number of the primaries again illustrated the weaknesses of the system.

## *THE NOMINATION OF CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT*

THE BUILD-UP · The campaign for the nomination of Presidential candidates may be said to start soon after each Presidential election. Leading members of Congress, governors of large States, members of the cabinet, and prominent party men keep themselves in the public eye. An unexpected turn of events may suddenly make some one "available" because of his association in the public mind with certain policies. An aspirant's personality may be attractive to the populace; his achievements as an administrator may evoke popular confidence, as was true of Alfred E. Smith as governor of New York and of Herbert Hoover as Secretary of Commerce. They attract friends and politicians who are willing to wager their political future on them. After a certain point has been reached, funds are collected and a publicity bureau is established. The cause is then on the way to the next stage, the contests in the direct primaries.

THE CONTEST FOR INSTRUCTED DELEGATES · The aspirant may follow any one of three possible courses with respect to the Presidential primaries: he may openly enter the contest with an organization equipped to put up a good fight; may refuse to allow his name to be used, but back a favorite son who may capture the delegates and hold them for his use at the critical moment; or may keep his hands entirely off the contest. The course he chooses will be determined by the strength which he evidently has in the State; by the nature of the opposition, that is, whether there is a bona fide favorite-son candidate who might be irrevocably antagonized by his entrance; and by the timeliness of announcing his candidacy.

Lining up delegates chosen by party conventions or committees is quite another thing. The emphasis here is on contacts with State and big-city party leaders more than on a showing before the mass of voters, although this is still important since the leaders are interested chiefly in a winner. When the party is in power, the bulk of the Southern Republican delegates are usually at the command of the President if he wishes a second term; and while custom dictates that he remain aloof from the choice of his successor, his influence may be quietly used to steer those delegates. Men known as party "regulars" have the advantage in securing the pledge of delegates chosen by party conventions, while the outsider of attractive personality finds his best opportunity in the primaries.

THE CALL OF THE CONVENTION · The national committee is the supreme party authority in the determination of the date and place of the nominating convention, the distribution of delegates among the States and territories, and the making of arrangements for its sessions. Late in December or early in January of every fourth year the chairman issues the formal call for the convention, which includes the necessary data as to the time, the place, and the apportionment of delegates, all of which previously have been the subject of deliberation by the executive committee, the national chairman, and prominent lay members of the party. The convention is not awarded without the recipient city's having raised a purse for helping to defray expenses. San Francisco paid the Democrats $205,000 in 1920; Chicago, which had both conventions in 1932, paid the Republicans $150,000 and the Democrats $200,000.[12] Convenience of location and adequacy of facilities count in making the award. It is also the general rule to keep the convention out of a city which is regarded as the seat of power of any of the favored aspirants, and it is sometimes placed in a large and doubtful State for purposes of propaganda. In 1924 the former consideration was ignored in choosing New York City when Smith was a strong contender; and the battles of that convention, with Tammany taking the lead for its candidate, will long be memorable in convention annals. Chicago is the favorite choice because of its central location, but Baltimore, Cleveland, Kansas City, Philadelphia, and St. Louis have more than once been chosen. In 1920 the Democrats met at San Francisco; four years later they favored the Atlantic coast, with the choice of New York City; and in another four years they chose Houston, Texas, near the Gulf, the only instance of a Southern city's being used by either major party since the Civil War.

ALLOCATION OF DELEGATES · For many years there was a simple rule followed by both parties in the apportionment of delegates, each State being given twice as many as it had Senators and Representatives, with an alternate for each. Under the caucus-convention system of choice two delegates were chosen from each Congressional district and four by the

[12]E. Sait, *American Parties and Elections* (1939), pp. 535, 536.

State convention. While seemingly fair, there were reasons, particularly with the Republicans, why this uniform system worked disadvantageously to the best interests of the party. The solid South voted unfailingly for Democratic electors, and yet a block of 270 delegates from those States in the Republican convention might easily determine the nomination. These votes were normally at the disposal of the President at the end of his first term, and at the end of his second term he might throw a majority of them to his chosen heir apparent. On a considerably smaller scale the same objection to the rule operated for the Democrats respecting a few solid Republican States of the Northeast. Agitation for the reduction of the representation of the Southern States in the Republican convention arose periodically; but fear of offending Negro votes in the North, and a distaste for any acknowledgment of the sectional weakness of the party, long forestalled any action. But in 1912, when the administration's control of these dummy delegates was a large contributing factor to the party split, some modification proved necessary. The rule adopted in 1913 reduced the representation of every Congressional district which had cast fewer than 7500 Republican votes the year before from two to one, which resulted in a decrease of 79 in the Southern representation. The allocation was somewhat altered in 1923. As readopted in 1940, the apportionment for each State was as follows: for delegates at large, an initial four, with two more for each Congressman at large, and three more if the State had voted Republican in the preceding Presidential election or meanwhile had elected a United States Senator; secondly, one delegate for each Congressional district casting at least 1000 votes for a Republican elector or for a Republican nominee for Congress, and an additional delegate if the vote was 10,000 or more.[13] Alaska, Hawaii, and the District of Columbia were each given three, and the Philippine Islands and Puerto Rico two delegates each. This made a convention of an even 1000 members, of whom 195 were from the twelve States of the South. Because of slight changes in the rules and more States with Republican majorities, the delegates in 1944 numbered 1059. The Democratic party, with a few minor changes, has retained the time-honored scheme of apportionment; but its rules permit any State to choose eight delegates at large rather than four, half of them women, each delegate to have half a vote. The rules adopted for the 1940 and 1944 conventions also gave two additional delegates at large to each State which, in the previous election, had cast its electoral votes for the Democratic candidates. The membership of the 1944 convention was 1176.[14]

CREDENTIALS OF THE DELEGATES · Delegates are chosen directly by the voters in the primaries or by the Congressional-district and State conven-

[13] *Proceedings of the Republican National Convention, 1940*, pp. 102, 103; *New York Times*, January 12, 1944, pp. 1, 6.

[14] *Proceedings of the Democratic National Convention, 1940*, p. 325; *New York Times*, January 23, 1944, p. 32.

tions, as explained in the preceding sections. Disputed seats appear principally among the convention-chosen delegates; for here the sending of complete delegations by rival conventions, each claiming to be the legal one, is not uncommon. But rival delegates appear also among those chosen at the direct primaries, in which case the State provides the machinery for their settlement. Nevertheless, the party reserves authority to pass on all disputes, and in 1912, at the Republican convention, over fifty Theodore Roosevelt delegates chosen in primaries were thus unseated. The national committee makes up a preliminary list of delegates, holding meetings in the convention city for several days preceding the convention. This is an important power, which for the one party is usually at the disposal of the administration. With the Republicans, contests among the Southern delegation are numerous, and often are settled chiefly on grounds of expediency and political advantage. The list of delegates thus made up is then turned over to the temporary chairman of the convention, and is subject to later revision by the credentials committee of the convention and by the convention itself. Unless there are close contests among factions in large States which might help to determine the nomination, the tentative roll of the national committee is accepted without careful scrutiny. Sometimes, to soothe hurt feelings, both contesting delegations are seated, one-half vote being given to each member.

CHARACTER OF THE CONVENTION · The Democratic and Republican national conventions are the nation's greatest political spectacle. In a country given to many national meetings, no other organization, professional, business, or fraternal, can rival the quadrennial gathering of the major political parties in picturesqueness, highly charged atmosphere, or aggregation of vivid and dynamic personalities. The trains disgorge into the convention city politically-minded people of every variety: statesmen, leaders, mere politicians, bosses, ward heelers and precinct henchmen, prominent citizens who are ardent party men or enjoy watching the game, brass bands, marching clubs, and glee clubs. The city rapidly assumes a holiday appearance, with great streamers, marching bands, and milling badge-bedecked crowds at every downtown street corner. The saturation point is nearly reached in those talented in the arts of the leading and management of men en masse for political purposes. United States Senators and State governors claim and are often accorded the distinction of serving as delegates at large; cabinet officers are usually present, sometimes at the heads of delegations; bosses of the great cities appear with their followers and are accorded the proper honors and respect. The President of the United States modestly remains at his desk, and the favored candidates preserve the proprieties by remaining in their hotel rooms or out of the city, leaving their fortunes to managers. As in most other national conventions, many of the important results are not obtained on the formal program but in lobbies and hotel rooms. Only once in four years is such an

opportunity presented for politicians of all grades from coast to coast to get in touch with each other. Friendships are formed which in time may sway the fortunes of the party. The meeting is more than a convention with legal functions to perform; it is, rather, a national party conference or, more properly, a multiplicity of conferences. Its tone is distinctly nationalistic. The sea of banners in the hall and the call of the roll symbolize the presence of the States. The pictures of party heroes that adorn the walls, and some of the speeches, strike those "mystic chords of memory" which bind the present with the past.

THE TEMPORARY ORGANIZATION · At the hour set for the opening, which is now chosen with an eye for the largest radio audience, the chairman of the national committee calls the convention to order, and a prayer is offered by a clergyman.[15] The call of the national committee is read, the number of delegates to which each State and territory is entitled is announced (in the Republican conventions), and temporary officers are elected. This slate, consisting of secretary, chairman, sergeant at arms, tally clerks, and other assistants, has been made up previously with great care and deliberation. Usually it is accepted without delay; but occasionally, as in the Democratic convention at Baltimore in 1912, when the possession of the temporary chairmanship is the key to the control of the convention, there is a contest. Care has been taken by the national committee in its recommendations to avoid controversy and favoritism among the candidates. The temporary chairman, immediately after taking the chair, delivers a carefully prepared keynote speech. He holds the opposition party up to scorn, lauds the achievements of his own party, bears down heavily on questions which arouse general party enthusiasm, and avoids commitment on issues which will soon be contested before the platform committee. The convention then proceeds to adopt the rules of the preceding convention until otherwise ordered. With a temporary organization effected, the convention proceeds to elect four standing committees: on credentials, permanent organization, rules and order of business, and platform and resolutions. All this is usually accomplished at the opening session, and the delegates, already beginning to be wearied, file out to await the next stage of the spectacle.

THE PERMANENT ORGANIZATION · The usual business at the opening of the second day's session is the report of the committee on credentials. Most of its work has already been done by the national committee, and its roll of delegates will be the same, with occasional exceptions made to correct errors or induced by behind-the-scene struggles of rival aspirants for the nomination. The committee on permanent organization prepares, for the duration of the convention, a slate of officers which is usually identical with the temporary organization except for those at the top. The committee on rules and order of business recommends the rules of the House

[15]E. Sait, op. cit. chap. xxi.

of Representatives so far as applicable for parliamentary matters, and a supplementary list governing the acts and organization of the national committee, including the power "to declare vacant the seat of any member who refuses to support the nominees of the Convention." The Democrats formally readopt the rules of the last preceding convention.

THE PLATFORM · Long before the meeting of the convention, organization men and elected delegates have been preparing planks on which they wish the party to make its November fight.[16] Many of these are inspired by blocs within the party, such as the grain-growers of the Middle West, the tobacco-growers, union labor, the banking interests, manufacturers, or sympathizers with some downtrodden people abroad, or by reform organizations such as the League of Women Voters and one-idea groups such as the Anti-Saloon League and the single-taxers. In 1920 the Republican National Committee followed the unique plan of setting up a special committee, some months before the meeting of the nominating convention, which was given the task of gathering and tabulating data, including the opinions of people in many walks of life, on a large number of questions, to be used in the drawing of the platform. These materials were turned over to the committee on resolutions of the convention of that year, but seem to have been given scant consideration. Usually several drafts of a platform are prepared in advance of the convention under the auspices of the national committee or by the management of those favorites who stand high in the chance for nomination. All but half a dozen planks of the platforms are glittering generalities on which all good men may agree, whose preparation is chiefly a problem of technical composition to achieve pleasant, innocuous, and attractive statements. Sometimes sentences and paragraphs are so worded that they may be quoted in part, as needed, on opposite sides of the question. The primary purpose is not deception but unity: to find a common ground on which nearly half the voters of so vast and conglomerate a population as ours can stand together. Denunciation of the opposing party must find a place in every platform. That of the Republicans in 1880 charged the Democratic party with "the habitual sacrifice of patriotism and justice to a supreme and insatiable lust for office and patronage"; and were answered with the retort "We execrate the course of this [Republican] administration in making places in the civil service a reward for political crime." At the next election the Democratic platform proclaimed that "the Republican Party, so far as principle is concerned, is a reminiscence," while the Republicans denounced "the so-called economic system of the Democratic Party, which would degrade our labor to the foreign standard." In 1892 the Republican platform expressed sympathy with the cause of home rule for Ireland, and protested against the persecution of Jews in Russia, while the Democrats not only expressed sympathy with the Irish but demanded that the government

[16]For the party platforms of the various years cf. K. H. Porter, *National Party Platforms* (1924).

attempt to bring about the cessation of the persecution of both Jews and Lutherans in Russia! The Republican platform in 1936 maintained that the Democrats had "dishonored American traditions and flagrantly" betrayed their campaign pledges, while the latter countered with the accusation of "12 years of Republican surrender to the dictatorship of the privileged few." But it must not be thought that the parties avoid a stand on the most pressing questions of the day. The tariff was the chief issue in the campaigns near the end of the last century, the Democratic platform of 1892 denouncing it as "a fraud, a robbery of the great majority of the American people for the benefit of the few"; while the Republicans reaffirmed their faith in "the American doctrine of protection" as a "practical business measure" which, they prophesied, would "eventually give us control of the trade of the world." Sound money, the gold standard versus free silver and a depreciated currency, was the chief issue on which the Republicans and the Democrats, respectively, split in 1896 and 1900. In 1912 the extension of government regulation over business life, and a more critical government attitude toward wealth and great corporations, were the main issues championed by both the Democratic and the new Progressive party. With the exception of the League of Nations issue in 1920, the parties were not clearly opposed on real issues until the day of the New Deal. The platforms of the two parties in 1936 and 1940 clashed on more points than at any previous time. The Democrats carried forward the chief issues of their 1932 platform and greatly expanded them. Most significant was their emphasis on Federal power, their 1936 platform pointing out that many great problems "cannot be adequately handled exclusively by 48 separate State legislatures, 48 separate State administrations, and 48 separate State courts."

Attempts to make the report of the committee on resolutions unanimous sometimes fail; a minority report consequently is carried to the floor of the convention, and all the ingenuity of the management is required to prevent overt acts which would cause disharmony in the ensuing campaign. For instance, at the Republican convention of 1896, after the adoption of the gold-standard plank, Senator Teller of Colorado, a silverite, broke his lifelong membership in the party in a dramatic speech and walked out of the convention. At the Republican convention of 1924 the chairman of the Wisconsin delegation read, as amendments to the proposed platform, a body of resolutions which of course were rejected; and shortly thereafter this delegation became the nucleus of the La Follette Progressive party.

ELECTION OF THE NATIONAL COMMITTEE · With the Republicans the election of the new national committee is next in the order of business. The rules provide that the roll of the States shall be called and the chairman of each delegation shall announce the nomination of one man and one woman by his delegation. If delegates have been elected previously in the primaries, as required by law, these are designated as the delegation nomi-

nees; if there is no such State requirement, the delegation follows the instructions given it by the party conventions. The Democrats follow about the same plan except that the election comes near the end of the session.

NOMINATION OF THE PRESIDENTIAL CANDIDATE · The stage is now set for the chief task of the convention, the choice of a candidate for the Presidency. All is tense, and a feeling of expectancy grips the assembly. The roll of the States is called alphabetically; and one of the earlier ones, Alabama, Arizona, California, or Colorado, if it has no favorite son to present, "yields" to the State which does have one, and a spokesman delivers a carefully prepared speech of nomination. Usually the name of the favorite is withheld until near the end of the speech, when a carefully prepared demonstration "spontaneously" breaks forth. The crowd breaks into a frenzy of excitement, some of the State standards begin to move in a parade about the aisles, and a home-town band may suddenly appear from a side entrance. A battery of klieg lights is turned on the speaker, the leader of the parade, and the pictures of the hero which suddenly descend suspended from the ceiling. The demonstration for one of the main contenders may last for as long as forty-five minutes. At recent conventions mechanical barometers for measuring the intensity of sound were installed in the auditoriums, their gauges, in plain sight of the assembly, being an inducement to greater efforts. After order is restored, the roll continues to the end, until half a dozen or more names have been placed before the convention and seconding speeches for each have been made in various numbers, so chosen as to exhibit the strength of each candidate. This is the prime occasion for an exhibition of all the gifts of oratory, and before the days of the loud speaker a loud voice was more to be treasured than philosophic thoughts. As the seconding speeches go on their wearisome way the delegates become more and more fatigued and sometimes begin a friendly banter, which may grow into boos and groans if the speaker fails to use an ingratiating technique. Some extemporize; but others, with the intrinsic beauties of the speech and the expectations of the home-town folks in mind, hold on to the bitter and unrequited end.

THE BALLOTING · When the roll reaches "Wyoming," all the nominating and seconding speeches have been made, the parades staged, and the literature and buttons passed out, and the bands have finished playing the State songs, then the klieg lights are dimmed, and it is time for the voting. The roll of the States again is called, and each chairman rises and announces the votes of its delegates. In the Republican convention the members vote individually, so that the State vote is often split among several aspirants. If any member of the delegation takes exception to the correctness of the vote as announced by his chairman, its roll is called by the secretary of the convention, and the votes are tabulated. If any person received a majority of all the votes cast, he is declared nominated. The attainment of a majority vote is the signal for another wild demonstration;

and when that point is reached, chairmen stand, waving wildly for recognition, asking permission to change the vote of the delegation to the victor. The next step, usually by a representative of the closest competitor, is a motion to make the nomination unanimous.

If one favorite stands out head and shoulders above all other aspirants, or if it is the second term for a President, the convention may be little more than a ratifying meeting and party conference; but under other circumstances it may be the arena for a battle of the giants. The first ballot outlines the terrain. Here appear the favorite-son tributes, the products of the direct primaries, and the accumulations from State-convention instructions. Several hundred votes on the first ballot may not mean much for an aspirant if there is undercover strength for one or more others. General Grant and James G. Blaine started in the Republican convention of 1880 with 304 and 284 votes, respectively, with only 378 necessary to a choice, but finally lost to James A. Garfield, whose name had not even been proposed to the convention. William G. McAdoo's first ballot vote in the 1924 Democratic convention was 431½, Alfred E. Smith's 241, and John W. Davis's 31, but Davis won on the 103d ballot. Likewise, Thomas E. Dewey, starting with 360 votes, and Robert Taft, with 189 votes, lost the Republican nomination in 1940 to Wendell L. Willkie, who at first could summon only 105 votes.[17] Party managers attempt to forestall a long-continued balloting for fear that the animosities engendered will imperil success in the forthcoming election.

THE UNIT AND TWO-THIRDS RULES · Two marked features long distinguished the Democratic from the Republican procedure in the balloting: the unit and two-thirds rules.[18] The unit rule required the delegation of each State to cast its entire vote for one candidate, to be determined by a poll of its members or the instructions of the State convention. The rule grew out of the party's adherence to the doctrine of States' rights: a State should no more divide its votes than should a nation's delegation at an international conference. The rule had the effect of greatly augmenting the influence of large States like New York on nominations. The coming of the direct primaries already had made inroads on the practice. The Democrats allowed individual voting where required by the primary laws or by the instructions of the State convention. The Republicans allowed it where the State party organization required and the State laws permitted, but at the same time the votes of the delegates were individually recorded.

The two-thirds rule required that proportion rather than a simple majority of the delegates to nominate a President or Vice-President. It was applied in the first convention in 1832, at the instigation of the Jackson men, some thought, to make sure that John C. Calhoun should not be nominated; but probably for the reason adduced on the floor, that it

[17] *Proceedings of the Republican National Convention, 1940*, p. 280.
[18] E. Sait, op. cit. pp. 580–587.

would "show a more general concurrence of sentiment in favor of a particular individual." It also was a safeguard against the domination of the convention by a few large States made possible by the unit rule. Only on two occasions has the rule deprived a man of the nomination who had succeeded in polling a majority of the votes: Martin Van Buren in 1844 and Champ Clark in 1912. This tells only a part of the story, however; for how many other candidacies were abandoned because of the knowledge that a two-thirds vote could not be secured is uncertain.

THE TWO-THIRDS RULE IN THE DEMOCRATIC CONVENTION OF 1912 · William Jennings Bryan and the two-thirds rule defeated Champ Clark and gave the Democratic nomination to Woodrow Wilson in 1912. As shown on the first ballot, Clark entered the convention with 440½ votes, Wilson with 324, Governor Harmon of Ohio with 148, and Senator Underwood of Alabama with 117½; and there were 53 scattering votes.[19] Clark was the first choice of the conservative forces, although they were favorable, too, to Underwood and Harmon. When the votes pledged to these three combined to elect the temporary chairman of the convention, the depth of the rift between the two wings of the party was shown. Bryan, sensing that the "interests" had combined to capture the nomination and the party, used all his resources of oratory and political strategy to thwart them. Suddenly and without notice he proposed from the rostrum the boldest and most extraordinary resolution ever offered in one of the national conventions. It was in the form of a greeting from the convention to the American people, assuring them that the party of Jefferson and of Jackson was still the champion of popular government, declaring opposition to the nomination of any candidate for President who was "the representative of or under obligation to J. Pierpont Morgan, Thomas F. Ryan, August Belmont, or any other member of the privilege-hunting and favor-seeking class," and demanding the withdrawal from the convention of any delegate or set of delegates representing those interests. Bitter as it was to many, the convention, with the campaign ahead, could not reject that resolution. In a great tumult the vote was taken, and the resolution passed by more than four to one. On the tenth ballot Boss Murphy dramatically gave Clark his majority by transferring the huge New York votes from Harmon, but the expected stampede to Clark did not take place. The Wilson forces held firm; on the forty-third ballot they were a majority, and on the forty-sixth had two thirds. They had won by a deliberate use of the veto power which the rule gave to the one-third minority.

In 1936 the rule was waived by the convention and in 1940 entirely abandoned. Southern leaders resented the change, arguing that the South, because of its party regularity and its scant likelihood of receiving a Presidential nomination, should have as compensation a veto on proposed candidates.

[19]E. Stanwood, *A History of the Presidency* (New Edition, 1916), Vol. II, pp. 256–259.

NOMINATION OF THE VICE-PRESIDENTIAL CANDIDATE · Everything else after the Presidential nomination is anticlimax, including the choosing of the Vice-Presidential candidate. Usually little consideration has been given to the second place on the ticket. The considerations of party strategy, which dominate his choice, will be considered in connection with another problem. The procedure of the Presidential nomination is employed here, but on a smaller scale. The roll is called for nominating and seconding speeches. Usually one vote is sufficient. In a surprising number of instances the nomination is unbossed, partly because the leaders are weary from their supreme effort and partly as a concession to the independence of the delegates. If it has been agreed that the nomination should go as a matter of strategy to a certain State, faction, or section, to it is left the choice of a person. In this way the New York delegation chose Chester Alan Arthur in 1880; turned down Levi P. Morton in 1892 for a second term, naming Whitelaw Reid instead; and, sullen at the nomination of Bryan in 1908, altogether disdained the honor, which was then given to Indiana. Three recent instances of spontaneous Vice-Presidential nominations were those of Theodore Roosevelt in 1900, Calvin Coolidge in 1920, and Frank W. Lowden in 1924. In the first-named, Roosevelt had stoutly asserted he did not want the office; and, although warned that if he appeared at the convention he would be named, he appeared wearing a Western sombrero, a propos of which one of the party leaders remarked, "Gentlemen, that is an acceptance hat." And so it turned out to be. Roosevelt later explained that he could not disappoint his Western friends. Generally the interest of the delegates in any one person is so slight that they are willing to agree to the judgment of the leaders as to how the nomination should be settled.

END OF THE CONVENTION · Finally there is a call of the roll of the States for the selection of the two committees to give the nominees for President and Vice-President official notification of their nomination. There are routine motions empowering the national committee to fill its own vacancies during the next four years and expressing thanks to various persons and committees for their work in connection with the convention, and then one for an adjournment sine die.

## *NON-PARTISAN NOMINATIONS*

It is evident from the foregoing that the task of nominating persons for elective office in the United States is performed chiefly by the political parties, who follow the methods and forms prescribed by law. But this is not the whole story: nominations for thousands of offices, as well as the elections to follow, are placed by law outside the auspices of the political party. City officers were the first to come under this plan. In a few States it is mandatory for all cities; in others, for certain classes of cities. The nonpartisan feature is almost always embodied in the charters of commis-

sion and city-manager cities. A dozen or more States apply it to all judicial offices, and most of them to school and other special districts. The counties and townships, with few exceptions, remain within the party fold. Two States, Minnesota and Nebraska, strangely enough have extended the nonpartisan requirement to the State legislature.

The nonpartisan movement is based on several considerations. The domination of city elections by the national parties and their national issues has often been referred to as irrational; for how can there be a Democratic way of paving streets or a Republican way of operating a police department? That argument, however, has been somewhat weakened of late years by the entrance of the Federal government into the field of local government, particularly in respect to poor relief and the building of public improvements. Few recent elections in large municipalities have failed to bring forth the argument that success for the Democratic candidates is needed in order to back the administration at Washington. The nonpartisan argument for judicial and some district offices is still more persuasive: that their work is technical and professional and should not in any way be hampered by obligations to a political party.

Nonpartisan nomination means that no party mark, name, or symbol may appear on the ballot, the petition, or other legal papers. The nomination may be made in a nonpartisan primary, in which case there is a single list of names under each office to be filled, and the two receiving the highest number of votes are placed on the final election ballot. In judicial elections there frequently is no contest, and nomination is equivalent to election. Names may be placed on the nonpartisan primary ballot by several methods. A declaration of candidacy by the person desiring to run for the office is the simplest. This is found in about a third of the States, in most cases with the additional requirement of a filing fee. But by far the most widely used is a petition signed by the aspirant's friends and backers, and filed with the proper election authorities. The number of signatures required is usually a percentage of the vote cast in that district in the last election, running from one half of 1 per cent to 3 per cent; sometimes it is an absolute number, as 500 or 1000 in a councilmanic ward.

The nonpartisan nomination generally has justified itself with respect to judicial and district special offices, although rare is the instance in which partisan influences have not been important. While less successful in the municipalities, it has many times enabled voters in a campaign to break party lines and unseat a corrupt or uninspired machine government, which is all the more effectively done in those States where the municipal elections are required to be held in the odd-numbered years. The reformer's hope of making a sharp separation of city and district politics from the national, however, is doomed to disappointment. The path of political preferment is no respecter of Federal-State boundaries: it lies from the precinct through the city and county, the Congressional district, and the

Statehouse, and upward to the United States Senate. And the national party organization needs the local party machines, whose nourishment is local patronage. Very unsavory indeed must be the municipal machine which the leadership of the national party cannot stomach, be it Democrat or Republican.

SUMMARY · The nomination of candidates for several hundred thousand elective offices, which means the printing of their names on ballots so that they may be considered by the electorate, is obviously one of the major tasks of the American democracy. The foregoing description of the machinery and procedure used to carry it out reveals the chief characteristic features and points to a few certain conclusions.

1. The making of nominations is primarily the task of the political parties, in spite of the fact that the process has been greatly shaped and regulated by law. This means a more or less responsible sponsorship for all persons nominated (except for those nominated by nonpartisan efforts), a vital item in the system of democratic rule.

2. The parties use two methods of making nominations: the convention of delegates, which functions also as a party conference and an issue-framing body; and the direct primary, which generally is a party election, strictly conditioned by law, and conducted by the State's election officials in most of the States, but in a minority of the States, chiefly Southern, conducted by party officials and less strictly regulated by law.

3. The direct primary was a result of the contest for power between party management and the party masses. Its results have been variable, but certainly inferior to the expectations of its proponents. The immediate purpose was to lessen the power of the leaders and bosses, and this has been accomplished at the expense of some legitimate party planning, cohesion, and responsibility. The boss remains, but is still more under cover and even less willing to accept responsibility. As to the character of the nominees, the truth seems to be that both candidates of outstanding ability and those of criminal propensities are rarer than formerly. Leadership, when unhampered by the direct primary, was usually shrewd enough to choose a few candidates of distinguished ability, who served to divert attention from run-of-the-mine politicians and a few unworthy to hold any public office. The time requirement of primary and election combined, usually seven or eight months, is thought to be an item in discouraging men successful in business, the professions, or labor organizations from running for public office. Even more important is the matter of expense involved in the canvass of a State or other sizable district, which is quite beyond the person of small income and so open only to persons of wealth or those with outside financial backing. Nevertheless the consensus, where the direct primary has been given a fair trial, seems to be that its advantages outweigh its faults. There is no disposition to go back the entire distance to undiluted

party government by leaders and bosses. Pre-primary conventions have been experimented with, and conventions have been retained for purposes of party conferences.

4. The Presidential primaries, now extending to fewer than twenty States, have been of little use in determining nominations. No final judgment can be passed until uniform primaries established by Federal law have been tried, and this would probably require a constitutional amendment. By contributing to the Republican schism in 1912 the Presidential primary brought about the election of Woodrow Wilson, and by abetting the McAdoo-Smith battles in the 1924 convention it contributed largely to the Democratic debacle of that year. Its educational value in keeping the issues acutely before the people for some months longer than would otherwise be the case is not inconsiderable.

5. Nominations for many local offices are made on a nonpartisan basis (including chiefly judicial, municipal, and district offices). This fact in many instances has made it easier to get bipartisan support for reform candidates. But even here the influence of the political party is only disguised: the hand may be the hand of Esau, but the voice is the voice of Jacob.

6. Perfection is nowhere found in the system of nominations from top to bottom, but it functions reasonably well. No autocracy after the manner of the European dictatorships imposes its judgments on the parties, and the use of force is confined sporadically to a relatively few localities. In making nominations party management tends to favor its own regulars, to the exclusion of newcomers, who often may have more popular appeal and a keener appreciation of popular needs. But on the whole the nominating system performs well its task of choosing men for the line-up from which the people pick their public officers. Further experience will doubtless show wherein the present machinery may be improved; but the greatest advance will come when the electorate is more alert, interested, and civic-minded, and when more able leadership has emerged, all of which are dependent upon forces much more complex than the fiats of statutes.

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CHAPTER XV

# *The Electoral System of the United States*

The purpose of our electoral system is to enable the people of the United States to control their government and hold it responsible. This they do specifically by choosing and retiring the key policy-making officers, by approving or disapproving directly questions and laws, and by determining the content and form of their written fundamental law by making constitutional amendments. None of these can be done without the instrumentality of a well-organized system of elections. Control by the formation and expression of public opinion and by the sending of petitions, however, may be exerted without the use of elections.

WHAT AN ELECTORAL SYSTEM IS · An electoral system is a scheme, or plan, which places personalities and issues before the citizens and furnishes a mechanism by which their choices or judgments on them may be recorded. It consists of many parts. First there is a plan; for a mechanism of excellent details and well operated may fail accurately to record popular judgments if faulty in design. Instances are the direct primary in the South, without a run-off election, and the national electoral system instituted by the Fathers, if it had not been changed by both formal and unwritten amendments. Within the confines of the general plan are administrative officials of several grades, voting districts, ballots and ballot boxes, and methods of count and certification. Surrounding it is a code of criminal law to protect the honesty and purity of the whole process.

QUALITIES AND FEATURES · The following are some of the qualities and features which the designers of the modern election code attempt to embody: (1) Accuracy. It should faithfully record the intent of the voters. (2) Simplicity. Its mechanics should be easily understandable by the mass of voters, for ballots of too great length, a confusing arrangement of offices and names, intricate statements of questions to be voted on, defeat the aim of the election. (3) Convenience. The polling places should not be so far distant as to discourage busy or infirm voters from using them; they should not be located in forbidding buildings or surroundings; and the number of voters allocated to the facilities should not be so great as to cause undue delay. (4) Effectiveness. The basic principles of the electoral scheme should be such as to bring about the outcome which the majority has in view; the elector's attention should be drawn to the key offices, the lesser ones being made appointive; each considerable block of opinion ought to be enabled to express itself in the election, but stalemate and minority dominance ought to be made impossible. (5) Economy. The

per capita cost of holding elections ought to be kept down to a reasonable figure. Elections are cheaper than dictatorships; nevertheless the cost has been kept high by their all but universal use for purposes of patronage. (6) The election "ought to be free," as the early State constitutions often asserted, free from intimidation from all sources. This freedom cannot be assured without the secret ballot, honest and able officials, and good order and dignity at the polls.

FEDERAL-STATE ELECTORAL CO-OPERATION · No other part of the Constitution illustrates better the Fathers' conception of a "state made up of states" than that part dealing with the electoral system. Today the Federal government carries out many of its functions strictly with its own administrative officials, but for the election of President, Vice-President, and members of Congress the active co-operation of the States is necessary. There is no such thing as a Federal election official or a Federal voting booth, unless the elections supervised by the National Labor Relations Board may be so classed. The Constitution, as originally framed, set up a plan for the election of the President and the Vice-President and gave Congress the right to legislate in some respects concerning the election of Senators and Representatives, but in a small measure; the elaboration of these plans and their administration were left to the States. The Federal part of the electoral system therefore is built upon both Federal and State legislation.

THE VOTING CONSTITUENCIES · The United States is cut up into several thousand voting constituencies, which in the nature of things are generally overlapping. The United States as a whole (not including the District of Columbia), for the purpose of electing President and Vice-President, comprises the largest one; but even this is true in practice and not in law, as will be explained later. The only other elective Federal officials are the 96 Senators and 435 Congressmen, the former chosen from the State as a whole and the latter from constituencies within the State under the general rules of the national constitution. Each State, for its own purposes, is a constituency for the choice of a chief executive and other central officials. The States, in turn, are dissected into crazy-quilt designs which differ vastly in detail. Generally the larger voting subdivisions are the legislative districts for members of the State senate and of the lower house. Then all the States have counties (called parishes in Louisiana), which, without exception, choose a corps of officials. Smaller voting units are the towns, townships, cities, villages, and an array of districts: school, sanitary, harbor, drainage, library, and conservancy districts, and the like, some of which are merely administrative, without any voting function. The task of supplying an administrative machinery for this array of constituencies is an imposing one, the responsibility for which is shouldered by both the Federal and State governments, but chiefly by the latter. In no field of administration has there been more experimentation and change than in this.

## *THE FEDERAL PART OF THE SYSTEM: THE ELECTION OF PRESIDENT AND VICE-PRESIDENT*

THE PLAN OF THE CONSTITUTION OF 1787 · Popular election of the head of the state was nowhere employed in 1787, when the Fathers were deliberating at Philadelphia. A proposition there to that effect did not receive the support of a single State delegation. The acts of King George III and of his colonial governors had not advanced with the Fathers the popularity of chief executives, by whatever name they might be called; moreover, the Fathers had been greatly influenced by the writings of the liberal philosophers John Locke and J.-J. Rousseau, who emphasized the supremacy of the legislative over the executive branch. The proceedings of the Constitutional Convention show how well aware its leaders were of the dangers to liberty from the ambitions of a strong executive, especially if he were in charge of the financial and military resources of the nation. The Virginia Plan, on which our Constitution was based, therefore proposed that the chief executive be kept within bounds by placing his election in the popular branch of the legislature.[1] The Fathers were well aware, however, that this violated another highly honored principle, the separation of powers, and looked about for a compromise. One was offered in a report by the Committee of Detail on September 4: choice by an electoral college, which seemed to avoid dependence both upon Congress and upon popular election.[2]

STEPS IN THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT · The plan of the Constitution of 1787 called for three and sometimes four distinct steps in the choice of a President and Vice-President of the United States. Although the Twelfth Amendment, of 1804, altered the spirit of the electoral scheme and the Twentieth Amendment, of 1933, and statutes of Congress altered various details, the steps in the procedure remained the same. Preceded by two others, added by custom and practice, they are as follows:

1. The nomination of candidates by national political parties, for many years occurring in June of the election year.
2. The political campaigns in behalf of the candidates, conducted by the respective political parties, usually beginning actively with notification ceremonies in August and continuing with an ever-increasing tempo until election night.

[1]Max Farrand, *Records of the Federal Convention* (1911), Vol. I, p. 20. "Resvd. that a National Executive be instituted; to be chosen by the National Legislature for the term of — years, to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time."

[2]Ibid. Vol. II, pp. 497, 498.

3. The election of Presidential electors, which a national law of 1845 requires shall everywhere be done on the first Tuesday after the first Monday of November.[3]

4. The election of the President and the Vice-President by the College of Electors, those of each State meeting together on the same day in their respective State capitals. The time of meeting, after several changes, is now fixed at the first Monday after the second Wednesday of December.[4]

5. The counting and tabulation of the electoral votes and the declaration of the results on the sixth of January. The president of the Senate opens the ballots in the chamber of the House of Representatives, where they are counted in the presence of both houses.

6. If no candidate for President or Vice-President has received a majority of the electoral votes (now 266), these officers are chosen in the House of Representatives and the Senate respectively. In the House the election is by States, which means that there are forty-eight votes, and only the three candidates standing highest in the Electoral College are eligible; while the Senators vote individually on the two highest in the Electoral College.[5]

PRINCIPLES OF THE SCHEME · The electoral scheme as originally conceived, like many other parts of the Constitution, was fashioned to maintain a balance between the small and the large States. It was federal rather than unitary in nature: the President was to be elected by the States through their agents, the electors. It was believed that each of the States would inevitably attempt to elect one of its own citizens; hence the provision that the electors should vote for at least one person from outside his State. Madison argued that this would work well; for the one vote would always be for a person of local importance, with small chance to be elected, while the second vote would be for "continental characters," persons known and honored throughout all the States. It seems, furthermore, to have been the general belief that the electors, scattered among remote States, required to vote on the same day, and lacking means of easy communication, would seldom give a majority to any candidate. Their voting (before the Twelfth Amendment) would amount to a nomination of five men for President, in which the large States would have the advantage since the electors were apportioned according to population; while the election which would take place in the House of Representatives would be to the advantage of the small States, because each delegation had been given one vote.[6] No one was voted for as Vice-President, but that place went to the runner-up for President.

[3] 5 Stat. 721.

[4] Act of June 5, 1934, 48 Stat. 879.

[5] *United States Constitution*, Amendment XII.

[6] Madison several times referred to the system as adopted as a compromise between the small and the large States. Since the electors, it was thought, would so scatter their votes that no person would receive a majority for President, their action would amount to a nomination; while

In the beginning no party line seems to have been drawn on the question of the electoral scheme as adopted. Alexander Hamilton wrote in the *Federalist*, "The mode of appointment of the chief magistrate of the United States is almost the only part of the system of any consequence which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents."[7] What were the chief features of this system which both Federalists and Anti-Federalists agreed were excellent? As Hamilton analyzed them they were these: (1) The choice of President would be made by men "most capable of analyzing the qualities adapted to the station," as the electors would be apt to be men of the proper "information and discernment." (2) Their choice would be made under circumstances "favorable to deliberation and to a judicious combination of all the reasons and inducements which were proper to govern their choice." (3) It would tend to eliminate "tumult and disorder"; the choice by an intermediate body would "be much less apt to convulse the community with any extraordinary or violent movements than the choice of one who was himself to be the final object of the public wishes." (There would be no "log cabin" campaigns, torchlight clubs, radio spellbinders, or Madison Square "bear garden" performances.) (4) It was well guarded against "cabal, intrigue, and corruption," because the electors were called into being for this one purpose by an "immediate act of the people," whereas a pre-existing body might be tampered with beforehand, all United States officers, including members of Congress, being excluded. (5) Lastly, it rendered the executive "independent for his continuance in office of all but the people themselves."

THE FIRST DEFECT: THE VOTING OF THE ELECTORS · Four elections took place under this revised plan. Every one of the sixty-nine electors in the first two cast one of his votes for George Washington. Alexander Hamilton, fearing the same unanimity in their second votes for John Adams, sent around word for a scattering so that there should be no tie for the Presidency; and the work was so well done that Adams received only 34 votes, but as the runner-up was elected Vice-President. The same tactics were used in the second election.[8] At the third, in 1796, there were the makings of two political parties in the field; but the parties were not well enough

the election would be effected in the House of Representatives voting by States. Writing to Henry Lee, January 14, 1825, Madison said that the Constitution as it stood was "regarded as the result of a compromise between the larger and smaller States, giving to the latter the advantage in selecting a President from the candidates, in consideration of the advantage possessed by the former in selecting the candidates from the people." (M. Farrand, op. cit. Vol. III, p. 464.) Other explanations of the same character are found in his remarks in the Virginia convention, June 18, 1788, ibid. pp. 329, 330, and in a letter to George Hay, August 23, 1823, ibid. p. 458. Rufus King, in the convention, gave the same explanation of the system, September 5, 1787, ibid. Vol. II, p. 514.

[7] *The Federalist* (G. Smith, Ed., 1901), No. LXVII.

[8] E. Stanwood, op. cit. Vol. I, pp. 34–35.

organized to bring concerted action for single candidates for the two offices. Hamilton again intrigued, this time to have another Federalist, Thomas Pinckney, receive an equal vote with Adams; but enough Federalist electors threw away their votes to give the latter a majority and bring in a Republican, Jefferson, for Vice-President.[9] A little more careful calculation would have placed Pinckney ahead. In 1800 both parties were well organized, and each controlled a set of pledged electors; but the threatened closeness of the contest between the two parties made it perilous to throw away any votes deliberately, in order to prevent a tie between the two Republican candidates, Jefferson and Burr. The result was what would take place in every election with well-organized parties and improved communications: a tie vote between the two candidates of the majority party. The bitter contest in the House of Representatives between the backers of Jefferson and those of Burr revealed sharply the defects of this part of the electoral scheme, and before the next Presidential election the Twelfth Amendment was adopted, which altered the scheme more radically than at the time was supposed.[10]

SPECIAL PROBLEMS: THE CHOICE OF PRESIDENTIAL ELECTORS · The Constitution disposes of the choice of the Presidential electors in these words:

> Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.[11]

It is seen that the State was not limited in its choice of method, but eighty years later the Fourteenth Amendment imposed a practical limitation. The representation of the State in the House of Representatives is required to be diminished in the same proportion as has been the right of all male citizens twenty-one years of age or over to vote for Presidential electors. By this rule any State now placing the choice of electors in its legislature would lose all representation in the lower house of Congress. Congress, for its part, is confined to the power of determining the time for the choosing of electors and the casting of their votes. Down to 1836 there was little order or system in the methods adopted by the State legislatures, but the growing power of the political parties and the rounding out of their systems of internal government and of making nominations led to a demand for more uniformity.

Today the electors in all States are chosen in the same way; but four different methods or variations have been used at times: choice by the two houses of the State legislature; choice by the people in single-member

[9] E. Stanwood, op. cit. Vol. I, pp. 48–51.
[10] Ibid. pp. 62–63.
[11] *United States Constitution*, Art. II, sect. 1.

districts; choice by the people voting for all electors on a general ticket, with a majority needed for choice; and choice by the people voting in the same way, with only a plurality necessary.

In the confusion and uncertainty incident to the wind-up of the old and the beginning of the new government in 1789, it was inevitable that the method for the choice of the electors should not have been well thought out. The Congress of the old Confederation had set the time for the choosing of electors at the first Wednesday of January; for the casting of their votes, a calendar month later; and for the assembling of Congress to make the count, another month later. This third step, falling on March 4, automatically established that date for the beginning of the Federal quadrennium. In Pennsylvania and Virginia the electors were chosen by popular vote; in New Hampshire and Massachusetts, by the people, subject to later ratification by the legislature; and in Connecticut, New Jersey, Delaware, South Carolina, and Georgia, by the legislature directly. In New York the two houses of the legislature wrangled over the part each should have until it was too late for any choice to be made. And so, with Rhode Island and North Carolina still out of the Union, the first President and Vice-President were elected by the votes of ten States.[12]

Four years later the States numbered fifteen, in nine of which the legislature chose the electors; in three (Pennsylvania, Maryland, and Virginia), the people; and in three, legislature and people together. In the 1796 election ten of the sixteen States chose by the legislature; six chose by the people, five of them by general ticket, and one (Maryland) by districts. In 1800 the ratio was twelve to four, which was the high tide for legislative choice. For several elections there was a slow drift toward popular choice, until in 1828 eighteen out of twenty-four States used that method, thirteen voting at large and five by districts. The Jacksonian election of 1828 found only two States, Delaware and South Carolina, using legislative choice, Delaware joining the democratic procession four years later, but South Carolina persisting in the old method until the Civil War. In 1832 Maine, New York, and Tennessee abandoned the district system of election, and Maryland, the last, abandoned it in 1836. The only recurrence to the system was in Michigan, for one election brought about by a rare Democratic legislature, which in 1892 yielded a split of the State vote, with nine for Harrison and five for Cleveland. By act of Congress of 1845 a uniform day for all elections of electors was set, the first Tuesday after the first Monday in November; and by that date a plurality was sufficient to elect in all the States except New Hampshire and Massachusetts, where, if no majority was secured, the choice was to go to the legislature.

SPLIT STATE VOTES · The effect of the general ticket system of choosing electors, which had become the accepted way by 1836, was to give the entire vote of a State to that party whose candidates should win a plurality

[12]E. Stanwood, op. cit. Vol. I, p. 27.

of the votes cast. Thereafter the winning of a State by a 1 per cent margin was as good as by 100 per cent. But occasionally there may be a split in the State's electoral vote without the district system, because of the type of ballot used. Legally, no one can vote for President or Vice-President but only for a set of electors whose names are printed on the ballot in a column. These may be voted for either by placing a cross in the square before each name or by placing a cross in a circle at the top of the list. The voter in each State has as many votes as the State has electors; in New York, for instance, one votes for forty-seven persons. Occasionally, when the contest is very close in a State and the name of a well-known and popular person appears among the electors of the minority, enough of the majority may mark his name to ensure his election and the defeat of one of its own electors. Three times the popular vote in California was so close, in 1880, 1892, and 1896, that one elector of the minority slipped in. In the first year cited five of the Democratic electors received 80,426 votes apiece, five of their Republican opponents received 80,348, and a sixth Republican received more than the sixth Democratic elector, with the result that five electors were chosen for Cleveland and Stevenson and one for Harrison and Reid. In Maryland in 1904 only 51 votes separated the two sets of electors, but one Republican elector slipped by.[13] A change of only 26 votes would have thrown all the electors to Theodore Roosevelt. Sixteen of the States now use ballots which, instead of carrying the list of electors, has a circle under the name of the Presidential and Vice-Presidential candidates and a statement that a cross placed therein is a vote for a list of electors whose names are deposited with the Secretary of State. While a literal interpretation of the Constitution might render such a ballot illegal, the arrangement has the effect of ruling out split State votes.

ELECTION OF PRESIDENT AND VICE-PRESIDENT · In the eyes of the law no man is chosen President or Vice-President until the electors have cast their ballots. On a day set by Congress, now the first Monday after the second Wednesday of December, the electors meet at their respective State capitals, elect a chairman and secretary, and cast one vote for President and one for Vice-President. The list of the electors with their votes is sent in duplicate by registered mail to the president of the Senate, and also in duplicate to the Secretary of State of the United States. When the political parties became well organized nationally, the electors were transformed into mere automatons which, with one possible exception, have never failed to respond as pledged. And yet there is no legal obstacle to an elector's exerting his constitutional privilege of voting as his judgment dictates. Horace Greeley, Liberal Republican and Democratic candidate for President, died a few days after the choice of electors in November, 1872. When the electors met, they scattered their votes among five other

[13] E. Stanwood, *A History of the Presidency* (1926), Vol. II, p. 137.

men; but three from Georgia gave votes for the dead man, which the houses in joint session declined to count.[14] So long as the two-party system exists, there is little possibility of the election of a President and Vice-President from different parties; but with three or more major parties, and the election thrown into the House and Senate, it easily could happen.[15] In 1896 Bryan was the nominee of both the Populist and the Democratic party, each of which had sets of electors in many of the States; but Arthur Sewall, of Maine, was the Vice-Presidential candidate of the Democrats, and Thomas E. Watson of the Populists. The result was that, while 176 Democratic and Populist electors pledged to Bryan were elected, there were 149 Democratic electors for Sewall and 27 Populist for Watson.[16] Bryan might well have been chosen President, and the election of the Vice-President thrown into the Senate. Should a candidate of the party winning the majority of the electors die or resign before their meeting in December, would these electors be free to vote according to their individual judgments? If they scattered their votes, the contest would be taken to the House of Representatives, where the defeated party and its candidate might have another chance. The probable outcome would be a hasty meeting of the party's national committee to recommend a candidate and demand his support by all its recently chosen electors.

THE COUNT OF THE ELECTORAL VOTES · The Constitution uses brief and simple but, unhappily, not adequate language on this step. After directing the sending of the electors' ballots to the president of the Senate, it reads, "The President of the Senate shall, in the presence of the members of the Senate and House of Representatives, open all the certificates and the vote shall be counted."[17] Are the members of the Senate and the House present as individuals or as houses? Are they present with powers over the count or merely as witnesses? If they are to perform duties, do they meet as one convention of 531 members or as two separate houses? If as the former, who is the presiding officer? If as the latter, how can they come to a decision? The president of the Senate is required to open the certificates; has he the right to say which is the proper return if there are two or more from a State? All these questions and more have come up in the course of history, and to none of them does the Constitution give an unmistakable answer either by words or by implication. A solution has been reached for every occasion, but once only after a narrow escape from civil strife.

Soon Congress established that procedure for the count of the electoral vote which ever afterward was to be followed. A joint resolution sets the day and hour, at which time the Senators, with the Vice-President at their head, preceded by the sergeant at arms carrying the ballots, march two by two down the long corridor of the Capitol to the larger House Chamber,

[14]Ibid. Vol. I, p. 353.
[15]Ibid. Vol. I, chap. i.
[16]Ibid. Vol. I, p. 568.
[17]*United States Constitution*, Amendment XII.

where they are seated in front. The Vice-President takes his place at the right of the Speaker and presides at the joint meeting. The first strain on the proceedings came in 1816, when someone objected to the receiving of the votes of Indiana, which had been admitted to the Union too late to cast its votes on the proper day. A motion was put by the president of the Senate, and that body retired to its own chamber so that the two houses could deliberate separately. This precedent, always thereafter followed, meant that the two sitting together did not constitute one body. When somewhat the same question arose four years later with respect to Missouri, a stopgap resolution was adopted by the houses deliberating separately.[18]

Were the votes of Missouri to be counted, the result would be, for A.B. for President of the United States, ____ votes; if not counted, for A.B. for President of the United States, ____ votes. But in either event A.B. is elected President of the United States.

What the settlement would have been had the votes of Missouri been needed to decide the election is difficult to imagine. On four other occasions before the Civil War the easy margin of one candidate made it possible to use the same formula.

The Civil War and reconstruction forced Congress to resolve some of the uncertainties of this dangerous hiatus in the Constitution. In 1864, when Lincoln desired to have the votes of two reconstructed States (Louisiana and Tennessee) counted, Congress at last laid claim to the right to pass on the validity of electoral returns. A new joint rule to govern the count provided that whenever the vote of a State should be objected to in the joint meeting, the two houses should separate and vote on the matter, and no vote objected to should be counted except by the concurrent vote of the two houses. Under this procedure the votes of neither of the seceded States were accepted.

THE HAYES-TILDEN CONTEST OF 1876 · In 1876 for the first time the outcome of an election for President and Vice-President depended upon the decision to be made upon certain contested votes.[19] Samuel J. Tilden, Democratic candidate, had received 184 undisputed electoral votes, and Rutherford B. Hayes, Republican candidate, 163. There were double returns from the four States of Oregon, Florida, Louisiana, and South Carolina, the last three of which were in a condition of chaos. With the Senate Republican, the House Democratic, and the Constitution inadequate to cover the matter, extraordinary measures were necessary if a peaceable settlement was to be made. Moderate men of both parties united in framing and adopting a statute providing machinery for deciding the disputed votes. The count would begin as in previous years. If there were

[18] J. H. Dougherty, *The Electoral System of the United States* (1906), pp. 42–46.
[19] Ibid. pp. 75–80; E. Stanwood, op. cit. Vol. I, pp. 380–393.

only one set of returns from a State, the certificates should be opened and read by the president of the Senate and entered on the journals of both houses, and any objections to them should be made in writing and signed by at least one member of each house. Thereupon the Senate should retire to its chamber and a vote should be taken on the objections, but no votes could be rejected without the affirmative vote of both houses. In case there were two sets of returns from a State, these likewise should be opened and read in the presence of the two houses and referred for decision to a special commission. When the returns of the four States mentioned above were opened and read, they were duly sent to the commission, which voted in each instance, 8 to 7, that the Hayes and Wheeler electors were the legal ones. By securing these 22 votes the Republican ticket won the election, 185 to 184.

THE ELECTORAL COUNT ACT OF 1887 · Although some of the ablest men in Congress believed that only a constitutional amendment could create a valid authority for canvassing and declaring the electoral returns, a statute was passed in February, 1887, which has governed all subsequent counts.[20] It wisely attempted to relinquish some of the power exerted by Congress in the postbellum days by providing that if a State had competent machinery as defined for making a final determination of any controversy, this should be conclusive in governing the count of the vote. Lists of electors and certificates of the determination of disputes in the choice of electors are transmitted to the Secretary of State of the United States. When the certificates are read, objections must be made in writing, after which the two houses deliberate but may not reject any votes which have been regularly given as certified by the State authorities; all others may be rejected by a concurrent vote. If there are two sets of returns, the one regularly given shall be counted; but if two governments, each purporting to be the legal one, send in sets of votes, those which the two houses sitting separately find to have been regularly given shall be counted.

The statute is an involved one, and its binding force on Congress is questionable; but happily no disputes have arisen since that time to test its efficacy. The theory on which it is based is more in harmony with the political ideas of the Fathers than was that on which Congress acted after the Civil War: the responsibility is thrown back on the State where the controversy arises, and the duty of Congress is primarily to ascertain what the decision of the State is.

ELECTION OF PRESIDENT AND VICE-PRESIDENT BY CONGRESS · If no majority has been given in the Electoral College, the House of Representatives chooses a President from among the three candidates who have received the highest number of electoral votes, and the Senate chooses a Vice-President from the two highest candidates. Two Presidents and two Vice-Presidents have been elected in this way. In the voting of the House

[20] Act of February 3, 1887, 24 Stat. 373.

each State has one vote, to be determined by balloting within its delegation. If this delegation should be of an even number and evenly divided between the two parties, the State would have no vote. In 1800 the two Democratic-Republican candidates each had received 73 electoral votes.[21] The intent of the voters to make Jefferson President was unquestionable, but under the law the two had equal claims to first place. The House had adopted a set of rules governing the election, which made provision for ballots, ballot boxes, tellers, and a procedure in voting. There was a long-continued deadlock in the "lame duck" House which was doing the balloting, and not until the seventeenth of February, on the thirty-sixth ballot, did the Federalist Congressmen who had been backing Burr give way and permit the election of Jefferson. Burr had come close to a victory. James A. Bayard, a Federalist Congressman from Delaware, later wrote Hamilton: "The means existed of electing Burr, but this required his co-operation. By deceiving one man (a great blockhead) and tempting two (not incorruptible) he might have secured a majority of the States." Under the constitutional provision at that time, Burr automatically became the Vice-President.

In 1824 the electoral votes for President were scattered among four candidates; those for Vice-President, among six.[22] No one had received a majority vote for President, although John C. Calhoun had received a majority for Vice-President. The House acted under a set of rules similar to those used twelve years before, and on the first ballot John Quincy Adams received the thirteen States required for election. In 1836 the refusal of the twenty-three Martin Van Buren electors of Virginia to vote for his running mate, Richard M. Johnson, threw that election into the Senate, and Johnson was elected by a 33-to-16 vote.[23]

No election since has been thrown into Congress in more than a hundred years, but it is a great mistake to assume that this will not happen again. It is clear that the ability of the Electoral College to elect is dependent upon the continued maintenance of the two-party system. It is true that in the three-party election of 1912 the Democratic candidate was able to win a large Electoral College majority with a popular minority, but this was because the Republican party was uniformly split in all the States of its greatest normal strength. Usually three and inevitably four or more independent parties would throw the election into the House. Early in the campaign of 1924 many good observers feared that the La Follette party movement would lose the Republicans enough States to give the election to the House, in which case an even division would have given the Wisconsin delegation the deciding vote between Republicans and Democrats. It is safe to predict in this day of popular rule that one House election would seal the doom of that form of election.

[21] J. H. Dougherty, op. cit. pp. 68–73.
[22] E. Stanwood, op. cit. Vol. I, chap. xi.
[23] Ibid. Vol. I, pp. 187–188.

## *OUTCOME OF THE PRESIDENTIAL ELECTORAL SYSTEM*

Many criticisms have been leveled at the Federal electoral system. One, that it does not promote the choice of the nation's ablest men, is as difficult to appraise as are those qualities of human beings which go to make up greatness. What we are certain about, however, is that it placed in office three men (Washington, Jefferson, and Lincoln) whose greatness the succeeding decades have served only to magnify; half a dozen more with pre-eminent civic qualities; many more with the experience and ability to discharge the duties of the office reasonably well; and none of questionable personal honesty, good intent, or patriotism. A few of the results flowing naturally from certain of its features will be considered next. These are concerned with the matters of minority Presidents, discrimination against the South and the small States in the making of nominations, and the influence on party organization.

MINORITY ELECTIONS · In three cases since the Civil War, men have been chosen to the Presidency by a minority of the nation's popular vote, and in two of these by a popular vote less than that of the nearest rival. According to the official tabulation, Hayes's 185 electoral votes in 1876 were given by 4,033,786 popular votes, while Tilden's 184 were given by 4,285,992 popular votes. In 1888 Grover Cleveland received 5,540,329 to Harrison's 5,285,992 popular votes, but the electoral votes were 168 and 233 respectively. Had 6502 persons in New York who voted for Harrison cast their votes for Cleveland, he would have won by an electoral count of 203 to 197 through the swing of the 36 New York electoral votes.[24] There is nothing dishonest or mysterious about such minority elections. After all, the system is one of election by States and not by popular votes. If a candidate wins the electoral votes of enough States by a scratch margin, he will be elected, even though his opponent has carried his States by large popular majorities. A 51 per cent majority is as effective as a 100 per cent majority in gaining a State's electoral votes.

Another type of "minority" President results from the presence of a strong third party in the field, when the electoral votes of some States are won with pluralities. The outstanding example was the 1912 election, with Woodrow Wilson, Theodore Roosevelt, and William H. Taft in the field. In none of the twenty-six States which Wilson carried outside the solid South did he have a majority of the popular votes, and he received only 42 per cent of the national total; but his was one of the most overwhelming Electoral College victories: 435 as against 88 for Roosevelt and 8 for Taft. What happened in New York was typical. There the votes were as follows: Wilson, 655,475; Taft, 455,428; Roosevelt, 390,021; Debs, 63,381.[25] A similar situation existed in 1860, when there were four parties in the field. Lincoln won only 35 per cent of the popular vote, but

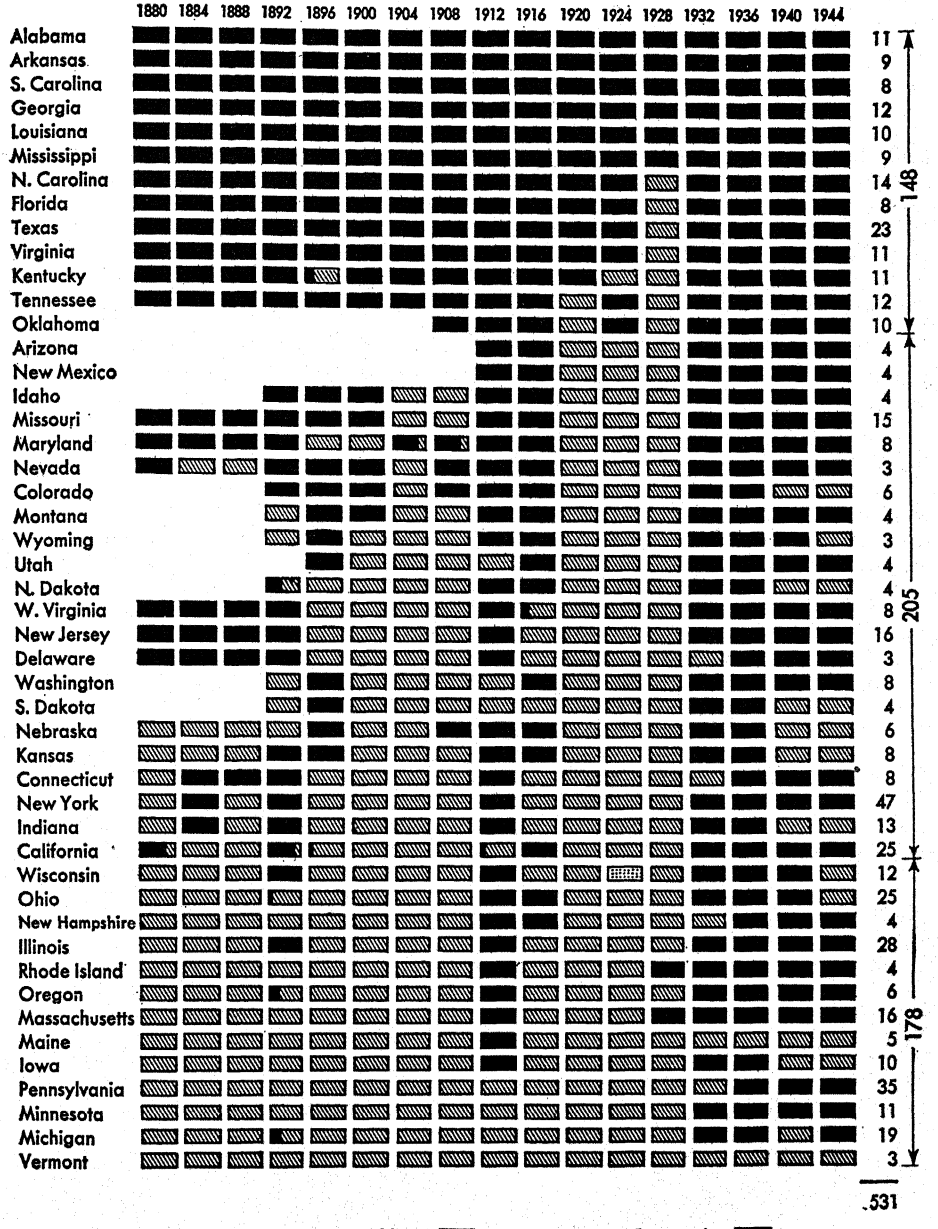
[24]Ibid. Vol. I, p. 483. [25]Ibid. Vol. I, p. 302.

pluralities in enough of the States to give him 180 electoral votes to the combined 123 of his opponents.

EFFECT ON NOMINATIONS FOR PRESIDENT AND VICE-PRESIDENT · The failure of the electoral system in two instances to place the man receiving the highest popular vote in the White House revealed a defect, but one relatively small as compared with the all-pervading influence of the system on the character of the nominations made both for President and for Vice-President, which in turn determine the outcome of the elections. Vice-President Marshall is reported to have replied, when asked why his home State was given so many Vice-Presidential nominations, "I don't know, but it might be because Indiana has more first-rate second-rate men than any other State of the Union." As a matter of fact, neither the first-rate second-rate men of Indiana nor the second-rate first-rate men of New York or Ohio have much to do with nominations. The mathematics of the electoral system requires that the nominations go to large States of doubtful political allegiance. With the general-ticket system of voting for electors, it is correct to say, paradoxical as it may seem, that the object of the campaign is to win not popular but electoral votes. With one section of the country solidly Democratic and certain States regularly Republican, the nomination must be handed to the native son of a large and uncertain State in the hope that this will hold its votes. The chart on page 337 is a schematic arrangement of the States in the order of their party fidelity in the elections from 1876 to 1944, the Democratic states reading from the top down, the Republican from the bottom up. This makes roughly three bands of States: the solidly Democratic and the regularly Republican at the margins, and the irregular and the uncertain in the middle. As often happens in life, steadfastness must be its own reward, while the prize goes to the fickle.

THE PRE-EMINENT POSITION OF NEW YORK · Normally no party can expect to win the Presidency without the 47 electoral votes of New York. The ideal strategy is to award the Presidential nomination to a New Yorker; but should personalities, sectional demands, or economic pressures demand its disposition elsewhere, then the second best is the Vice-Presidential nomination. A glance at the charts on page 339 will show the pre-eminent advantage which New York statesmen and politicians have enjoyed, and the somewhat lesser ones enjoyed by those of Ohio, Indiana, and a few other States. But the negative side is that no matter how distinguished or promising the aspirant from the small or certain States may be, he is out of the running as a matter of course. Particularly has this operated against the West and the South and Pennsylvania since the Civil War. Between 1800 and 1944 there were thirty-seven Presidential elections, in thirty of which one or more of the four candidates of the two major parties were from New York. If we count the nineteen elections back to 1872, only in 1896 did that State fail to secure

## SOLID AND DOUBTFUL STATES, 1880-1944

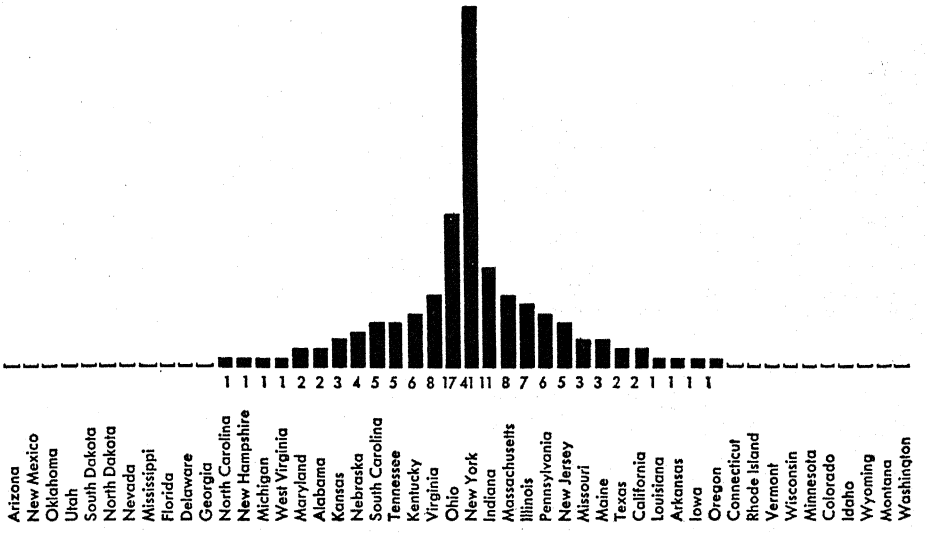


one or more of the four places. In that period of seventy-two years New York Presidents have occupied the White House more than thirty years and New York Vice-Presidents have stood ready to take over another sixteen years. Election to the office of governor of that State, coupled with a fair performance of its duties, almost inevitably places a person in the front line of eligibility for a Presidential or Vice-Presidential nomination. Any other State which met the same two conditions of size and voting uncertainty, of course, would have the same advantage. If, for instance, a line were thrown around the six States of Kansas, Nebraska, Missouri, Oklahoma, Iowa, and Colorado so that their electoral votes went as one block, the political parties would generally be compelled to award this new entity recognition at the head of the ticket.

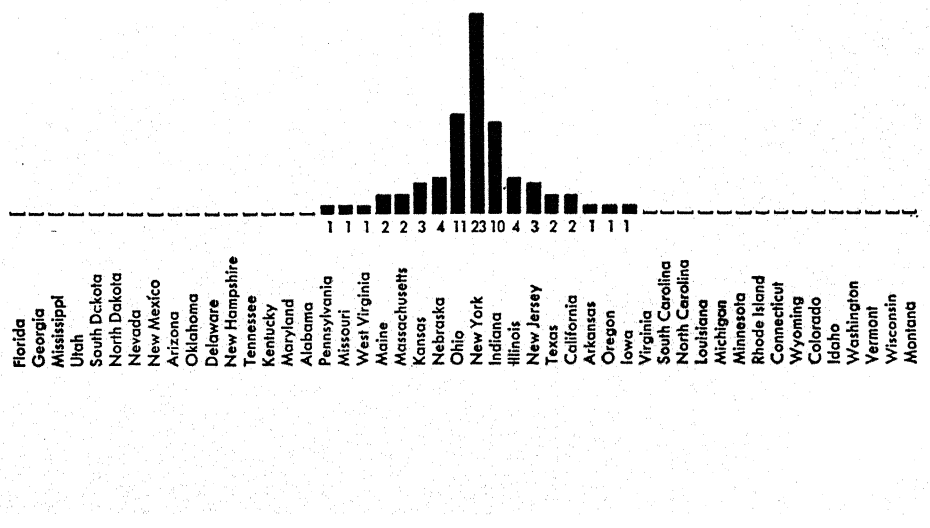
The negative of the picture is equally significant. The chart at the bottom of page 339 shows at a glance the greatly increased concentration since 1876 of the nominations in a few States of the Northeast. Although the solid South had voted a straight Democratic ticket since the removal of force in 1876, and meanwhile had furnished the greater part of that party's able and experienced leadership, it failed to receive a single place on the ticket until 1932, when Senator Joseph Robinson of Arkansas was nominated as Vice-President to thwart an anticipated political revolt. The same slight awaited half a dozen Northern States which had been too faithful to the Republican party. Pennsylvania, which since 1860 had never failed that party, and which for many years carried the second largest block of electoral votes, never in its nearly three quarters of a century of loyalty received a Republican nomination for either President or Vice-President. Sectional interests may occasionally subordinate the pivotal State strategy to other considerations, such as an outstanding personality who dramatizes popular grievances, like Bryan in 1896 and 1900; but in normal times it is more to the party's interest to nominate even mediocre personages from large and uncertain States than an outstanding individual without such backing. Able men who happen to come from small States or from large ones of steady political habits seldom are justified in aspiring to a place on the national ticket.

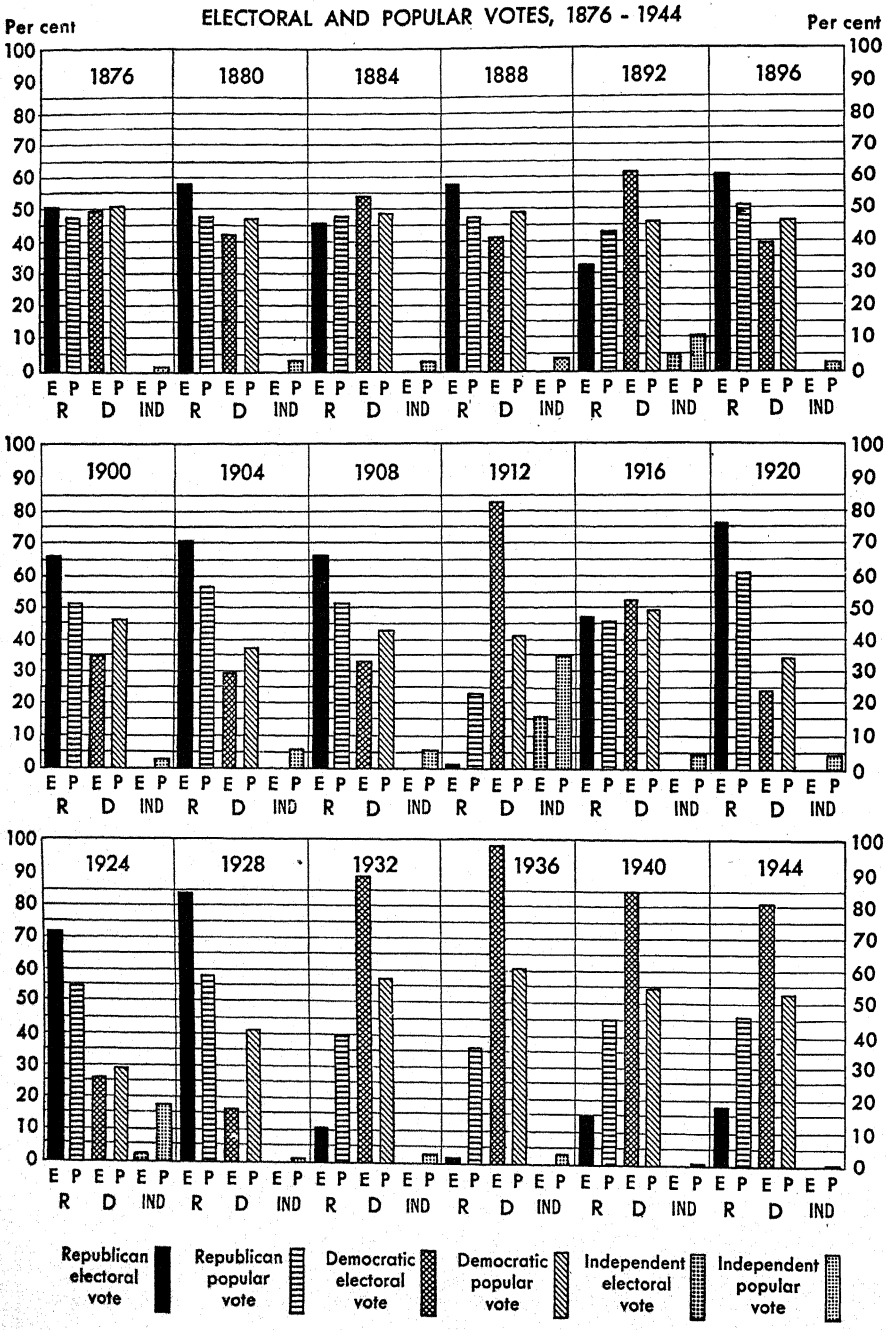
EXAGGERATION OF VICTORY AND DEFEAT · The chart on page 340 showing the curves of the Republican popular and electoral votes in the period from 1876 to 1944 is proof of the uncertain correlation between the two. Generally the winning of a majority of the popular votes is reflected in a much exaggerated electoral majority. The case is somewhat different for the two major parties because of the solid South. For instance, Harding received 60 per cent of the popular votes in 1920, and 404 electoral votes to the 127 of his Democratic opponent; but when the Democratic candidate Franklin D. Roosevelt received 60 per cent in 1936, he captured 523 electoral votes and his opponent only 8. In 1932 Roosevelt's popular vote was only 57 per cent of the whole, but the electoral votes

## DISTRIBUTION OF PRESIDENTIAL AND VICE-PRESIDENTIAL NOMINATIONS OF MAJOR POLITICAL PARTIES BY STATES, 1800-1944




## DISTRIBUTION OF PRESIDENTIAL AND VICE-PRESIDENTIAL NOMINATIONS OF MAJOR POLITICAL PARTIES BY STATES, 1876-1944




ELECTORAL AND POPULAR VOTES, 1876 - 1944
Per cent
Per cent
1876
1880
1884
1888
1892
1896
1900
1904
1908
1912
1916
1920
1924
1928
1932
1936
1940
1944
E P E P E P
R D IND
Republican electoral vote
Republican popular vote
Democratic electoral vote
Democratic popular vote
Independent electoral vote
Independent popular vote

stood 472 to 59; and in 1944, in the closest race since 1916, Roosevelt, with only 53.6 per cent of the popular votes, won the Electoral College 432 to 99. The appearance of sweeping the Electoral College is of practical value to an incoming administration; for the populace is impressed with the idea that an overwhelming mandate to rule has been given.[26]

EFFECT ON STATE PARTY ORGANIZATION · The immediate purpose of the national political party to capture blocks of electoral votes rather than to win popular votes anywhere has a direct influence both on the form of party organization and on the direction of its activities. Presidents are elected by solid delegations of State electors; such delegations are won by well-organized State machines, and these machines are nourished by the Federal patronage at the disposal of the President directly and through the party's Senators and Representatives. Both parties therefore maintain strong organizations in every State where they have any sort of chance to win; even in southern States skeleton Republican organizations are maintained in order to enjoy the local patronage which a Republican President can dispense. Party organizations in pivotal States like New York, Ohio, and Indiana have been particularly strong.

MAINTENANCE OF THE TWO-PARTY SYSTEM · If such eloquent orators or champions of popular causes as John L. Lewis, Dr. Townshend, Huey P. Long, or Father Coughlin could have been voted for directly for President by their followers, they might have launched new political parties without any hesitation. The requirements of our electoral system, however, have made well-advised leaders wary of new launchings. Lists of pledged electors must be placed on the ballot, and the new organization must qualify as a political party in order to be entitled to watchers and challengers at the polls; these things require petitions to be circulated and signed by a formidable number of electors in each State separately. If we take into consideration also the lack of historic good-will tokens, such as party heroes, traditions, and slogans, it is small wonder that the political enterpriser prefers to work within one of the existing major parties. Existing major parties are preserved and the emergence of new ones is discouraged.

PROPOSALS FOR CHANGE · Resolutions many times have been introduced in Congress proposing amendments for the direct popular election of the President and Vice-President. Andrew Jackson first gave prominence to the proposition in his annual message of 1829, which he repeated annually thereafter until the end of his term.[27] It was a logical move at the moment,

[26] C. E. Merriam and H. F. Gosnell, *The American Party System* (1940), p. 355.

[27] "To the people belongs the right of electing their Chief Magistrate; it was never designed that their choice should in any case be defeated, either by the intervention of electoral colleges or by the agency confided, under certain contingencies, to the House of Representatives. . . . I would, therefore, recommend such an amendment to the Constitution as may remove all intermediate agency in the election of the President and Vice President."—Andrew Jackson, "First Annual Message," December 8, 1829, in J. D. Richardson, *Messages and Papers of the Presidents*, Vol. II, pp. 447, 448

since the country just then had arrived at universal suffrage and national party organizations and nominating systems. Although President Andrew Johnson, in 1868, urged it, and many such resolutions have been prepared in Congress, none has ever been submitted to the states.[28] Several proposals for the amending of the electoral system are now (1945) pending in Congress. One, by Senator Langer of North Dakota, would abolish the Electoral College outright and substitute direct election by the people. In the improbable event of a tie vote the choice would go to the House of Representatives, where each State would have one vote. The one by Lea of California in the House of Representatives would abolish the Electoral College, but would retain the present distribution of electoral votes among the States. Each person for whom votes were cast for President would be credited with a proportion of the State's electoral votes corresponding to his share of the popular votes. The person receiving the greatest number of electoral votes, even if not a majority, would be declared elected President; in case of a tie the one receiving the highest number of popular votes would win. The Vice-President would be chosen according to the same rules. This amendment would permit the States with a low voting rate, like those of the South, to retain their present weight in the election; but by splitting the State votes it would take away the semimonopoly which New York, Ohio, and several other States have in the matter of nominations, and, moreover, would encourage active campaigning and voting in all the States. It would seem to offer a fair compromise between the present system and that of direct election and would retain the virtue of the present system in the discouragement of the multiparty system.

EFFECTS OF A DIRECT ELECTION BY THE PEOPLE · In view of the known merits and defects of the system of indirect election, what might be expected from a change to direct election? Some results doubtless would ensue which no one had foreseen, but others seem evident.

1. The most important outcome would be in the change of emphasis on the qualities required in nominees. The claims of the large and uncertain States to consideration would be greatly deflated. The person who could win 48 per cent of the popular votes in New York State would be almost as good a candidate nationally as the one who could win 52 per cent; for every vote cast would be counted and would have weight in the final result, whereas under the present system the votes of the former are a total loss. "Continental characters," as Madison called them, that is, men known throughout the land, would be relatively more desirable as candidates than now. "Availability" because of personal qualities and because of class and economic affiliations would be given a greater relative weight. Sectional appeal would still be a factor: a New York man might have a better appeal to the voters of the seaboard States of the Northeast

[28] Andrew Johnson, "Special Message to Congress," July 18, 1868, ibid. Vol. VI, pp. 640–642.

than one from the prairie States, and vice versa; but no such gambling proposition as choosing a man on the basis of win all or lose all in two or three populous States would be the basis of the nominations. Nationally known men of the South and of the small States of the West and Northwest could easily be as available as men of equal merit from New York or Ohio. When the proposed Twelfth Amendment was before the House in 1803, Roger Griswold of Connecticut gloomily remarked, "The office [of Vice President] will generally be carried into the market to be exchanged for the votes of some large States for President,"[29] a prophecy which proved wrong only in the few instances in which the office was bartered to sullen factions of the party or luke-warm sections of the country. Direct election would have the same effect on nomination for this office as on that for President, namely, the elimination of the large-State factor and the laying of greater emphasis on the candidate's personality and his drawing power for various sections, interests, and causes.

2. It would decrease the political power of the South and of the pivotal States of the North, at least temporarily. In 1940 twelve States of the South had a combined population of 34,676,653 and were allotted 135 electoral votes, both population and electoral votes amounting to approximately 25 per cent of the nation's whole. In the Presidential election of that year they cast 5,604,383 popular votes for President, or 11.25 per cent of the total.[30] Therefore, unless they should increase the voting rate, their weight in the election of a President would be cut in half. This loss, however, would be somewhat compensated for by the increased availability of their leaders as Presidential and Vice-Presidential candidates.

3. The electoral system has acted as a sort of gentlemen's agreement by which, in spite of the Fifteenth Amendment, the South has been left to settle its own suffrage problems; no serious attempt has been made to enforce that section of the Fourteenth Amendment which requires the cutting down of Southern representation in the House of Representatives. The direct popular election of the President and Vice-President would undoubtedly bring pressure to reopen the question of Negro suffrage in those States where they are disfranchised. Under the present system, so long as the Negroes are outvoted in a State, the Republicans have nothing to gain in having some of them vote in a Presidential election; for all minority votes are lost anyway. But with direct popular election, a Negro's vote in Alabama would have as much weight as a white man's in New York. Each party would be under heavy pressure to find votes wherever available in States large and small. Since long-ineffective Democratic votes in such normally Republican States as Pennsylvania and Vermont would now find expression, the Republicans would doubtless insist on the same privilege for whatever votes they might muster in the Southern States.

[29] *Annals of Congress*, 8th Cong., 1st Sess., pp. 144–145.
[30] *World Almanac* (1945), p. 747.

4. It would stimulate campaigning in every part of the United States, whereas today only the doubtful States are subjected to a vigorous contest. In the South the real contests are in the Democratic primaries, and until recently the Presidential campaign was pushed only half-heartedly by the Democrats in a number of Republican States.

5. It would modify party organization perhaps in many ways that cannot be foreseen. State party organizations would be weakened and the national machinery strengthened. Regional machines embracing several States of small size or only parts of States where population is dense would be encouraged.

6. Direct election would doubtless bring with it concomitant changes in the electoral system, such as the abolition of the right of the two houses to elect when there is no majority, in place of which there might well be a second, or run-off, election. Greater Federal participation in the election process would probably ensue, with some sort of national canvassing board.

## *STATE ELECTORAL ADMINISTRATION*

In the hands of the State legislature rests the authority to provide electoral machinery to fill the offices of a network of political units from township or smallest village to the central State government itself. But that is not all. Section 4 of Article I of the Constitution provides: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." That is to say, the conduct of Congressional elections is given in the first instance to the States, but such arrangements may be modified or superseded by Federal statutes. As a matter of fact, no Federal voting machinery parallel to that of the States has ever been set up. Federal legislation has been confined chiefly to remedial matters and regulations where uniformity is desirable. A statute of 1842 required that Representatives allotted to each State should be chosen by districts; another, in 1871, that a secret ballot should be used; and still another, four years later, that all Congressional elections should be held the first Tuesday after the first Monday in November of even-numbered years.[31] As to Presidential electors, Congress may set the day for choosing them and the day for the casting of their ballots, but the State legislatures determine the manner in which they shall be chosen.

THE STEPS IN VOTING · There are five distinct phases of the process of voting, each with statutes governing the details. (1) The determination of who shall vote, or the suffrage laws. These are governed by national and State constitutional provisions, and have been described at another point. (2) The identification of the voter. In rural regions this may be done per-

[31] 16 Stat. 440; 18 Stat. 400.

sonally; in more thickly populated ones, by written registration. (3) Casting the vote. This is now universally done in the United States by ballot or by voting machine. (4) The counting of the ballots. In the comparatively few places where machines are used, the tabulation is done mechanically and the work of the election officers is simple; as to the rest of the country, this task is performed by legally designated officials under a legally prescribed procedure. (5) Canvass of the votes and issuance of the certificate of election. Certain officials are empowered to make a tabulation of the votes and a final and authoritative decision as to who has been elected. To carry these five steps through, there must be official machinery, equipment, rules regulating both officials' and voters' conduct, and other safeguards against outside intimidation and obstruction.

ADMINISTRATIVE MACHINERY · For many years voting was more under the control of the party than under that of the State. When the latter came to be asserted, the tendency was to make it an ex officio duty of existing officers, such as the board of county commissioners, the township board, or the city council. Now that voting has become a major industry, because of the greatly increased duties laid on the electorate, the tendency is to create special electoral machinery distinct from other administrative machinery. Control of election machinery by local party organizations for the dual purposes of obtaining patronage and corrupting the processes of election has stimulated the creation of supervisory control by the central State government. The history of practically every urban boss and machine reveals how much their power rests on the control of elections. The cases are too numerous to mention, but the trials of corrupt election officials in Kansas City, Missouri, showed that the Pendergast machine was running true to nature. Arguments against central control hinge on the proposition that the governor or other State officer may use his authority to control the elections in all the subdivisions of the State. That there is ground for this fear is doubtless true; but except in Louisiana, under the Long regime, no such result has appeared, perhaps because in no case has much power been entrusted to such a State board.

CENTRAL STATE AUTHORITIES · Six States, all in the South, have central boards of elections, and a seventh, Indiana, a state board of election commissioners made up of the governor and two members appointed upon the recommendation of the two major political parties.[32] In many other States the governor and one or more other officers, usually the Secretary of State, perform duties in connection with elections. The governor may issue the proclamations for elections, sign the credentials of Presidential electors and of persons elected to Congress, act as a member of the State canvassing board, and, as in eight States, appoint the city and county election boards. In New York the attorney-general is furnished with lists of the voters of the various precincts and is authorized to take over the

[32] J. P. Harris, *Election Administration in the United States* (1934), pp. 101–105.

prosecution of violations of the election laws whenever he believes it necessary. In view of the usual dominance of the local district attorney's office by the party machines, the salutary nature of this provision is plain. In none of the States referred to above have the State election officials strong powers of supervision or of rule-making. Their formal duties are confined chiefly to the appointment of local election officers and the issuance of the state election laws. Generally they do not even maintain year-round offices. Actually, their chief concern seems to be to keep the general control of elections throughout the State in the hands of the majority party.

COUNTY AND CITY BOARDS OF ELECTION · With State supervision over elections weak or entirely lacking, the county (or the town in New England) is the logical unit to provide boards of election. Nine States make provision throughout their area for county boards and three for city boards.[33] Others provide for such boards in populous cities and counties only, while in the rural States the board of county commissioners usually performs the chief supervisory electoral duties.

Three or four is the usual size of board membership, although in a few large cities there is a single commissioner. Appointment is usually by the mayor or the governor; in nine States it is made upon the recommendation of the major political parties. The powers of the board, generally exercised through its chief clerk, are extensive. The board has general charge of the registration of voters and of elections; lays out the voting precincts according to the standards set by law and provides polling places; hires workers for precincts and for headquarters; lets contracts for ballots and other election supplies; issues instructions to the election workers, and even may hold a brief training school before election day; tabulates the returns from the precincts; and canvasses the final returns and issues certificates of election.

THE VOTING PRECINCTS · The current which carries along national policy for two and probably for four years gathers its rivulets from the 130,000 to 140,000 voting precincts of the United States.[34] The purity of the stream is dependent upon what issues from the fountains, and that is conditioned by what the voters put in and what the precinct officials count and record. The county board of elections usually has the power to lay out the voting precincts and locate the polling places. Many of the States set a maximum for the number of voters, ranging from 200 in California to 2000 in Massachusetts, beyond which the precinct must be divided.[35] A familiar device employed by the boss in order to make fraud, intimidation, and violence easy is the location of the polling places in forbidding surroundings. An observer who toured the polling places of a back region

[33] J. P. Harris, op. cit. pp. 110–120.

[34] C. E. Merriam and H. F. Gosnell, op. cit. p. 145. Information furnished by the Republican National Committee.

[35] J. P. Harris, op. cit. p. 207.

of Chicago thus described them: "small, dark rooms in the basement of shabby flats, accessible only through a narrow, dark hallway; the rear end of small shops; barber shops with business going on as usual; one livery stable; and one beauty parlor, while large public school buildings near by went unused."[36] The officers, generally six to a precinct, consist of judges of election, who pass on disputed questions subject to appeal to the county board, clerks, and inspectors. They commonly are appointed by the boards or commissioners for the county or city, and are taken from lists submitted by the party managers. In some districts of the larger cities an amazingly high average of ignorance, inefficiency, and dishonesty is found among them. Service on the precinct boards is widely considered one of the perquisites of the hangers-on of the party machine. The salary of three to five dollars is high enough to be attractive to the heelers of the precinct or to their wives or daughters. With the total number of precinct workers running beyond 15,000 in Chicago and 13,000 in New York City, and with sometimes as many as three or four elections a year, the total revenue for the party faithful runs into large sums.

VOTING DEVICES · Four different means have been used at various times by the American voter to indicate his choice at an election: viva voce, a show of hands, a slip of paper or ballot for marking, and a mechanical recording machine.[37] The first two are entirely obsolete, and the ballot predominates, though the voting machine has slowly made its way in a few of the larger cities.

The American colonies seem to have led the way in the use of written ballots for the election of public officers. Massachusetts used this device as early as 1634, and all the New England States by the end of the Revolution. In the middle-Atlantic colonies the methods of viva-voce voting and the show of hands prevailed until the Revolution, with some instances of the use of written ballots; but in the Southern colonies the last-named method was not used at all. At first the voter was required to write out his own ballot, which was thought to be something of a guarantee of the independence of his voting, as well as a safeguard against ballot-box stuffing. Later the candidates and the political parties printed their own ballots and handed them out freely to the voters. Their characteristic shape and color made it easy to know what vote was cast. The intimidation, coercion, and bribery under this system brought arguments for the return of viva-voce voting, because of the good example such an open exhibition gave to the uninformed and irresolute members of the community; but its abandonment by Kentucky in 1890 was the end. Meanwhile efforts had been made to design a better ballot, and safeguards for its use.

THE AUSTRALIAN BALLOT · As early as 1856 one of the Australian provinces had adopted a secret official ballot whose use soon spread to the re-

[36]Ibid. p. 215.

[37]C. Seymour and D. P. Frary, *How the World Votes* (1918), Vol. I, pp. 217–223.

mainder of the island continent and to New Zealand.[38] Strangely enough, the first State to use it was Kentucky, which in 1888 applied it to the city of Louisville even while the requirement of viva-voce voting was still in its constitution. By 1892 it had been adopted by thirty-two States, and today it is in use in all but South Carolina. Its characteristics are four in number: (1) It is official, which means that its form is determined by law, that it is printed at government expense, and that it bears the signatures of the election officials to attest to its genuineness; (2) it is secret, marked in the privacy of a booth, folded and deposited by the voter himself, and devoid of identification mark; (3) it bears the names of all duly nominated candidates; and (4) the results are counted by the regular public officials.

THE TWO CHIEF TYPES: PARTY COLUMN AND OFFICE GROUP · The experimentation of many States has brought forth many variations on the original Australian ballot, but these all now fall into one of two types: the party-column, or Indiana, form and the office-group, or Massachusetts, form.[39] The first, the Indiana or party-column ballot, has a vertical column for each political party, with the nominees of the party appearing under the name of the office for which they are running. At the top is an emblem which is not uniform for all States. The Republicans variously use the elephant or eagle; the Democrats, a rooster crowing; the Socialists, clasped hands. Below the emblem is a circle, and a cross placed in this automatically casts the elector's vote for a long line of party candidates below. The second, the Massachusetts or office-group type, has the names of all the candidates arranged under the heading of the office for which they are running. For instance, under "Governor" might be the names of four men, the candidates of the Republican, Democratic, Socialist, and Farmer-Labor parties; and there would be space for the voter to write in a name if he wished. The voter is obliged to go down the entire ballot, picking out from each group the name of the man he prefers for each office. Naturally this is a discouragement to straight voting and a handicap to the ignorant and the illiterate. A variation is found in New York, where the name of the party and a small symbol denoting it are placed after each candidate's name. There are variations on these two types. Some States omit the party circle; others leave off the emblem; some require a statement of residence and occupation; while Nebraska and Pennsylvania paradoxically carry the party circle with the office-group ballot.

WHICH IS THE BETTER TYPE? · The validity of the arguments for and against these two types of ballots depends somewhat on one's beliefs with respect to party solidarity. The Indiana ballot encourages straight party voting, makes it easier for the run-of-the-mine elector to vote without spoiling his ballot, and amounts to something like a plebiscite on the vir-

[38] E. Sait, *American Parties and Elections* (1939), pp. 729–731; E. C. Evans, *A History of the Australian Ballot in the United States* (1917); J. P. Harris, op. cit. pp. 153–154.

[39] Ibid. pp. 732–736; J. P. Harris, op. cit. pp. 154–159.

tues of that party. Those without too much faith in the rational qualities of the mass of voters and with a hope of basing democracy more on party leadership than on individuals, favor the Indiana ballot, emblems and all. For those who would place great dependence on the individual voter's judgment, the Massachusetts ballot is the logical choice. Even if many ballots are spoiled, this is something of a natural selection, they say; for those who spoil the ballots are mostly the ones who are least fit to pass judgment on men and measures. They point to the large number of poor candidates in State and county who are carried into office on the popularity of a Presidential candidate, men whose names, if placed alongside those of their rivals on the ticket, would undoubtedly be rejected by the voters of their own party. The office-group type, in fact, more nearly corresponds to the original Australian ballot. During the past thirty years many States have wavered between the two, with the result that today about two thirds of them hold to the party-column type.

OTHER BALLOT FEATURES · Other variations in making and using ballots include the division of the candidates and offices among several ballots; for instance, separate ones for the Presidential electors and State and Congressional officers, for the county and township officers, and for the judicial offices, and one for each question on referendum. In a few States the identification of the nominee is made easier by the requirement that his residence and occupation be printed on the ballot. For primaries or nonpartisan elections a few States print a short slogan of the candidate's choosing. Devices for combating fraud include the printing of heavy black margins so that identification marks are more difficult to make, and the manufacture of ballots in pads, with attached stubs numbered in duplicate serially, as a safeguard against endless chain voting.

VOTING MACHINES · The Australian-ballot system was just well under way when its supremacy was threatened by a still more mechanized method of voting, the voting machine.[40] In 1892 the first machine was installed at Lockport, New York; by 1929 twenty-four States had given authorization for its use, and it had been taken advantage of in ten. Among the large cities using machines are New York, Philadelphia, Pittsburgh, Indianapolis, and San Francisco. The machine is enclosed in a curtained booth. When the voter opens and closes the door by pulling a lever, the machine is set in operation. Across its face are small tabs on which are the names of all candidates officially nominated and the referendum questions. To vote, one pulls down a small lever over the name of the candidate or question and operates the lever which opens the booth door. All the decisions which the voter indicates are recorded and at the same time added to those already cast by others. The mechanism is such that no one may vote more than once for any candidate. Usually the machine is so built that the straight ticket may be voted by pulling down one master lever.

[40] J. P. Harris, op. cit. chap. vii.

Sufficient experience has now been had with this mode of voting to pass a tentative judgment on the claims made for and against it. That it has eliminated much fraud and greatly increased the accuracy of results seems certain. The traditional practices of filling the ballot boxes after voting hours with ballots marked by the gang, inaccurate and false counting, and the arbitrary throwing out of ballots of the opposition are eliminated, of course, by the machine. Falsification of the returns of the machines is too hazardous to attempt if there is any legal means for a recanvass of the votes. "Repeating," of course, is as easy as with paper ballots. Recounts are more easily accomplished: the machine is simply unlocked and the numbers recorded for the candidates are taken off. Claims of financial economy have not been borne out. The machines are very expensive, with a minimum of $900 for the original investment; a new type of election officer is necessary to set up and service them, and their custody and upkeep are much more expensive than the old method. The voting time is somewhat shorter than with the written ballot, but not so much so as was expected. While under the old system as many as a dozen voting booths could be set up inexpensively for use in the congested voting hours, one or two machines are all that are financially justifiable for any one precinct; and the result in the large cities is lines of impatient voters awaiting their turn. The use of machines, furthermore, does not greatly reduce the election staff, which must be maintained for the registration of voters and the primary elections. Claims that machines discourage people from voting more than the traditional ballots did have not been substantiated. Elimination of the laborious count of the ballots which, in elections of heavy voting, tries the endurance of the workers, and the almost immediate announcement of the results with a full assurance of its accuracy, are advantages which go far to outweigh the expense and inconveniences of the machines.

SUMMARY · (1) The nation's electoral system is a product of Federal-State co-operation. Federal law establishes machinery of a limited scope, applying chiefly to the election of President and Vice-President, and a few standards extending beyond these, while the State establishes a much more elaborate machinery and more extensive standards and administers many of the Federal regulations and all of its own. (2) The original scheme of the Constitution soon proved defective and was changed in 1804 by the Twelfth Amendment, to require the electors to vote separately for President and Vice-President. Three other constitutional amendments directly or indirectly altered the electoral system: the Fourteenth placed a penalty on such States as might restrict adult male suffrage; the Fifteenth forbade them to deny the right to vote on account of race, color, or previous condition of servitude; and the Twentieth, by eliminating the "lame duck" session of Congress, placed the choice of a President and Vice-President, where none had been made by the electors, in the newly elected Congress.

(3) Federal regulations deal chiefly with the time of choosing electors, the time and manner of their balloting and of making returns to the president of the Senate, the count of the electoral votes, and the defining and punishing of bad practices in connection with elections; Congress also has legislated to establish a uniform day for the election of members of Congress and to require their choice by single-member districts. (4) The Constitution is defective in not clearly establishing an authority to decide contested electoral votes of the States. Congress, out of necessity, has gone about halfway in assuming the power for itself. (5) The system of election by electors has produced several marked results: it has given a disproportionate weight to a few large and doubtful States; stimulated party organization by States and so tended to strengthen State independence; exaggerated election victories and defeats in the popular mind and so given the winner a mandate to rule; bolstered the two-party system; tended to diminish the emphasis on the personal ability of candidates by stressing the importance of carrying doubtful States; and left home rule to the South in the matter of Negro suffrage. (6) All voting for both Federal and State officers is in State-administered precincts. Administration is chiefly by county or city boards, subject generally to slight central State control. (7) Every State has elaborate instruments and paraphernalia to facilitate voting and the count of the votes and to save the process from perversion and contamination at the source.

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## CHAPTER XVI

# *Campaigns and Elections*

The one simple object of an election campaign is to capture the offices which are at stake. This can be done legitimately only by attracting more adherents than the opposition and seeing that they record their judgments at the polls. The student may emphasize the by-product of popular education, but the political manager sees only one measurement of success or failure—the winning of a majority for his candidate. Campaign management involves many things: the building of an effective organization; the collection of large funds; the employment of a large "staff of persuasion," including writers, distributors, and orators; and the devising of sound plans of tactics and strategy. A century and a half of American experience has served to produce a great accumulation of knowledge concerning the art and principles of campaigning. The gifts of the born leader, even though he works by rule of thumb, still count the most; but the techniques efficiently employed by the professional advertising agencies for the commercial world, and the findings of the new science of psychology, are powerful aids. These, guided by the worldly wisdom of the experienced politician, confront the voter in campaign years with a formidable battery of the instruments of instruction and persuasion. As early as 1920 the scientific campaign was struggling into being, but not until 1932 had it attained mature proportions.

## *PRESIDENTIAL CAMPAIGNS*

The actual Presidential campaign begins when the delegates stream forth from the convention hall to carry the spirit and message of the national conclave to the people at home. The newly appointed national committee soon completes its organization and outlines the main course of the campaign.[1] During the summer months both parties content themselves chiefly with press releases from prominent party members and inspired statements from the national committee itself. Sometime in August the notification committee, which was appointed by the convention, waits on the candidate in his home town and breaks the news of his nomination, whereupon the surprised candidate delivers a carefully prepared speech which gives some indication of the direction the campaign will take. The notification ceremonies of 1936 were particularly colorful. That of Roose-

[1] E. M. Sait, *American Political Parties and Elections* (1939), chap. xii; V. O. Key, *Politics, Parties, and Pressure Groups* (1942), chap. xviii.

velt took place in the great Philadelphia stadium, where a frantically jubilant crowd listened to the candidate's statement of campaign issues and a denunciation of his opponents. The Landon notification was held on the Statehouse grounds in the little city of Topeka and was preceded by a huge parade in the Western style, with Indians, cowboys, and pioneer wagons. By late September the committees have raised funds, organized a speakers' bureau, arranged for radio time, and printed tons of literature to be used in the weeks before election. Modern means of communication, particularly the radio, have served to shorten the time of the intensive campaign. Experience has shown that the public is unable to stand more than a month to six weeks of the fire and smoke of such a campaign without a fatigue-induced reaction. The traditional time for the formal close of the campaign is the Saturday night before election, when the wearied candidate delivers his closing exhortation and retires to his home for recuperation.

CAMPAIGN ORGANIZATION · The governing committees of the party, described in a previous chapter, take charge of the task of organizing for the national and all lesser campaigns. Dominating all is the recently chosen national committee.[2] Its chairman actually is the personal choice of the Presidential nominee and more often than not has served as his personal manager in securing the nomination. The party nominees and the national chairman soon agree upon several vice-chairmen, a secretary, and, most important of all, a treasurer of the national committee. National headquarters are established at New York or at Washington, and regional headquarters for the West at Chicago and for the East at New York (if the national headquarters are at Washington). The treasurer usually maintains his headquarters in his own home town. The national chairman then proceeds to build up a large organization, including a speakers' bureau, publicity and editorial divisions, and so on. National headquarters must depend chiefly, for actual contacts with the voters, on the regular party organizations in the States and localities, remaining largely a planning and co-ordinating agency. From their storehouses come the literature, the strategy, and much of the funds, but the veteran regulars of township and ward must carry the trenches.

CAMPAIGN METHODS: STRATEGY · Party managers do not conduct a campaign on the principle of the Irishman at the Kilkenny Fair, hitting a head wherever he sees one. There is a broad over-all plan more like that of the colonial at Bunker Hill, namely, withholding fire until he could see the enemy's eyes. As heretofore explained, the first principle of strategy is one taken from the United States manual of arms: a superior concentration of force at the crucial point, which in a Presidential campaign means the capture and holding of doubtful States, regions, and cohesive groups, be they economic, racial, or otherwise. Normally the Republican party would be foolish to expend funds or efforts in an attempt to capture

[2] V. O. Key, op. cit. pp. 571–575.

the twenty-three electoral votes of Texas, or the Democrats to capture the thirty-six electoral votes of Pennsylvania. On the other hand, no pains must be spared to win in Illinois, Ohio, Indiana, New York, and the States of the prairie region. It is the custom of both parties to wind up the campaign with a great rally in New York City addressed by the Presidential candidate.

The party in power has a great advantage if there has been a fair degree of prosperity. The strategy then is to claim everything in sight, even such benevolent dispensations of Providence as the rains and the sunshine. For instance, Coolidge in 1924 simply pointed to the record of economic advance, and the public was callous to the scandals and general ineptitude of the short Harding administration. Hoover in 1928 followed the same course. "No better guarantee of prosperity and contentment among all our people at home," declared that party's platform in 1928, "can be given than the pledge to maintain and continue the Coolidge traditions." "Under this administration the country has been lifted from the depth of a great depression to a level of prosperity," it further asserted.[3] To claim credit for all good in sight and attribute all evil to the opposition party is a favored principle of party action. On the other hand, the party in power at the time of a depression or, in the Middle West, at a time of drought and crop failure is in an unenviable position. The inevitable strategy of the Democratic party in the 1932 campaign was to point out a simple logical sequence: Hoover was in power from 1929 to 1932, a depression occurred in those years, therefore Hoover caused the depression. The depression was as irrefutable an argument against Hoover in 1932 as prosperity was for Coolidge in 1924. Such logic the Republicans used with great success against Grover Cleveland and his party after the depression of the early 1890's. How devastatingly the argument can be used was shown in Roosevelt's Baltimore speech in 1932, when the Hoover administration was characterized as "the Four Horsemen—Destruction, Delay, Despair, and Deceit."[4]

Another type of strategy is the setting up of seemingly nonpartisan organizations to catch a particular category of voters. Such were Labor's Nonpartisan League, which represented the political activities of union labor (both the Congress of Industrial Organizations and the American Federation of Labor), and the Good Neighbor League, whose Biblically inspired name was to epitomize the humanitarian and charitable features of the Roosevelt administration. On the Republican side were the Liberty League, whose name signified a popular protest against the augmented powers of government over the individual, but which was supported chiefly by men of great wealth, and the independent Coalition of American Women. In 1940 the Democrats sponsored, among other organizations, the National

[3]Roy V. Peel and T. C. Donnelly, *The 1928 Campaign* (1931), p. 130.
[4]Roy V. Peel and T. C. Donnelly, *The 1932 Campaign* (1935), p. 147.

Committee for Agriculture and the Business Men's League for Roosevelt; the Republicans, the National Committee to Uphold Constitutional Government and the Citizen's Information Committee.

Creating an illusion of overwhelming victory is a stratagem which both sides always undertake. Devices for that purpose appeal to the crowd instinct to be on the winning side, give zest to the workers, and encourage a surge of emotion such as grows in the victors in a battle. "Interviews" previously written by the publicity bureau are given out from time to time by party leaders from widely scattered points, asserting the growing strength of the party ticket in their respective States. Periodically the national chairman claims various States, even specifying the majority. The Republicans may report steady gains in Louisiana, or claim an actual majority in Georgia "if the election were held today"; and the Democratic chairman reports the tide running so swiftly toward his ticket in Pennsylvania that by November it will make a "triumphant sweep." No campaign is complete without the announcement, just at the psychological moment, of prominent proselytes from the opposition party. "Lifelong" partisans are so impressed with the opposition's statesmanlike nominee and farsighted program that they feel constrained to break old ties and join the erstwhile enemy. Mugwump Republican Senator George W. Norris in 1932 announced that he would support Roosevelt, and Borah of Idaho and Johnson of California that they would not support Hoover. Alfred E. Smith, Democratic nominee of 1928 and erstwhile friend of Roosevelt, announced in 1936 that he would "take a walk" from the old party. Leaders of economic groups are similarly sought after, particularly in agriculture and labor. In 1928, for instance, George Peek, prominent farm leader, deserted the Republicans and declared for Smith; and in 1944 Republican Senator J. H. Ball, of Minnesota, made public announcement of his intention to support Roosevelt. A campaign never develops far without the announcement that well-known university scholars are for the respective candidates. Even athletic fame is used to party advantage, Babe Ruth in 1928 championing Smith, and Joe Louis in 1940 supporting Willkie.

THE BUILD-UP OF THE CANDIDATES · "Humanizing" the candidate and at the same time giving him a build-up as a statesman are inevitable features of the campaign.[5] Even the candidate's family cannot hope to escape scrutiny and glorification or the opposite. The picture of Coolidge taking the oath of office at the humble rural home of his father by the light

[5]Charles Michelson, director of publicity for the Democratic National Committee, said (or wrote) in 1932: "The American people will elect as President of the United States, in November, a non-existent person, and defeat likewise a mythical identity. They will vote for and against a picture that has been painted for them by protagonists and antagonists in a myriad of publications —a picture that must be either a caricature or an idealization." Quoted by R. D. Casey, in "Party Campaign Propaganda," *The Annals of the American Academy of Political and Social Science* (1935), Vol. CLXXIX, pp. 96–105

of a kerosene lamp, coupled with his reputation for plainness and frugality, was admirably designed to evoke approval in the masses of the people. The home life of the candidate's family is pictured as ideal, and little incidents concerning it are circulated which will find a sympathetic reaction in the hearts of the humblest people. The achievements of the candidate as legislator, governor, or diplomat, or in whatever office he may have held, are portrayed in such a way as to show his statesmanship and his devotion to the cause of the common man. Coming up in life the hard way, such as early employment as a rail-splitter, canal boy, farmer, or cow-puncher, and birth or rearing in a log cabin or other humble surroundings are great assets for a candidate. That there are other routes to the Presidency, however, is shown by the fact that the three Democratic Presidents who perhaps are best known for their devotion to the common man, Jefferson, Jackson, and F. D. Roosevelt, all lived in the style of wealthy country gentlemen.

SPEECH-MAKING BY CANDIDATES · After the popular choice of electors became general in Jackson's time, the candidates for President and Vice-President were expected to participate actively in the campaign.[6] The long-existing exception was a President running for a second term, who not only could preserve the dignity of his office by remaining aloof but could win votes by a show of devotion to the duties of his office. The rule seems to be in the discard; for in recent campaigns no candidate up for re-election has hesitated to enter the lists if he thought it advisable. In 1940, however, Roosevelt made his speeches ostensibly as incidents in official inspection trips to war-production factories. He opened his campaign of 1944 with a speech as commander in chief of the army and navy, but later took the usual line of the candidate seeking re-election.

As the means of transportation improved, the candidates were better able to appear before multitudes in all corners of the country. Itineraries are planned by the campaign committee so that the maximum of party benefit may accrue. Pronouncements on critical issues are reserved for the psychological moments and for the strategic places. Anxious Senatorial and Congressional candidates implore the candidate to appear in their districts or States in order to strengthen the ticket. Sometimes the fortunes of the party in a State may depend on the attitude of one municipal machine.

The Vice-Presidential candidate must dutifully follow the lead of the ticket or of the national committee's board of strategy.[7] He may be required to appear in those sections where the head of the ticket is least popular, devote himself to making safe the pivotal State from which he

[6] V. O. Key, op. cit. pp. 582–589; E. Sait, op. cit. pp. 617–626; R. V. Peel and T. C. Donnelly, *The 1928 Campaign*, chap. vii.

[7] L. C. Hatch and E. L. Shoup, *A History of the Vice Presidency of the United States* (1934), pp. 410–411.

comes, "mop up" for the head of the ticket in his own strongholds, or simply keep silent. Both the Roosevelts, when Vice-Presidential candidates, bore the brunt of the campaigning for the ticket. Democratic candidates C. W. Bryan, in 1924, and John N. Garner, in 1932, were kept strictly in the background. Republican candidate Charles Curtis, in 1932, confined his efforts chiefly to the farm belt of the Middle West. Charles McNary, in 1940, was little more than an onlooker of the campaign; but Frank Knox, in 1936, by his vigor did much to make up for the shortcomings as a campaigner of the head of his ticket.

After the radio in 1924 began to play a leading role in campaign tactics, the Presidential candidates confined themselves to eight or ten major speeches, each devoted to the development of one subject and delivered from a carefully chosen point. Thus Hoover in 1928 made eight chief speeches: that on the farm question was delivered to the nation from St. Louis, Missouri; that on labor and industry, from Elizabethtown, New Jersey. Franklin D. Roosevelt in 1932 made his farm speech from Topeka, Kansas, and that on the repeal of the prohibition amendment from Pittsburgh, Pennsylvania; in 1936 he delivered a triumphant eulogy of recovery at a great "Green Meadows" celebration at Charlotte, North Carolina. The radio not only eases the candidate's task but renders obsolete the time-honored duplicity of contradictory promises to sections of the country remote from each other. A very much larger percentage of the population than formerly is able to gain first impressions through hearing the speaker's voice, and the sound-picture reproduction of parts of speeches still further enlightens them as to the candidate's personality.

SPEECH-MAKING BY OTHER PARTY LEADERS · The speakers' bureau of the national committee compiles a list of orators of all grades, and acts as a supply bureau and routing agency. Just below the Presidential candidate in desirability are usually a few cabinet members and a dozen or so Senators and Congressmen. These are sent into pivotal States, with a careful selection to fit particular qualities to particular regional needs. Some platform planks must be softened or ignored in certain areas and stressed in others. The board of strategy of the national committee has an important task in its sifting of issues to determine what is to be done with each, whether it is to be quietly dropped, restated, or elaborated and emphasized. Great care must be taken, particularly during the last days of the campaign, to avoid seemingly innocuous statements, which may become disastrous to the party if taken up and distorted by the opposition.

THE NEWSPAPERS · The newspapers, despite radio competition, still hold the leading place in the conduct of a national campaign.[8] Speeches at first hand and over the radio are more efficacious in popularizing the personality of the candidate, while the newspapers can best exert a pressure on the minds of vast numbers of people by maintaining a constant stream

[8]V. O. Key, op. cit. pp. 590–594.

of news and views. Early in the campaign the management of the newspaper chain makes a decision as to which candidate to support, and its battery of verbal artillery swings into action. For instance, in 1928 the Scripps-Howard chain announced its support of Herbert Hoover, but in 1932 and again in 1936 it threw its support to F. D. Roosevelt. The partisan papers of course support the candidates of the party, although with varying degrees of enthusiasm. One agency of the national committee is busily engaged in preparing ready-made editorials, political articles on many topics, cuts of prominent party leaders, and cartoons, which are shipped in great quantities to the rural dailies and weeklies. Script and pictures are designed especially for various nationality groups. Editorials and syndicated columns play their partisan roles. Once or twice during the campaign the national committee buys space in a large number of leading newspapers in order indignantly and with an air of martyrdom to deny the "unfair" or "baseless" attacks of the opposition. Meanwhile the national committee is busy manufacturing news which papers in general will print without charge: politicians make startling statements, one files a libel suit against an opponent, a lifelong partisan makes a dramatic resignation from his party and cleaves to the opposition; and accusations are made which, though later retracted, never entirely lose their force. Newspapers conduct polls of voters in order to prognosticate the outcome of the election. Partisan papers sometimes deliberately make these polls one-sided in order to create an illusion of victory among the faithful.

CAMPAIGN LITERATURE · The writing staff of the national committee not only markets its products through the established channels but publishes and distributes great quantities of literature directly.[9] Pamphlets, leaflets, and dodgers in the millions are printed and distributed to the various State and local party committees. Outstanding is the *Campaign Textbook*, published as an aid to the thousands of speakers and workers, which contains many valuable data such as the party platform, biographies of candidates, speeches of acceptance, party history, arguments for the party's stand, and damaging facts about the opposition. Pamphlets purporting to come from plain citizens unconnected with partisan politics are often used by both sides. For instance, in 1936 a pro-Democratic pamphlet was entitled *A Business Man's Personal Views of the Roosevelt Administration*; a pro-Republican one, *Pay Day: Letters from a Missouri Farmer to His Son in College*. Copies of partisan speeches made in Congress for that very purpose were sent out by the thousands. State and local party committees in the larger places usually add no inconsiderable amount to the total of printed matter for the voters' edification.

[9] V. O. Key, op. cit. pp. 594–595; R. V. Peel and T. C. Donnelly, *The Campaign of 1932*, pp. 115–117. In the 1932 campaign 63,000,000 pieces of literature were distributed by the Democratic National Committee, some of it being sent to the State chairmen, but the greater part, in bundles of ten pieces, to the 140,000 precinct committeemen.

THE HANDLING OF CAMPAIGN ISSUES · Basic economic and political conditions of the years immediately preceding will have largely determined already the character of the issues which dominate the campaign, and the convention platform builders already, by declarations and omissions, have established the party's formal stand. However, as the campaign progresses and public reactions are more clearly expressed and appraised, an unwritten revision of the party platform may take place. Harding at the beginning of his campaign in 1920 stood by his platform for an "association" of nations as against a "league" of nations, but before its end was against both a league and an association. The Democratic platform of 1928 had a dry plank, but the Presidential nominee sent the convention, as it was breaking up, a telegram asserting his stand as a wet. The Democratic platform of 1916 declared for greater American participation in world affairs, including a league of nations; but Wilson, the second-term candidate, remained at Washington while his representatives campaigned in the Middle West on the slogan "He kept us out of war." The Republican party platform handled the conflagration in Europe even more gingerly, while Hughes, the Republican candidate, talked at times about a stronger foreign policy and at others appealed to the isolationist sentiment. It required great skill on the part of the Democratic organization in 1936 to win the Negro vote away from the Republicans in the North while at the same time maintaining the usual exclusion of the Negro from politics in the Southern States. The Republican candidates found the economy and sound-money issues utterly unattractive to the masses, who were the chief beneficiaries of the administration's spending and debt policy.

## *CONGRESSIONAL AND STATE AND LOCAL CAMPAIGNS*

Every two years one third of the United States Senate and the entire House of Representatives are elected. In Presidential years these elections are intimately tied up with the struggle for the Presidency. A popular Presidential candidate carries with him many a Congressman and Senator who otherwise would have gone down to defeat. At the general in-between election Congressional candidates must in large measure stand on their own feet.

CAMPAIGN ORGANIZATION · As the autumn months approach, the Congressional and Senatorial campaign committees bestir themselves. They raise funds, outline the issues and the strategy of the campaign, and assign speakers to those States and districts where the party seems hardest pressed. In Presidential years they are little more than cogs in the greater national machine. Individual candidates attempt to build their own organizations, for which the postmasters, collectors of internal revenue, United States district attorneys, and United States marshals furnish important material to the party in power. Usually the candidate will have a campaign man-

ager with financial, advisory, and political duties characteristic of such positions.

CAMPAIGN METHODS · The campaign methods of the candidates for Senator and Representative are those used nationally, but are adapted to a smaller area. Candidates for the House particularly make many personal contacts with individual voters. They visit villages, townships, and wards and come to know personally a large number of the local leaders. Even some Senators maintain card catalogues so that on a visit to the smallest village they are able to meet people on the basis of familiarity and friendship. The prestige of a Congressman at home is dependent not only upon the honors he has won in statecraft but also upon the jobs he has dispensed, the Federal improvements he has secured for his district or State, and the legislation he has put through favoring their special interests.

CAMPAIGNS OF STATE OFFICERS · The governor and a half dozen or so other administrative officers are chosen every two or four years. Outside the South their electoral fortunes are greatly dependent upon those of the Presidential candidate when the two elections coincide. A gubernatorial candidate who can carry a pivotal State by a great majority is the dream of every national chairman. So F. D. Roosevelt ran for governor of New York in 1928 with the aim of helping his friend Alfred E. Smith to win the Presidency; and Herbert H. Lehman, who had been chairman of the finance committee of the National Democratic Committee, to help Roosevelt entered the lists for governor in 1932 and again in 1936 and 1940. A similarly close connection between the needs of the national ticket and State gubernatorial nominations and campaigns existed in Michigan in 1936, when Frank Murphy, governor-general of the Philippine Islands, was brought home to run for the office of governor, and in Ohio in 1944, when a popular mayor of Cleveland, Frank Lausche, entered the gubernatorial race as a counter to the pronounced Republican swing in that State. Candidates for the State legislatures do much in the way of personal solicitation, but in Presidential years they find their political fortunes tied very closely to the vote-winning abilities of the Presidential candidates.

COUNTY AND MUNICIPAL CAMPAIGNS · Both county and municipal campaigns are affected by the national contest. A vote-getting Presidential candidate is a boon to the municipal bosses no less than to the candidates from wider areas. The popularity of McKinley and the first Roosevelt were as helpful to the Chicago and Cincinnati Republican machines as the vote-getting ability of the second Roosevelt was to the Democratic organizations of Chicago, Philadelphia, Kansas City, and Jersey City. Nevertheless, it is easier for the small areas to vote independently of the national trend than it is for the States and the Congressional districts.

The stratagems and tactics of the local campaigns have more individuality than those of the larger units. In one large city an independent, running for mayor without an organization, conducted a house-to-house

doorbell-ringing campaign and defeated the candidates of the old parties.[10] A candidate for mayor of a large Eastern city had served a prison term; when the fact was advertised by the newspapers, he freely admitted it in his speeches in such a way as to gain sympathy and a triumphant election. William Hale Thompson, when campaigning in 1924 for his second term as mayor of Chicago, took as slogans "Down with King George!" and "Down with prohibition!"; and he too was re-elected. The leaders of nationality groups are wooed; ministers and other religious leaders are brought into the line-up, if possible; and prominent Catholic, Protestant, and Jewish laymen are enlisted. Vast amounts of handbills and small pamphlets are distributed at meetings, in the streets, and from house to house. Newspaper space is purchased for pictures of candidates, brief declarations or slogans, and sometimes emergency declarations to the public in answer to "unwarranted" attacks. Radio time for speeches, campaign music, or spot announcements is purchased. Sound trucks tour the streets making their appeals. Candidates for village, township, and county offices in rural regions usually carry on a thorough personal canvass of the voters. The farmer at his plow, the threshing crew at work, the loafers at the general store, regularly expect the compliment of a personal solicitation.

After all, the national party fortunes on election day depend upon what takes place in these small communities. No national, Congressional, or State central committee ever checked the polling lists to see how many of the faithful had voted, hauled the sick to the polls, or cared for the babies while the mother was voting. Candidates for the great offices, Federal and State, cannot afford to look askance at the hard-working professionals of the localities. Every experienced political manager has discovered what Boss Pendergast thus expressed: "There are no alibis in politics. The delivery of the votes is what counts. And it is efficient organization in every little ward and precinct that determines national as well as local elections. . . . It boils down to the wards and precincts."

### *FINANCING THE CAMPAIGNS*

It costs an individual money to run for office, but huge figures are involved when a party management attempts to underwrite the campaign expenses of an entire ticket.[11] No candidate can well stand on his virtue and refuse to contribute. He would speedily win the same disapprobation from his fellows on the municipal or county ticket as would the person at a picnic who ate but did not pay. The mounting expenses of campaigning, like many other great changes in our politics and government, date from

[10]Fred Kohler, candidate for mayor of Cleveland in 1922.

[11]E. M. Sait, op. cit. chap. xxiii; L. Overacker, *Money in Elections* (1932); also articles in *American Political Science Review* on the financing of the campaigns of 1932, 1936, 1940 (Vols. XXVII (October, 1933), pp. 769–783; XXXI (June, 1937), pp. 473–498; and XXXV (August. 1941), pp. 701–727).

the time of the transition from a rural to an urban economy. Campaigning no more than government itself could escape the *Zeitgeist* of largeness, mass production, and high expense.

How the Funds Are Expended · In the complete national picture the real issues of the day and personalities famed for statecraft dominate the scene; but even there, and still more in the localities, the principles and arts by which customers in the commercial field are attracted to some product must be followed. In large constituencies the candidate must first become known, no matter whether well or badly. An able person who has lived a quiet retired life, if pitted against a motion-picture artist, for instance, would normally find himself the loser. A man in a well-advertised business, a pugilist, auctioneer, editor, athlete, or real-estate operator starts out with an initial advantage. To make the masses of a city or a State familiar with a person heretofore known only in his own neighborhood requires a large amount of money. The most legitimate way up the incline is through the smaller offices, one by one, by which an ever-widening advertising is combined with ever-ripening experience and abilities.

Professor Pollock, in his careful study *Party Campaign Funds*, classified the expenditures of national party campaign funds under these principal headings: publicity, headquarters expense, grants to lesser committees; speakers, radio, halls, and bands; field workers; election-day expenses; and miscellaneous. The first item, the largest of all, includes newspaper and magazine advertising, billboard posters, buttons, banners, and placards, and the printing and distributing in pamphlet form of the speeches of the candidates and special articles for labor, agriculture, and other groups. In 1920 the Republican National Committee paid $159,264.74 for billboard advertising alone.[12] The cost of headquarters, where a large staff including a press bureau is maintained, is very heavy. In 1936 the postage bills of Democrats and Republicans, respectively, were $206,000 and $264,000. Radio broadcasting in 1936 cost the two national committees $582,327 and $757,737 respectively; in 1940, $387,224 and $335,000. Grants to party committees in poor or doubtful States were found to be the third largest item of expense in the early 1920's—$686,000 for the Republicans in 1924.[13] The State committees in turn pass some of these grants down to the county and city committees. The Speakers' Bureau has a large budget. Special trains for notables cost tens of thousands of dollars. A host of election-day workers must be paid: runners, messengers, knockers at doors, chauffeurs, dispensers of literature, watchers at the polls. The prevailing rate for these in the populous States is $5 or $10 a day.[14]

[12]J. K. Pollock, *Party Campaign Funds* (1926), p. 145.

[13]L. Overacker, "Campaign Funds in the Presidential Election of 1936," *American Political Science Review* (June, 1937), Vol. XXXI, pp. 473–498; "Campaign Finance in the Presidential Election of 1940, *American Political Science Review* (August, 1941), Vol. XXXV, p. 706.

[14]L. Overacker, *Money in Elections* (1932), p. 36.

THE SOURCES OF PARTY INCOME · The sources of the great sums used in the party campaigns are many, but they may be classed under three heads: assessments on office-holders, contributions by candidates, and gifts from members and friends of the party and candidates. The first-named seems to be one of the oldest of the sources. Both gratitude and self-interest dictate that those who enjoy the perquisites of office should be among the first to contribute to the needs of the party which elected them. The recent tightening of restrictions on contributions by large givers has, if anything, given this source new importance.[15] Much is heard everywhere of two-per-cent and five-per-cent "clubs." The systematic collections in Pennsylvania in the early part of the century during the reign of Boss Penrose became famous, and more lately the five-per-cent "club" of Governor McNutt of Indiana. Civil-service laws generally forbid party assessments, but these are easily evaded by the formation of "clubs" which require the payment of "dues." Although it seems that the middle and lower ranks of the United States civil service are relatively free from such pressures, Democratic office-holders of the upper salary brackets in 1936 and 1940 contributed heavily, directly or by buying dinner tickets at fancy prices.

The expenditures of the two national committees for the 1936 campaign set a new high. The number of gifts of $1000 or more for the Republicans was nearly five times that for the Democrats. Total contributions for both parties exceeded $14,000,000, divided as follows: $5,194,741 for the Democrats and $8,892,972 for the Republicans. By all odds the largest single contribution made in this or any other campaign was the $469,870 contributed by John L. Lewis's United Mine Workers, which was divided among the Democratic National Committee, Labor's Nonpartisan League, and several other subsidiaries of the Democratic organization. The total contribution of organized labor to the Democrats was $770,218.[16]. The party preference of the various economic interests as shown by their contributions may be significant. Bankers and brokers and manufacturers supported the Republicans six to one, except for tobacco-manufacturing, which was heavily Democratic; while motion-picture producers and theater-owners were thirty to one and the brewers more than ten to one for the Democrats. That the poor man or one in moderate circumstances had little directly to do with the financing of either campaign is shown by the fact that only 18.5 per cent of the total collected by the Democratic National Committee and 13.5 per cent of that collected by the Republican National Committee was in gifts of less than $1000. Two unusual sources of revenue for the Democrats were a souvenir *Book of the Democratic Convention* and subscription dinners. The former was a means of securing subscriptions from corporations, which bought not only advertising space but

[15]Ibid. pp. 104, 105.

[16]L. Overacker, "Campaign Funds in the Presidential Election of 1936," *American Political Science Review* (June, 1937), Vol. XXXI, pp. 473–498.

large quantities of the volume. There were editions suited to various incomes, priced at $2.50, $5, and $100 (for leather-bound copies autographed by the President). The gross amount credited to the *Book* was over $860,000. The Jackson Day dinners served not only as party rallies but as a means of getting contributions from the wealthy and from office-holders in the higher brackets. The prices ran from $5 to $100, depending upon the locality, and the amount credited to them in 1936 was $315,104.

THE LEGAL REGULATION OF CAMPAIGN FINANCE · The financing of individual and party campaigns presents some curious difficulties. That the rich man should have an advantage over the poor man in seeking public office is repugnant to our concepts of democracy and our ideas of fair play. It is also contrary to the idea of the government as an impartial representative of all; for usually those contributing heavily expect special favors from those whom they help to elect. And yet anyone with an ordinary knowledge of the ways of commerce and politics knows that there is little prospect for a person or a product to capture popular favor without adequate publicity. The means and the costs for attaining that objective, in a given area and population, are well known to every advertising agency. Legal regulation, which began to take form late in the last century, has used three chief angles of attack: the requirement of publicity of the givers and the amounts given, the prohibition of contributions from certain sources, and the setting of a maximum amount which committees or candidates may spend.

FEDERAL REGULATION · Federal regulation of the use of money can apply only to the election of Presidential electors and of members of Congress, and even here there are some constitutional difficulties. First came the act of 1910, which was amended in 1911 and 1918, and finally incorporated in what was known as the Federal Corrupt Practices Act of 1925.[17] Every committee, whether of a political party or of any other organization, which makes expenditures for the election of Federal officials is required to file with the clerk of the House of Representatives quarterly reports of receipts and expenditures, and in campaign years two other reports, one sometime between the fifteenth and the tenth day and the other on the fifth day preceding the election. These reports must be itemized to show the total amounts received and spent in the year, the name and address of every person making within the year an aggregate contribution of $100 or more and his total contribution and every expenditure of $10 or more, including to whom and for what purpose the money was paid. Every candidate for Senator or Representative must file similar reports before election day. Furthermore, every candidate for Senator is restricted to $10,000 for his campaign or to an amount equal to three cents for each vote cast in the last general election for all candidates up to a total of $25,000; and every candidate for Representative is restricted to

[17] 43 Stat. 1070 (February 28, 1925); J. K. Pollock, op. cit. chap. vii.

$2500 or three cents for each such vote, with $5000 as the ceiling. The original act had made the limitation applicable to the primary elections, but this limitation was dropped after the unfavorable Supreme Court decision in the Michigan case of *Newberry* v. *United States*.[18] The restrictions are somewhat softened by placing outside the limits the candidate's filing fees, his traveling and subsistence expenses, and those for stationery, postage, writing or printing, telegraph and telephone service, and for distributing letters, circulars, and other literature. If the State laws prescribe a smaller maximum, this is accepted as the Federal amount. In 1912, the first year of national-campaign fund publicity, the Republican National Committee reported $1,071,549, and the Democratic Committee $1,134,848.

THE HATCH ACT: THE 1940 CAMPAIGN · Besides money, the good will of numerous citizens, including beneficiaries of the government's acts and policy, and their willingness to work with or without pay are important in running a campaign. Many persons doubtless contribute both money and time without other motive than a devotion to the party whose success they rightly or wrongly associate with the best interests of the country. On the other hand, there are millions who owe their living or a large part of it directly to the government, whose services or contributions to the party in power are given freely or may be gained under pressure. Besides the regular office-holders, there are the great special interests which benefit in general from the party's policies, and those which benefit directly, such as the manufacturers who sell materials, the contractors who build the public works, and after 1934 the millions engaged in government work projects or on the relief rolls. This broader conception of the problem led to the enactment of the Political Activities Act of 1939 and its amendment in 1940, which together may be referred to conveniently as the Hatch Act.[19]

Some of the things which this act makes unlawful are these: to intimidate or coerce any person to vote for or against any particular person for any of the Federal offices; for any Federal administrative officer, or any State administrative officer connected with the spending of Federal funds, to use his official authority to interfere with the nomination or election of any Federal officer; for any person on political grounds to threaten to deprive any person of a place on the work-relief rolls or to solicit political funds from people on work or other relief; for any person in the executive branch of the Federal government to use his official authority to interfere in elections or take any part in political campaigns or their management, though heads and assistant heads of departments and the thousands of officers appointed by the President and Senate are excepted. The law is

[18]256 U.S. 232 (1920). The ruling in effect was reversed in the case of *United States* v. *Classic*, the Court ruling, "The primary in Louisiana is an integral part of the procedure for the popular choice of a Congressman." (313 U.S. 299 (1941)).

[19]53 Stat. 1147 (August 2, 1929); 54 Stat. 767 (July 19, 1940).

made applicable to State officers whose principal employment is financed by Federal funds. Enforcement of these provisions is vested in the United States Civil Service Commission.

The Hatch Act takes up again the old question of campaign contributions and expenditures. For any one person, committee, or corporation to contribute more than $5000 to the nomination or election of any person in any one year either directly or to his manager or committee, is declared to be a "pernicious activity" and punishable. Placed in the same category is the purchase of any goods, commodities, or advertising where the proceeds go to the benefit of any candidate for Federal office. No firm contracting with the United States for supplies or materials may be solicited or may contribute to any political party or committee or candidate; but this ban is limited to the period of the negotiation of the contract and the furnishing of the goods. Finally, no political committee may receive contributions in any calendar year or make expenditures in excess of $3,000,000.

The law added to the inconveniences of the party managers but did not substantially alter the earlier financial practices. Expenditures made by the national committees in 1940 stayed well within the legal limit ($2,197,816 for the Democrats and $2,242,742 for the Republicans), but the total spent by all committees directly in behalf of the two Presidential candidates was $20,796,224, divided $5,855,082 for the Democrats and $14,941,142 for the Republicans. The explanation is that many committees were set up, each of which could legally spend $3,000,000. The various State committees together spent more than thirteen and a half million dollars, and there were many nonparty committees which had very large budgets, such as the Associated Willkie Clubs, the Democrats for Willkie, the National Committee of Independent Voters for Roosevelt and Wallace, and the National Committee of Agriculture. The ban on contributions of over $5000 caused little trouble: in many instances a husband and wife each gave that amount, or the contribution was distributed widely among members of the family, as in the case of the Du Pont family, sixty-six members of which gave an aggregate of $203,780 for the Republicans, while Richard J. Reynolds, a tobacco magnate, made "loans" totaling $300,000 to three Democratic state committees.[20]

STATE REGULATION · The States, under their police power, not only may regulate the practices in the election of all State, county, municipal, and district officers but have concurrent power in the election of Federal officers. All have detailed election codes which in all but two or three cases include the regulation of campaign finance. The requirement of publicity is general and naturally varies much in methods and details.[21] In some States only the candidate or his manager is required to file a

[20] L. Overacker, "Campaign Finance in the Presidential Election of 1940," *American Political Science Review* (August, 1941), Vol. XXXV, pp. 701–727.

[21] L. Overacker, *Money in Elections* (1932), chaps. xii and xiii.

financial statement; in others all committees or individuals who are active in the campaign must do so. About three fourths of the States forbid contributions from corporations, while only a few have no limitations as to source. About a third forbid the assessment of office-holders, but only two limit the size of contributions from any one person. Most of the States limit the total amount which may be spent for individual candidates or the amount which a State committee may spend in a campaign. Eighteen name flat sums, fourteen make it a percentage of the salary of the office sought, and seven limit it to so much for every thousand registered voters. Only about two thirds of the States having such laws require the filing of statements before election.

SUMMARY · The inherent difficulties in placing legal limitations on the financing of political campaigns are numerous. Spending for purposes universally recognized as corrupt, such as bribery, is one thing, but spending to advance the cause of candidates or party in which the donor has a geniune interest is another. Evasions are easy, and unquestionably a considerable element of insincerity is present in the enactment and administration of some of the laws. The $3,000,000 limit on the expenditures for any one Presidential candidate, which the Hatch Act seemed to intend, is so unreasonable, the prohibitions on political activities are so drastic, some of the other prohibited acts are so ill-defined, and the entire structure of the act is so loose and vague that one wonders how it could have gone through so sophisticated a body as the Congress of the United States. While few criminal prosecutions have been instituted under either Federal or State laws, it is a mistake to conclude that the laws have been without effect. They set standards of political ethics which have been of some efficacy. The outward flouting of their provisions is dangerous to the political fortunes of candidates and party committees. Today there is probably little direct bribery, and the more gross forms of political assessments have been greatly lessened. Collections from plutocrats are at least in better taste than of old, if not greatly lessened. The public is much better informed of the sources of campaign funds than ever before, and knowledge may be the beginning of wisdom in action.

## *THE CONDUCT OF ELECTIONS*

The call for the election is issued by a designated officer, who may be sheriff, board of elections, or Secretary of State. It may be by newspaper notices, or bills posted at the election headquarters or the polling booths, or both. The hours for voting are usually from six A.M. to six P.M., to suit the convenience of both early and late workers.[22] Ballots are delivered under seal, and all those unused must be accounted for at the end of the day. A member of the precinct election board is usually designated as

[22] J. P. Harris, *Election Administration in the United States* (1934), chap. vi.

chairman and is in general charge of the day's work. No solicitation of votes, passing out of cards or literature, or gathering of crowds is permitted within the polls or their environs (usually marked off by flags). Watchers and challengers for each political party, and, at the primaries, for each political committee sponsoring candidates, are permitted within the room where the voting is going on, as are watchers for the counting of the votes after the close of the polls.

THE IDENTIFICATION OF VOTERS: REGISTRATION LISTS · In most thickly populated areas today, before a voter is given a ballot, he must sign his name on a poll list opposite his registration signature, and other identifying personal items may be checked.[23] While America was rural, there was no real problem in identification of voters. The number of strangers in a voting precinct was small, and their right to vote was easily determined. Urbanization and the attendant increase in the mobility of the population have changed all this. Corruptionists were quick to take advantage of the impersonal character of the elections. "Repeaters" were hired and placed in charge of leaders who throughout the day took them from precinct to precinct for voting. Personal-registration laws were the answer to this abuse. Beginning with the California and New York laws of 1866, they have spread to almost all the States. Registration is made a prerequisite to voting and is accomplished by the personal appearance of the citizen before a board, where he signs the list and is duly enrolled as a voter. Identifying data, differing from State to State, are required. In Tennessee, for instance, the applicant must state his age and place of residence, by district, ward, street, and house number; the name of the owner of his residence; how long he has resided in the State, district, and city; his marital status, vocation, and place of business or employment; if a newcomer, whence he came, and if a foreigner, when and where naturalized; and, finally, whether he was ever disqualified from voting by any court. The registrars make up alphabetical lists for each precinct; and these, together with identifying data relating to height, weight, color, etc., and showing whether or not the applicant is a taxpayer, are turned over to the election officials.

Registration may be either permanent or periodical. In the former case the person registers only on becoming twenty-one years of age or when he changes his residence to another precinct. The lists remain permanent except for the gradual transition occasioned by deaths, the attainment of the requisite years, and change of residence. In periodical registration the lists entirely lapse at prescribed intervals, usually two or four years, and all voters must be enrolled again. For the convenience of voters the law designates three or four days a year, properly spaced before elections, when the precinct booths will be open for registration; but where year-round headquarters are maintained, longer periods are available for those who wish to register there.

[23] J. P. Harris, *Registration of Voters in the United States* (1929), chap. viii.

Registration has been successful in eliminating the grosser abuses in repeating and impersonation, but its efficacy, of course, depends much on the human element in its administration. Lists in some cities have been filled with names of fictitious characters registered from nonexistent houses and streets; names of persons long dead or removed from the precinct have been retained on the books; and ballot-box stuffing has still been possible by filling up the registration list with a corresponding number of fictitious names. Opposition to the requirement of registration comes chiefly from the spoilsmen, but there are thoughtful people who believe it deprives too many persons of the privilege of voting. Elections are too frequent anyway, they argue, and registration is just one more obstacle in the way of the free exercise of the privilege. While these hardships are real, it does not seem that the fault goes deep enough to warrant forgoing the great public benefit that flows from the safeguards which registration provides. In urbanized States the pertinent question is not whether to have registration but how to strengthen it in plan and in administration.

VOTING IN ABSENTIA · Ease of transportation and the widened area in which the average man carries on his work cause many more persons to be absent from their home precincts and States on election day than formerly.[24] Absentee voting was first used on a large scale for the Union army in 1864. Vermont in 1896 and Kansas in 1901 gave permission to persons outside their precincts and within the State, upon proof of eligibility, to vote at any polling place for State officers. In 1913 five States enacted absentee-voting laws, and the movement went on rapidly until by 1944 all but three had them: Indiana's had been repealed, Kentucky's had been declared unconstitutional, and Connecticut had never adopted one. The laws differ considerably in content and scope. Four are restricted to persons in the military service during wartime; twenty-five confer the privilege on all who are "unavoidably" or "necessarily" absent; and fourteen extend it to persons who are in the precinct but disabled and infirm. Seven States restrict the scope of absentee voting to a part of the normal ticket; four to general elections, one to Presidential electors, and another to primary elections.

In most of the States the ballot may be secured before the day of election. If application is made in person, the ballot is then marked and delivered to the election officer; if application is made by mail, the ballot must be marked before a notary public, wherever the voter may be, and mailed in an official envelope to the home election officials. Five States permit the voter to cast his ballot in any precinct of the State where he happens to be on the day of the election. He is given the official ballot of the precinct and is permitted to write in the names of the local candidates of his home precinct. For all forms of absentee balloting proper safe-

[24] J. P. Harris, *Election Administration in the United States*, chap. viii, pp. 63–65, 90, 91; H. Rocca, *Brief Digest of Laws Relating to Absentee Voting and Registration* (1928).

guards with respect to identification, registration, and certification are established.[25]

The devices of absentee voting have proved a boon for those absentees who take the electoral duty seriously. Thousands of persons temporarily in the District of Columbia are required no longer to rush to the home State for the sole purpose of casting their ballots. Statistics gathered by competent students show that the average number of absentee ballots cast in an election is under 1 per cent. Instances in which the system has encouraged fraud have been pointed out, but this danger does not seem substantial enough to outweigh the convenience which the system has brought to thousands of voters.

WARTIME VOTING OF THE ARMED FORCES · The absence from their home communities or from the United States of large numbers of persons of voting age in the armed forces created an absentee voting problem of unprecedented magnitude. For the wartime election of 1864 the legislatures of most of the Northern States had made provision for the voting of absentee soldiers and sailors. State commissions of thirteen of the States conducted the elections, although the votes of three (Vermont, Kansas, and Minnesota) arrived too late to be counted. In the neighborhood of 150,000 votes in all were cast.[26] On September 16, 1942, a hastily drawn law was passed by Congress, too late for wide use in the general elections of that year.[27] It declared the right of every person, absent from the place of his residence and serving in the armed forces, to vote for Presidential electors and members of Congress. The requirements of State poll taxes and of registration, if the person was eligible under the law, were waived. Upon the respective secretaries of state was laid the obligation to prepare ballots and other forms, and on the county and precinct boards the obligation to canvass and count the votes.

THE CONSTITUTIONAL PROBLEM · While the need for uniform action, which only Congress could furnish, was generally recognized, the act of 1942 essentially did nothing more than lay a moral obligation on the State officials. The principles of the electoral system established by the Constitution are few but clear: (1) The President and Vice President of the United States are not chosen by the people of the United States as a single electorate but by the States. (2) "Each State shall appoint, in such manner as the Legislature thereof shall direct," the electors allotted to it. The election of the electors by the people is not required. It has been seen that until 1860 the electors in some of the States were chosen by the legislatures themselves. (3) Obviously, if the legislature decides that the electors shall be popularly chosen, it may specify the qualifications for voting,

[25] P. G. Steinbricker, "Absentee Voting in the United States," *American Political Science Review* (October, 1938), Vol. XXXII, pp. 898–907.

[26] E. Stanwood, *History of the Presidency* (1926), Vol. I, pp. 307–308.

[27] 56 Stat. 753.

devise the form of the ballots, and establish the election machinery. (4) This power, originally given the legislature by the Constitution, has been modified in only two respects. First, qualifications for suffrage may not be based on race, color, previous condition of servitude, or sex; but other limitations are open, such as education, wealth, or taxpaying. Secondly, the Fourteenth Amendment provides that if a State denies any male citizen, twenty-one years of age or older, the right to vote on any basis whatsoever, the State's representation in the House of Representatives, and therefore in the Electoral College, shall be reduced proportionately. A State legislature which assumed the duty of choosing Presidential electors would find itself with only two electors to choose, those corresponding to the two Senators of its allotment. This provision, which long ago would have reduced the vote of the South in the Electoral College by approximately half, has never been enforced. No action to take away the electors of a State where they were chosen by the legislature could well be taken without parallel action to reduce the electoral vote of all States where educational and taxpaying requirements for voting are imposed.

THE BALLOT LAW OF 1944 · The approach of the Presidential election of 1944 threw the matter of absentee voting into the arena of party politics. The extremists of one side demanded a Federal ballot confined to President and Vice-President and independent Federal election machinery; the others wished to leave the ballot legislation entirely to the States. The act of March 20, 1944, avoided the constitutional uncertainties of the existing law, which might well have thrown a close election into the courts.[28] A practical scheme of Federal and State co-operation was worked out, giving to each government the duties which it best could perform within the constitutional plan. The law made certain recommendations to the States in the interest of uniformity, including a liberalizing of the registration and absentee-voting laws. To a Federal War Ballot Commission and the military and naval organizations were given the tasks of transmitting the State-prepared ballots to the armed forces and of administering the voting; to the States and their election boards, the tasks of preparing ballots, and their final canvassing and tabulation. An official Federal war ballot was authorized, which might be used with the approval of the individual States and whose canvass and count were left to the usual State county and precinct boards.

Voting by the armed forces, in view of its inherent difficulties, was relatively large. By election day it was estimated that 4,000,000 such ballots had been received in the various States; New York alone received 403,117, of which 241,657 were for the five counties of New York City. The vote of the armed forces in the five States where it was separately tabulated amounted to somewhat more than 500,000.[29]

[28] *Public Law 277*, 78th Cong., 2d Sess.

[29] *New York Times*, November 4, 1944, pp. 4, 12; *Newsweek* (January 22, 1945), Vol. V, p. 6.

THE PROCESS OF VOTING · Such are the preliminaries for that judgment day when 48,000,000 citizens march up to 125,000 polling places, with their open books, stacks of new ballots, metal boxes, or (a new style symbolic of the age) recording machines. The voter entering the area, which is usually barred off from the rest of the room, is asked his name and address, which are found and checked on the registration list; a blank ballot is torn from the serially numbered pad and handed him (sometimes there are as many as half a dozen separate ballots to be voted); and he enters a curtained booth provided with pencils and tables. The law provides whether he is to use pencil, pen and ink, a rubber stamp, or stickers. Usually a time limit is set for voting, but it is of little use except against purposive delay. After the ballot is marked, the voter folds it so that the official signatures and the serial number are visible, and drops it into the proper ballot box, one usually being provided for each type of ballot in order to facilitate the work of the count. Almost all States provide that an elector who is unable to mark his ballot may receive assistance. He must state his inability to the election officers and usually take an oath to that effect, which in some States is made a part of the registration record. Usually he may receive aid either from one or more election officials or from some other person whom he designates. Great abuses have arisen from this benevolent feature of election codes, and in many instances the provisions need strengthening. When a person asks for a ballot, his right to vote may be challenged by any citizen present or by an election officer. Some codes state the exact terms in which challenges must be made and the procedure to be followed. A decision is made by the precinct election judges, which in some systems may be appealed immediately to the central election board of the city or county.

THE COUNT, CANVASS, AND CERTIFICATION · Immediately after the close of the polls the count of the ballots begins. This is usually made by the precinct officers of the day, but in some States it may be made by a special force. The law provides a procedure and safeguards for the process, of which the following are typical. At the close of the polls the ballots are counted and their number checked with the record of voting in the poll list. Usually the law requires that the ballots be read out one by one and the votes for each office be recorded by tally clerks. In general elections or others of heavy voting this would require an unreasonable amount of time. The usual practice is to divide the ballots among those conducting the count, to read out and tabulate the votes for each office separately, and finally to transfer the results to the official tally sheets. Ballots voted straight are taken out and tabulated separately. At the end of the count the result sheets are signed by the proper election officers and sent to headquarters, the ballots are strung on wires, and the stubs with the serial numbers and the unused ballots are burned.

The official canvass of the returns is a recheck of the computation of

the votes for all candidates and issues for each political subdivision, ward, village, township, city, district, and county.[30] These are placed on official results sheets and become the official totals. The convassing agency is the city or county board of elections or such ex officio body (for instance, the board of county commissioners or the municipal council) as may be authorized to perform it. The law may require the issuance of a certificate of election or provide that the results as spread on the canvassing record shall constitute a sufficient claim to the powers and duties of the office.

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[30] J. P. Harris, *Election Administration in the United States*, pp. 305–314.

# III

If she (a wife) have not been a careful mistress, have gadded about, have neglected her house and have belittled her husband, they shall throw that woman into the water.—*Code of Hammurabi, King of Babylon*, 2250 B.C.

If a man has recovered the article which he lost, the thief shall be condemned to pay double value; if not, to pay tenfold besides the cumulative penalty; and shall be kept in the stocks five days and as many nights, if the jury tribunal shall have imposed such sentence.—*Laws of Solon*, Greece

No one shall be put to death except after formal trial and sentence.—*The Twelve Tables*, Rome, 451–450 B.C.

If any persons shall have called another "fox," he shall be sentenced to 120 dinars, which make 3 shillings.

If anyone shall have gone, where there is no way or path, through another's harvest which has already become thick, he shall be sentenced to 600 dinars, which make 15 shillings.—*Leges Barbarorum* (German), 500–600 A.D.

Thou shalt have none other gods before me.—*Law of Moses* (Hebrew)

Wild animals, birds and fish, that is to say, all the creatures which the land, the sea, and the sky produce, as soon as they are caught by anyone become at once the property of their captor by the law of nations.—*Corpus Juris Civilis*, Rome

God bids that, in distributing an estate, a son receive as much as two daughters; if only daughters remain, and more than two, they receive two thirds of the estate; if only one, the half.—*The Koran*, Arabia

Let him who breaks the chin bone pay for it with shillings. If anyone strike another with his fist on the nose, iii shillings.—*Laws of King Ethelbert of Kent*, England, 600 A.D.

Whoever takes lands or tenements by way of mortgage, without entering into regular contract, duly authenticated and assessed with the legal duty by the proper magistrate, shall receive 50 blows, and forfeit to the government half the consideration money of the mortgage.—*Code of Tsing*, China, 1650 A.D.

If any man or woman be a Witch (that is) hath consulteth with a familiar spirit, they shall be put to death.—*Laws of the General Court of New Haven Colony*, 1642

Any man that will, [may] sell beers or ale out of doors, at a penny a quart or cheaper.—*Laws of the General Court of New Haven Colony*, 1675

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.—*Act of United States Congress*, July 2, 1890

The emission of cinders and fly ash or other solids larger than 50 mesh in a concentration greater than four (4) pounds per 1000 pounds of dry flue gas is declared to be a nuisance and shall, at the direction of the smoke abatement engineer, be abated.—*Ordinance of the Cleveland, Ohio, City Council*, June 12, 1939

No person shall make any exhibition, training or demonstration parachute jump from an altitude of less than 2,000 feet above the surface of the ground or water.—*Air Traffic Rules, United States Department of Commerce, Bureau of Air Commerce*, No. 60,750, March 9, 1938

## LAWMAKING

*The longest article of the United States Constitution and of most state constitutions and city charters is that dealing with the lawmaking function. Those who drew these documents must have thought through such matters as who should perform this function and how, the subjects with which it might and might not deal, and the safeguarding of the legislative body from the dominance of an entrenched executive. Their concern for the legislature was concern for the protection of its product, law. They knew that law and administration together constitute government; that without law there can be no administration; and that without an organized administration there can be no law.*

*It is evident that lawmaking is a function which every political organization of mankind, from clan or tribe to the highly organized modern state, must make provision for. Only in comparatively recent times has it been placed on a mass-production basis, to be performed as a routine duty by some governmental body set aside for that very purpose. All the ancient civilizations had their famed codes of law, the authorship of which often was attributed to a superwise legislator or to Deity. Thus there were the Babylonian Code of Hammurabi, the Mosaic Law of the Hebrews, the Greek Codes of Draco and Solon, and the Roman Laws of the Twelve Tables. English lawmaking, out of whose traditions and practices the American system grew, was not without its primitive codes, some attributed to King Ethelbert and King Alfred. During the Middle Ages laws such as the First Statute of Westminster, of 1270, were made by special parliaments or assemblies of the nobles called sporadically to deal with particular problems. Not until the sixteenth century did the "Mother of Parliaments" begin to take on the appearance and methods of the modern legislative mill.*

*Rather than to a cut-and-dried definition of what is law, the student's attention is called to the dozen or more examples at the top of this section, collected here and there at random. If examined closely they will be seen to have a number of characteristics in common. All were commands from a superior authority, the government of the time, directed to all citizens to whom they might be applicable, and as commands there was the implication of enforcement by the government. Disobedience entailed physical punishment or the payment of money, either to the government or to the injured individual, or restitution of property to the person to whom*

*the law gave the right. It is seen, too, that all of them were concerned with human conduct. The student may as well be left with the simple definition that* law is a rule of human conduct which the government will enforce.

*Why the masses of the Western world, as gradually emancipated from ignorance and want, drove ahead to take over the lawmaking function is perfectly clear. Laws set the legal duties and obligations of every citizen as a member of the community; for instance, of parent to child, employer to employee, seller to buyer, neighbor to neighbor. Laws define those acts the commission or the omission of which the government will punish as an offense against society. They determine whether all persons shall be placed in a position equally advantageous with all others, or whether certain races or classes shall be singled out for favored treatment. The legislator consequently has it in his power to build up a set of rules for living which is burdensome or light, or well- or ill-adapted to the needs of the day. To him, in a republic, falls primarily the function of policy-making.*

*Laws in the United States emanate principally from three sources: (1) representative assemblies, chosen for that very purpose: Congress, State legislatures, and city councils; (2) the people, directly by petitions and votes at the polls, known as the initiative and the referendum; and (3) the courts. The laws of the representative assemblies are known by that name or as "acts," "statutes," or "ordinances"; and about the same terminology is used for the laws passed directly by the people. The courts make law in the broader meaning of the term, but of course do not enact statutes. The executive and administrative bodies are a fourth source of rules enforceable on the citizens. Examples of agencies with such rule-making powers are the Interstate Commerce Commission, the National Labor Relations Board, the President of the United States, the Secretary of Agriculture, and, indeed, all other cabinet officers and the various State civil-service commissions and boards of health. Their acts are in the twilight zone which separates legislation from administration. For instance, if the chief of police establishes limited parking on a certain street, this is an administrative act; but if the city council adopts exactly the same rule, it is an act of legislation. For the purposes of this study these orders of executive and administrative bodies will be regarded as administrative in character and be left for consideration at a later point.*

## CHAPTER XVII

# *Legislation and Representative Government*

LEGISLATION AS THE BASIS OF GOVERNMENT · If an ocean liner were wrecked and its crew and passengers of several hundred persons forced to take refuge on an island with the prospect of living there several months, they would soon take measures to establish an orderly existence. Action might originate with a mass meeting or with a leader and a small group who would seek to impose their will on the rest. No matter what the beginning, the first step would be the announcement of a set of rules. These doubtless would deal with the territorial distribution of the people and their living quarters, regulate the gathering and allotment of food, enjoin a few simple rules of conduct, establish certain offices and designate the persons to hold them. What happened in the creation of this small community is paralleled in the oldest and the most complex. There must be law and administration, sets of rules for the conduct of people and officers, and persons recognized as authorized to administer them. Whether the government of the community is democratic, aristocratic, or despotic does not matter: both elements must be present.

The fabric from which modern government is cut was woven from laws.[1] This is so absolute in the American scheme that if anything of another material is discovered, we know that it is unwitting or extraneous. The American state began with a law of the Continental Congress: "That these United Colonies are, and of Right ought to be, Free and Independent States; that they are absolved from all Allegiance to the British Crown," etc. The legislatures of the new States adopted rules for the governing of the citizens in their everyday relations as to family, property, trade and commerce. The Congress of the old Confederation by resolution made provision for the election of a President and Vice-President of the United States and for their inauguration; and during the first few months of Washington's administration the new Congress passed laws instituting state, war, and treasury departments and the many customs, postal, military, and naval offices. In this way, legislation built the American governmental machine and set it in motion.

SHOULD THE LEGISLATIVE BRANCH BE SUPREME? · The men who wrote the national and early State constitutions were prejudiced greatly in favor of legislatures as against chief executives. Congress had carried the Revolution through to a successful conclusion, whereas the royal governors had

[1] W. F. Willoughby, *Principles of Legislative Organization and Administration* (1934), chap. vii.

been the agents of popular oppression. So in all thirteen States unquestioned legislative supremacy was established. This was true also for the national government, although the leaders were aware that they were creating a strong executive which might become still stronger. The attitude of that generation arose both from experience and from the ideas of two highly respected political philosophers of that time, John Locke and the Baron de Montesquieu. Both argued not only for three separate departments of government but for the pre-eminence of the legislative. Locke's description of the place a legislature should hold, written in the late seventeenth century, was prophetic of what the Americans would do a century later. "The first and fundamental positive law of all commonwealths," he wrote, "is the establishing of the legislative power. . . . This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it."[2] And in a later paragraph he said:

> In all cases whilst the government subsists, the legislative is the supreme power, for what can give laws to another must needs be superior to him, and since the legislative is no otherwise legislative of the society but by the right it has to make laws for all the parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it.

All that Locke said was true; but what he left unsaid was that while the legislatures are the founts of power, they never are able to exert any power themselves.

THE WORK OF LEGISLATURES · Lawmaking, of course, is the chief function of a legislature, but there are no legislatures which do not have at least a few nonlegislative duties. The judicial one of voting and trying impeachments is all but universal for American State legislatures, and so is the confirmation of nominations for appointive administrative offices by the upper house. Investigating the operations of the government in domestic affairs is an ancient legislative function which has been on the increase in late years. This is done either by legislative committees or by commissions composed both of members of the legislature and of persons from outside, and may be considered as accessory to the function of legislation, namely, the ascertainment of facts upon which later legislation may be based. The confirmation of treaties negotiated by the executive is given to the United States Senate, but in some foreign countries to the entire legislature. American legislatures all the way down to the city council have frequently voted expressions of sentiment on questions of the day, foreign or domestic: sympathy for the sufferings of Ireland or for the victims of such disasters as earthquakes or fires, or congratulations to some-

[2] John Locke, *Two Treatises of Civil Government* (1884 ed., London), p. 270.

one for a valorous exploit. Although the President of the United States or the State governor, more usually, performs such courtesy functions, a resolution by a legislative body is thought of as coming more directly from the people themselves.

DEFINITION OF LEGISLATION · *Legislation* is the name applied to the formulation and the adoption by a legislature of rules which have binding effect upon citizens and officers. It consists in considering, reshaping, and adopting "resolutions" and "bills," which when finally approved are "statutes" and the law of the land.[3] Although a legislative body is engaged in declaring rules governing the conduct of citizens and officers, it has nothing to do with their application in individual cases. That is the task of the courts or of administrative officers. The courts apply to individuals rules which they find in the statutes or in their own past decisions. They may rephrase or interpret a rule laid down by a legislature, which is a phase of lawmaking; but they may not go so far afield as to make rules which run counter to those of the legislature. The only example of court legislation equivalent to that of the legislature is the framing and promulgation of rules of court procedure.

Critics have often pointed to the multiplicity of bills and resolutions introduced in our legislative bodies as a great hardship for the citizens: about fifteen thousand in the House of Representatives and five thousand in the Senate each session, and fifty to sixty thousand by the State legislatures in the odd years. While the spirit of the age undoubtedly tends to fasten an increasingly heavy load of legal obligations on the citizen, the new burdens imposed are not what these figures might imply. Only eight to nine hundred distinct laws are passed by Congress in a biennium, and from a hundred to two hundred and fifty by a State legislature.

The acts adopted in a legislative session fall into four classes: (1) those which alter the general body of law applying to citizens in general; (2) those which deal with the administrative branch, creating new agencies or changing old ones and conferring powers, establishing new local governments or altering old ones, or making rules for the administration of State institutions; (3) those which govern financial matters, such as the levying of taxes and provision for their collection, and the voting of appropriations from the treasury; and (4) a miscellaneous group of matters not otherwise classified, such as the settlement of the claims of private individuals.

Only the first-mentioned class is concerned with what is generally known as *the law*; it is plain that the other three relate chiefly to the administration of the government. By *the law* is meant that great body of rules enforced by the state: statutes, interpretations of statutes, and precedents from judicial decisions, which govern the social life of people. These rules

[3] J. P. Chamberlain, *Legislative Processes: National and State* (1936), pp. 191, 192; H. Walker, *Law-Making in the United States* (1934), pp. 317–321; S. W. McCall, *The Business of Congress* (1911); C. L. Jones, *Statute Law Making* (1912), chaps. iv, xiii.

define the rights and obligations of persons in all the relations of life, as individuals and as members of the family and of other groups; property, its acquisition and enjoyment; and the many things which may not be done or which may not be omitted. This is the field which, if altered every biennium by numerous statutes, would lead to great hardship and inconvenience. As a matter of fact, only a small portion of the annual crop of legislation is concerned with the body of this law, while the rest is more like the orders and regulations common to subordinate administrative bodies here and abroad. The difference between practice in the United States and that in other countries is that American legislatures are more addicted to detailed statutes, whereas in most other states the legislature passes laws in general terms and delegates the making of details to inferior bodies. A study of the four hundred and ninety-five acts of the 1930 session of the Massachusetts legislature showed that three hundred and twenty-three dealt with city, State, and county activities, relating to buildings, schools, streets, salaries, civil service, and many other details of the business of government, and that only one hundred and sixteen dealt with matters of a general and nonadministrative nature; yet all four hundred and ninety-five were listed as "laws." The laws enacted in a session of Congress or of any State legislature would show something like the same distribution.

LEGISLATION AS POLICY-MAKING · When a political party has won a national campaign, received a majority in the legislatures, and filled the chief executive offices, it is in a position to carry out its commitments. The word *policy* connotes both the methods of work and the objective. We may speak of a policy of aiding the weak against the strong, little business against big business, farmers against the producers of finished goods, labor against management, or the Middle West against the Northeast; of a policy of isolation or of participation in world affairs, of economy, spending, conservation of national resources, or efficiency in government. All these call for legislation: to create the offices and supply the cash to carry out the new plans. President or governor can do little to fulfill the policies promised in a campaign until the legislature acts. Quite properly the legislature is the realm of policy-making, for here are represented all the chief elements and interests of the population. To no single person could safely be entrusted the task of defining the rights and obligations of the citizens, ordering their manner of life, setting up their social ideals or goals, saying what and how much private property shall be taken for government use and for what purposes the common fund shall be spent. Executive leadership and suggestion may play a large part, but the actual authorization in a free society must rest with the representative legislature.

LEGISLATION AS PLANNING · Legislation is often condemned as haphazard, opportunistic, and directed too much to the immediate present without proper thought for the future. With the rapid turnover in office which is characteristic of democracies, it is inevitable that there should be force in

all these accusations. The strength of one-man rule, whether it is despotic or benevolent, is that there is more likely to be a plan and a consistent course; its weakness is that the course is set arbitrarily, not tempered by public opinion, and the whole people may be carried efficiently to disaster. Nevertheless, all legislative bodies are inevitably planning bodies. They may habitually call upon public or private expert agencies for guidance and advice, but theirs is the task of choosing the end and the means of making it effective by legislation. The public-land policy of the Federal government, while faltering and sometimes inconsistent, followed in the long run a discernible plan. The drawing of a corporation or an election code, legislation as to health, safety, and morals, banking and currency regulations, all are parts of a larger whole.

## *REPRESENTATIVE GOVERNMENT*

WHAT REPRESENTATIVE GOVERNMENT IS · "The meaning of representative government," wrote John Stuart Mill in 1861, "is that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere."[4] In the Greek and Roman democratic city states law was made by all the citizens assembled together. But when these cities extended their political power over larger areas, the legislative function was left with the old popular assemblies, which now could not conduct their business efficiently because of size and could not be attended by all the citizens because of distance. Not until the Middle Ages was the idea hit upon that a numerous body of people might choose a few of their number to act for them in a council or assembly. This device was used in the Church, and the boroughs and shires of England began in the thirteenth century to send men of their choosing to a central assembly which in time grew into the national Parliament. Representation did not begin as a democratic institution, but in time it was eagerly seized upon as a necessary part of the democratic paraphernalia. Mill many years later wrote that "nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state. But since all cannot, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative."[5] John Locke contended not only that no edict could have the "force and obligation of a law" unless it had the sanction of a legislature "which the public has chosen and appointed" but that such a legislature should "have a fair and equal representation."[6] The framers of the Constitution, familiar

[4]J. S. Mill, *Considerations on Representatative Government* (2d ed., 1861), p. 86.
[5]Ibid. p. 69.
[6]J. Locke, op. cit. chap. xi.

with the experience of the colonial legislatures, were devoted to the principle of representative government. Madison, writing in the *Federalist*, extolled the Constitution because it provided a House of Representatives "elected immediately by the great body of the people"; and Hamilton agreed that one branch of the Congress "should have an immediate dependence on and an intimate sympathy with the people."[7]

THE VARIOUS SYSTEMS OF REPRESENTATION · When it is agreed that government should be controlled by representatives of the people who are competent to give the consent of the governed, there are still many things left unsolved. What constitutes representation? Could a representative assembly of India, for instance, ignore the divisions of the population into Mohammedans and Hindus, and of the latter into castes? Should wealth and property be given a special voice? Other economic interests? Occupations? Races? Historic regions or political units? Or should representation be based only upon the number of people, grouped by residence or otherwise? All these have been tried at various times and places. They will be briefly examined.[8]

CLASSES · Representation of the established social orders in the political assemblies was the first to be used and to hold over to the present day. The English Parliament for many years was composed of four divisions: the peers in a body, representatives of the lower clergy, the knights of the shires, and the townsmen, or burghers. In time the representatives of the last three classes merged into one house, called the Commons. They represented the nation as a whole, and the peers (including the lords spiritual), making up the House of Lords, remained a class legislative house. In France, until the Revolution, the Estates General, as the parliament was called, was composed of three houses representing respectively the nobility, the clergy, and the third estate, or the middle class. As legislative bodies were set up in Europe during the nineteenth century most of the nations gave the nobility the dominance, if not the complete membership, of an upper house.

WEALTH · Ownership of property, particularly of land, was long a requirement for voting both here and abroad. It mostly disappeared in the United States at the time of the Jackson administration and now exists only in a few localities as a qualification for voting on bond issues or for new real-estate tax assessments. The weighting of the individual's vote on the basis of wealth for the purpose of choosing representatives, however, is something which was never used here. The best example of such weighting was the so-called "three-class system" of voting which was used in Prussia for the election of its house of representatives from 1849 until changed by the Weimar constitution of 1919.[9] Its members were chosen by

[7] *The Federalist* (Lodge ed., 1895), Nos. XXXVI and LI.
[8] R. Luce, *Legislative Principles* (1930), chap xix, "Theories of Representation."
[9] A. L. Lowell, *Governments and Politics in Central Europe* (1896), Vol. I, pp. 303–308.

electors, one, two, or three from each electoral district. The electors were chosen on the basis of universal suffrage according to the following curious system. In each electoral district all the inhabitants were enrolled on a list in the order of their wealth, from millionaires down to paupers. Those at the top whose combined wealth was one third of the district's total chose one third of the electors; those who followed in order, whose combined wealth was another one third of the total, chose another third of the electors; and all that followed, the other third of the electors. These electors then met together and chose the representatives by a majority vote. The wealthy and the upper middle class elected two thirds of the electors, who then could elect all the representatives.

POLITICAL UNITS OR REGIONS · Both in Europe and in America political entities such as provinces, States, counties, cities, and towns have been used as the bases of representation. Logic and reason often have been of less force than necessity in giving them weight in the composition of a legislative assembly. Even though they may be small in size and poor, they are organized and going concerns; they may have a social solidarity and historic pride, and there may be magic in the name. An allotment of representation to such a unit may be the price of union or co-operation. The Constitution of the United States could not have been adopted without giving the small States an equality in some respects. The United States Senate was long referred to as the "council of the States" because here those sovereign beings met together on grounds of equality. Representation in one or more of the houses of the State legislatures is based on such political units as counties or townships, often to the disadvantage of the metropolitan counties, which are usually underrepresented.

FUNCTIONS.· The idea behind functional representation could about as well be expressed by the term *group representation* or *occupational representation.* Even before the First World War it had gained some vogue.[10] Society, it was pointed out, functions not through its individuals but through its organized groups. The individual is significant chiefly when acting as a member of a group. Individual thinking and acting are the exception, not the rule. The hundreds of permanent lobbyists at Washington, paid for and supported by associations with memberships running all the way from a few hundred to tens of thousands, were thought by some to be more significant than the five hundred and thirty-one members of Congress, each representing so many thousands of individuals unrelated except by territorial propinquity. If these lobbyists were united into one public body, would they not be well qualified to legislate intelligently on national questions? In the twentieth century three great states, Russia, Germany, and Italy, repudiated the idea of individual majority representation in favor of the functional type.

[10]R. Luce, op. cit. chap. xii, "Occupational Representation."

The German constitution of 1919 made provision for a series of workers' councils in addition to the old-type national representative legislature. There were to be workers' councils for each locality and manufacturing establishment, district councils for each economic area, and a national workers' council. All substantial vocational groups were to be represented according to their respective economic and social importance. Drafts of laws of fundamental importance relating to social and economic policy, before introduction in the Reichstag, were to be submitted to the national economic council, and this council could propose measures for enactment into law.[11] The system was never fully established, but the provisional national economic council was organized on the basis of ten groups, including one for the "consumers." The Nazi regime discarded the idea of workers' democracy, but with great thoroughness organized the state on economic lines dominated from above. At the top was the National Economic Chamber, in which there was a functional representation of all trade and industrial groups and a regional representation of eighteen provincial economic chambers.[12]

The Russian representative system under the constitutions of 1918 and 1924 was based on economic units. Soviets of workers', peasants', and soldiers' deputies were chosen by factories, villages, and towns. Arranged above them in hierarchical order were the district, the provincial, and finally the All-Russian Congress of Soviets, each elected by the soviet or congress next below. In 1936 a new constitution was drawn up and adopted which declares that "the political foundation of the U.S.S.R. consists of soviets of working people's deputies." The national legislature is the Supreme Soviet, consisting of two houses: the Soviet of the Union, chosen by electoral districts of three hundred thousand population, and the Soviet of Nationalities, composed of deputies from the eleven constituent republics and the self-governing provinces and national regions. The local legislative and administrative bodies are the soviets of working people, as fixed in the constitutions of the constituent republics and provinces. The scheme as a whole is a combination of the two principles of functional and territorial representation.[13]

The Italian Fascist state also laid out an elaborate organization based on occupations, only a part of which ever was put into effect.[14] At the base were the separate organizations of labor and of employers called the syndicates, to one of which official recognition was accorded when it included at least 10 per cent of the workers or members in the respective occupation. The syndicate had a monopoly in its field and collected dues from non-

[11]W. B. Munro, *The Governments of Europe* (1927), pp. 642–647.

[12]R. A. Brady, *The Rationalization Movement in German Industry* (1933), chap. xiv; P. Einzig, *Hitler's New Order in Europe* (1941), pp. 11–34.

[13]Soviet Union Information Bureau, *The Soviet Union* (1929), pp. 24–29; A. L. Strong, *The New Soviet Constitution* (1937), "Constitution," chap. v, Art. 49.

[14]H. A. Steiner, *Government in Fascist Italy* (1938), chap. vi.

members. The syndicates were organized in six economic fields—industry, agriculture, commerce, internal communication, maritime transportation, and credit and insurance—and then grouped into twelve national Fascist Confederations, an employers' and an employees' for each. The Confederation of the Professions and Arts made the thirteenth. Later the number was decreased to nine.

The National Corporative Council, instituted in 1930, a type of economic legislature, was meant eventually to displace the old political chamber of deputies. Its membership of eight hundred and twenty-four was drawn from the twenty-two corporations into which Italian working life was divided. *Corporation* was the name for an administrative agency which brought together in one council the persons who represented the various phases of one industry or productive process. Examples of corporations were those of "cereals," "textiles," "extractive industries," and "theater." The whole scheme operated from above, chiefly through the agency of the Ministry of Corporations. The chief duty of the council was to listen or, at the most, to advise.

NUMBERS · The apportionment of representatives on the basis of numbers more nearly than any other method fits the characteristic American view of government. It is a logical consequence of two major assumptions: first, of the equality of men; second, of their individualistic character. If men are equal, of course, there is little to be said for the apportionment of political power on the basis of wealth, social standing, territorial groupings, or any other factor except their number. The second assumption is that each person will make his own decision on candidates and measures, and ignores the possibility that he may be swayed more by the organization to which he belongs than by his own individual thinking. It follows that a good voting constituency may be made anywhere by drawing a line about, say, one hundred thousand persons, simply with an eye to voting convenience. The principle of representation by numbers has been applied in a number of different ways, each of which requires a distinctive kind of ballot. The four chiefly used in the United States are the general ticket, or "at large" system; the single-member district; cumulative voting; and proportional representation, with the single transferable ballot.[15]

1. *At-Large System, or General Ticket.* Here the voters all have equal weight, and all participate in choosing the entire body or council. The most famous example is the choice of Presidential electors from the State at large; another, in most commission-governed cities, the choice of all commissioners from the city at large. The chief advantage urged for the system is the encouragement of a broad view and the discouragement of logrolling in the legislature for petty local advantages. Members will owe their selection to the entire unit and therefore will think of the general interest first. The disadvantage is that normally the minority party is entirely ex-

[15]W. F. Willoughby, op. cit. pp. 289–301.

cluded from representation, and that if there are more than two parties of strength, a plurality will often elect the entire legislative body.

2. *Single-Member Districts.* By all odds the most widely used system of representation in the United States is the choice by single-member districts of equal population. On this basis are elected the members of the national House of Representatives, the lower houses of most of the State legislatures (except as the basis is modified by concessions to counties and towns), and the councils of all those cities retaining the mayor-council form of government. The advantages are the ensuring of representation to the minority parties, if of significant strength, and of representation to the various geographical parts of the unit. The disadvantages include the emphasis placed on localism, noted above, and the use of trickery in laying out the electoral districts by making them of unequal population or by drawing the lines to the disadvantage of one party.

3. *Cumulative Voting.* Illinois uses the single-member district system for choosing the fifty members of the State senate; but instead of laying out separate districts it provides that the one hundred and fifty members of its lower house shall be chosen three from each senatorial district.[16] Every elector is entitled to vote for three different persons or to cumulate his votes on one or two names. A strong minority party, by concentrating its votes on one person, will usually be able to elect him. The scheme eliminates the very small electoral district, with its inclination to a narrow localism, and at the same time ensures the minority a fair general representation in the legislature. However, if the majority party runs too many candidates, it may not succeed in winning two of the places; and if one party underestimates its strength and runs only one candidate, it may lose a place which otherwise it would have won. The party strength in about half the districts until recently was such that the Republicans nominated two candidates and the Democrats one, and there was no contest.

4. *Limited Voting.* This is another system designed to give the minority an opportunity to secure a fair representation. Several members are elected on a general ticket, but the voter is limited to voting for a specified number smaller than the whole. For instance, when used in Boston, with twelve members of the city council to be elected, the elector could vote for only seven. It has been used for short periods for local elections in several American States, for the choice of members of Parliament in some English constituencies, and rather extensively on the continent of Europe. It generally serves the purpose of giving minority representation; but the results for both majority and minority parties depend much upon the nomination of the right number of candidates. For instance, the majority can lose by scattering its votes among too many.[17]

[16] B. F. Moore, "Cumulative Voting," *University of Illinois, Studies*, etc. (1919), Vol. VIII, No. 2.

[17] G. H. Hallett and C. G. Hoag, *Proportional Representation—the Key to Democracy* (1937), pp. 42–45.

5. *Preferential Voting.* Preferential voting is a method devised for use in those places where there are more than two candidates for one place. If there are but two candidates, the citizen of course shows his preference when he votes for one; this at the same time is a vote against the other. But if he votes for one out of five candidates, there may be another whom he would prefer to have elected if the one for whom he voted is defeated. The ordinary ballot does not allow him to express any such choice, with the result that often a person is elected who never could have commanded votes outside the minority which gave him their initial support. That system by which the voter may say how he would have voted under any one of several situations which might arise is called the preferential ballot. The run-off primaries used in the Southern States are a crude form of preferential voting; for after several persons have been eliminated in the original primary, those who had voted for them now have the opportunity to vote for what might have been originally a second, third, or fourth choice.

The two systems formally labeled as "preferential" are the Bucklin and the Nanson system. Since only the former has had a considerable use in the United States, it alone will be briefly described.[18] It was first used for public elections at Grand Junction, Colorado, in 1909, where James W. Bucklin was its sponsor; but its longest and most extensive use was in Cleveland from 1913 to 1921. The names of the candidates are printed in a column at the left side of the ballot; and there are four blank columns, paralleling the names, headed, respectively, "First Choice," "Second Choice," "Third Choice," and "Total." If, for example, there are five members of a council to be elected, the voter places an X opposite the names of five persons in the first blank column; likewise an X opposite five other names in the next, to indicate his second choice; and five more in the next column for his third choice. The first choices of each candidate are then tabulated, and whoever has received a majority of all votes cast is declared elected. If there are still places to be filled, the first and second choices of each candidate are added together and seats awarded to those who now have received a majority of the new sum. The same process is gone through for the third choices, if necessary; but if not enough have received a majority to fill all the places, they are chosen from those with the highest totals, in the order of their size. An unforeseen but nearly fatal weakness was demonstrated in practice. It soon became evident that the designation of a second choice might easily serve to defeat the candidate of the voter's first choice. The voters then began to ignore the preferential feature by marking only a first choice. In the Cleveland election of 1921 only 28 per cent marked a second choice for mayor and 18 per cent for the council, while eighteen of the thirty-two councilmen were elected by less than a majority vote.

[18] R. C. Brooks, *Political Parties and Electoral Problems* (1923), pp. 443–445.

PROPORTIONAL REPRESENTATION · The best-known and most widely used variant from the old-fashioned system of majority-plurality voting is proportional representation, generally designated as P. R. Its central idea was known much earlier but it was first given high respectability and fame by John Stuart Mill in his work on *Representative Government*, published in 1861.[19] It has developed several forms, but these all may be classified in either the system of the single transferable vote (the Hare system) or the list system. In one form or the other it was widely used in Europe at the time of the German invasions of 1939 and 1940. It has been used for the national legislature in Ireland, France, Denmark, Belgium, Sweden, Czechoslovakia, a few other states, and Germany, and for certain local governments in many other states, including Australia, New Zealand, the Union of South Africa, India, Moravia, Switzerland, Canada, and the United States.

Proportional representation is both a system of preferential voting and a system of representation. It is preferential in that if the first or other high choice of a voter has insufficient strength to win, his ballot will be counted for his second or subsequent choice. It is proportional because all groups or parties of the body politic, if numerous enough to be entitled to a representative, will succeed in proportion to their voting strength. Suppose that in a city where 20,000 voters elect a council of twenty members, the voters are divided as follows: Democratic, 11,000; Republican, 8000; Progressive, 1000. Under the P. R. system the Democrats would elect 11 councilmen, the Republicans 8, and the Progressives 1. Under the general-ticket system the Democrats might have elected all 20; under the system of the single-member district, according to how the city was districted, the Democrats probably would have elected twelve or thirteen, the Republicans seven or eight, and the Progressives none, since their votes would probably have been scattered about as a minority in all the districts. P. R. operates to make a legislative assembly a contour map of the social landscape.

THE HARE SYSTEM · The Hare system has been used considerably in the United States, and so its mechanism merits a brief description.[20] The

[19]J. S. Mill, op. cit. pp. 139–161. Thomas Hare, an English barrister, had explained the method of using the single transferable vote in a pamphlet *The Machinery of Representation*, published in 1857.

[20]G. H. Hallett and C. G. Hoag, op. cit. pp. 196–223, and *Proportional Representation: the Key to Democracy* (1937), pp. 105–146. (Ashtabula, Ohio, was the first American city to adopt the Hare system of proportional representation. Three large cities subsequently adopted it: Cleveland, in 1921, where it was used from 1923 to 1931; Cincinnati, in 1925; and New York, in 1937. Other sizable cities adopting it were Boulder, Colorado, 1917; Toledo, Ohio, 1934; Wheeling, West Virginia, 1935; and Cambridge, Massachusetts, in 1938. In New York's first election for city council in 1937 the party distribution of seats was as follows: Democrats, 13; American Labor, 5; City Fusion, 3; Republican, 3; Insurgent Democrats, 2. Neither the Socialists nor the Communists won seats, but the latter cast 4 per cent of the votes.) F. A. Hermens, *Democracy or Anarchy*, pp. 366–394, 395–414.

ballot is the office-group type, with the list of contestants arranged in a column under the name of the office, a square to the left of each name, and no party designations, although there is no reason why they could not be employed. Voting is accomplished by placing the figure 1 in the square at the right of the voter's first choice, 2 at the right of his second choice, and so on. The number of offices to be filled has little to do with the number of preferences which the voter should mark. Indicating a second or a large number of choices can never help to defeat his first choice; in fact, the system works best when a considerable number are indicated.

THE COUNT OF THE VOTES · At the close of the voting the election officials of the precinct sort the ballots into bundles according to the first choices and send these and the tabulation to the election headquarters. Here all the first-choice ballots of each candidate are placed together in a box and the totals determined. The candidates receiving the requisite "quota" are declared elected. This is such a number as the total of councilmen to be elected could get but which one more could not get. For example, in an election of 5 councilmen where 1000 votes are cast, the number would be 167. Their total would be 835, which would leave 165 for the runner-up.

With the quota determined, all those having that number of first choices are declared elected. Thereupon all surplus votes of these men are in turn distributed to other candidates as marked. If A has 185 first-choice ballots, the surplus of 18 are pulled at random from his pile and distributed to those persons marked as second choice; but should any of the 18 so marked have been elected already, that ballot goes to the person marked as third choice, and so on. With all surpluses thus disposed of, the next step is to declare the candidate with the smallest number of first choices defeated and to distribute his ballots according to the second choices or subsequent choices. And so the count goes on until each of five men has received the quota. In practice, as in the case here, when four have reached the quota and only two candidates remain, the one with the higher number of votes is declared elected without going through the process of distributing the ballots of the runner-up.

APPRAISAL OF P. R. · The advocates of P. R. have several strong arguments to offer in its favor.[21] It accurately records the sentiments of the voters, giving both majority and minority the number of representatives to which each is entitled. It tends to weaken boss and machine rule because the well-drilled regulars now have only the weight to which their numbers entitle them. It removes the necessity for a second, or run-off, election; for now the second and other choices of the voters can be given weight. It has all the virtues of an "at-large" election while avoiding its faults. Single-

[21]R. S. Moley, "Proportional Representation in Cleveland," *Political Science Quarterly* (December, 1923), Vol. XXXVIII, pp. 652–659; S. G. Lowrie, "Proportional Representation in Cincinnati," *American Political Science Review* (May, 1926), Vol. XX, pp. 367–371; G. H. Hallett and C. G. Hoag, *Proportional Representation* (1926), chap. vii.

member districts are eliminated, and consequently the gerrymander and the obligation of the legislator to think chiefly of favors for his home district; and at the same time the majority is not able to elect the entire delegation. Fewer men are elected to office by a minority of the voters, a common occurrence when the votes were scattered among a number of candidates, with no chance to count the second and subsequent choices. Finally, more independence and discrimination in voting is encouraged: it is easy to make preferences within both parties.

The arguments advanced *against* P. R. are also strong. The system is too intricate for the mass of voters, very few of them understanding the method of computing the votes, and the result of the act of voting is not direct and obvious. This tends to discourage voting.[22] Some mechanical weaknesses also are urged: the ease with which a figure 1 is transformed into another number, thereby invalidating all the other preferences; the time and labor consumed in making the count, which runs from five days or more in the larger cities to about three weeks in New York; and the relatively small difference between the outcome of an election under this system and under the old. But the most serious objection is the one based on principle: that it tends to solidify minority factions and blocs and disintegrate the two-party system.[23] To a certain point this argument is acknowledged by both those for and those against the system; for the encouragement of individual voting is a discouragement to party voting. The virtue extolled by the admirers of P. R. is a vice to the all-out party man. The Frenchman Mirabeau correctly expressed the P. R. point of view in 1789:[24]

> A representative body is to the nation what a chart is for the physical configuration of its soil: in all its parts, and as a whole, the representative body should at all times present a reduced picture of the people—their opinions, aspirations, and wishes, and that presentation should bear the relative proportion to the original precisely as a map brings before us mountains and dales, rivers and lakes, forests and plains, cities and towns.

The contrary view is that the representative body should not so much reproduce the social landscape in the legislature in miniature as secure a coherent body of men, representing the majority interests in general, who will be capable of conducting the government for the next two or four years. In the legislative picture some elements may be obscured, some not

[22]Statement of Newton D. Baker in the Cleveland *Plain Dealer* (July 25, 1925). Quoted in F. A. Hermens, op. cit. p. 438.

[23]This is the conclusion of F. A. Hermens based on a study of the operation of the list system of proportional representation in Italy, France, Belgium, Ireland, Austria, Germany, and several other European countries. By giving representation to racial, religious, and interest groups and blocs a stable national or parliamentary majority is difficult to procure. Op. cit. pp. 35–38 et passim.

[24]Speech before the assembly of Provence, January 30, 1789. Quoted in G. H. Hallett and C. G. Hoag, *Proportional Representation* (1926), p. 162.

recorded at all, and others vastly overemphasized. By this means, however, a consensus and an apparent majority and solidarity are secured which furnish a basis for a government which the people will support.

Present experience does not justify any clean-cut judgment on the efficacy of P.R. Its known virtues and defects, however, indicate that it should not be used where party government is desirable, for the national or the State offices; that it has particular promise for political units of the States, where strong partisan control is often more of a liability than an asset; and that it is a particularly valuable adjunct to the manager form of city government, because it permits the abolition of the ward-district system of election in favor of a smaller council elected at large.

THE LIST SYSTEM · The list system of P.R. has never been used in the United States, but before the Second World War it had received wide acceptance in Europe. The details of the system varied greatly from country to country, but the basic principle was the same. Each political party nominated a list of candidates for the several legislative seats allotted to each electoral district. These seats after election were distributed among the various parties (there were likely to be five or more) in proportion to the total number of votes cast for each. Usually they were distributed within the party to those candidates who had received the highest number of votes. So in the last free German election (1930) fifteen different parties elected candidates among these, the National Socialists (Nazis) 107 and the Socialists 143 out of a total of 577. At the last French election for the chamber of deputies in 1936 five parties chose members, the National Front 222 and the Socialists 149 out of a total of 608.[25] It is evident that the government of most of these states must usually be a coalition one.

UNICAMERAL OR BICAMERAL REPRESENTATION · The American Revolution was won by a government headed by a unicameral legislature, and three of the States had experimented with the unicameral plan.[26] Several Canadian provinces have long had unicameral legislatures, and after the First World War they were joined by a number of European states. American cities for generations have been moving in that direction. The extreme advocates and opponents of the application of the plan to the States are both very sure of their ground, but the case is as yet hardly susceptible of proof. Only the question of representation will be considered at this point. The earlier bicameral legislatures, like Harriet Beecher Stowe's Topsy, just naturally "growed," but once established many arguments were advanced in their justification. Certainly one of the strongest was that they afforded an opportunity for two types of representation: in the national Congress, the States and the people; in the State legislatures, people of wealth and social standing and the masses. Today no such distinctions exist or would be countenanced in State legislatures, but in spite of uni-

[25] F. A. Hermens, op. cit. pp. 128, 246.

[26] J. P. Senning, *The One-House Legislature* (1937), chap. i.

versal suffrage the two-house legislatures in a majority of the States do represent two distinct types of representation: regional and numerical. By this means the people residing on the few square miles of Manhattan Island and near by are prevented from writing the laws for great areas of the rest of the State, and Chicago is restricted in the same way. Unquestionably, if numbers are to be taken as the sole criterion of representation, the single-chambered legislature is best adapted to give the majority direct and full control of legislation and administration. Better still would be the merging of the chief executive with the single house. The American people in nation and State elect three different agencies which together share the responsibility for legislation: the chief executive and the two houses of the legislature. Public policy is a result of compromises and the exchanges of counsel among them, whereas with a union of executive and legislature in a single chamber it would proceed more directly from the people.

## *REPRESENTATION IN THE VARIOUS AMERICAN LEGISLATIVE BODIES*

THE UNITED STATES SENATE · "What gives the Senate its real character and significance as an organ of constitutional government is the fact that it does not represent population, but regions of the country, the political units into which it has, by our singular constitutional process, been cut up."[27] The principle was of capital importance "that regions must be represented, irrespective of population, in a country physically as various as ours and therefore certain to exhibit a great variety of social and economic and even political conditions. It is of utmost importance that its parts as well as its people should be represented; and there can be no doubt in the mind of any one who really sees the Senate of the United States as it is that it represents the country, as distinct from the accumulated populations of the country, much more fully and much more truly than the House of Representatives." This view of the value of regional representation as demonstrated in the United States Senate was expressed by Woodrow Wilson in 1907 and, of course, was based on his personal observation of the Senate of his generation and knowledge of its history to that time.

The drafters of the Constitution, however, had other reasons for giving the small and large States equality of representation in the Senate and placing the election in the State legislature. The chief of these was necessity. Certainly no constitution could have been adopted which did not concede it. But to make a bad feature appear better, other reasons were given in its support. The "filtration" of the choice through the legislatures, as having "more sense of character than the people at large," would give a Senate

[27] W. Wilson, *Constitutional Government in the United States* (1908), pp. 114–116; G. H. Haynes, *The Senate of the United States* (1938), Vol. I, p. 13.

of persons distinguished for their rank in life and accumulation of property.[28] A Senate representing the States in their political capacity would serve as a proper and independent check on the House of Representatives, which would speak directly for the people and their individual interests. Moreover, the Senate would mediate the rivalry of State legislature and Congress, helping to interpret each to the other and acting to prevent encroachments of the national government on the States.

To some of the framers, including Madison, State equality in the Senate was a violation of fundamental principles of good government. They foresaw the small States combining against the large and vice versa.[29] They would doubtless have been still more disturbed if they had been able to visualize the future disparity of the States in population: a ratio of twelve to one between the largest and the smallest; six States with less than half a million inhabitants each, and fourteen with less than a million each, while twenty-five totaling twenty-five million inhabitants could dominate the Senate as against the others with more than a hundred million. The danger, however, is purely an abstract one, since the cleavage in voting is by parties and sections and economic interests rather than by size of States. Today about the only conceivable issue which could line small against large States would be one directed against either side as such; for instance, the cutting down of the representation of the former in the Senate or the establishing of State equality in the lower house. Hamilton, in the *Federalist*, recognized the doubtful soundness of equal representation, but conceded it was a question that had to be settled not "by a standard of theory" but by the necessity for "mutual deference and concession."[30] He pointed out that "the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."

Occasionally there is an outburst in the Senate against the power wielded there by the smaller members of the Union. Possibly foreseeing such a sentiment, the framers included in the amending article the declaration "that no State, without its consent, shall be deprived of its equal suffrage in the Senate," the meaning of which is that a unanimous vote of the States would be necessary to alter equal representation. It has been suggested that this section might first be stricken out by an amendment which would require only three fourths of the States, after which the basis of representation could be altered by another amendment made in the ordinary way. Whether such a subterfuge would be upheld by the Supreme Court no one

[28] "He [Madison] was an advocate for the policy of refining popular appointments by successive filtrations, but thought it might be carried too far." M. Farrand, *Records of the Federal Convention*, Vol. I, p. 50. For the views of John Dickinson and Elbridge Gerry, cf. ibid. pp. 150, 154.

[29] G. H. Haynes, *The Election of Senators* (1906), pp. 1–14.

[30] *The Federalist* (Lodge ed., 1895), No. LXII.

can foretell, but that at least thirteen of the smaller States will always be found to vote against any such diminution of their power is highly probable.

The original Constitution provided that the Senators from each State should be "chosen by the legislature thereof," and that the legislature should prescribe the "time, places, and manner of holding elections for Senators and Representatives," but that Congress might alter or supersede such regulations except for the place of choosing Senators.[31] The States followed their own individual methods in conducting the elections, the two houses sometimes acting separately and sometimes meeting in joint session. Bitter contests in the State legislatures, sometimes even a failure to elect for a whole session, led to the enactment of the Federal statute of 1866.[32] This provided that the two houses should meet separately on the second Tuesday of the session and take one ballot for Senator. If no one received a majority in both houses, they were to join together as one body the next day and take one ballot, and each day thereafter until someone was elected.

Many things combined to render obsolete the constitutional method of election, among which were the death of the doctrine of State sovereignty; the rising tide of democracy; the interference of the elections with the State legislature and its routine work; and the intensity of the struggle for the office, attended frequently with allegations of bribery or other improper influences. During the hot summer months of 1881, while President Garfield lay ill, a titanic struggle was carried on in the New York legislature by Senators Conkling and Platt, who had made an ill-tempered resignation from the Senate and now sought re-election as a "vindication," while the attention of the country was largely divided between concern for the President and disgust with the senators. Several cases of the corrupt use of money in Senatorial elections came to light in the first years of the new century. More influential still was the movement which in more than half the States by 1912 had served to turn the State legislature into a dummy electoral body like the Presidential Electoral College. By means of party primaries or by preferential elections the voters were given an opportunity to vote for Senatorial candidates, and by written or unwritten law the members of the legislature were pledged to honor the voters' expressed preference. The obligation, of course, was only a moral one, but was binding in all clear-cut cases.

In 1912 the Senate gave way and permitted the submission to the States of a joint resolution which was ratified and became effective in the following year.[33] This amendment requires that Senators be chosen on the same suffrage as that required for electors for the most numerous branch of the State legislatures, which placed it on the same basis as that for Representa-

[31] *United States Constitution*, Art. I, sect. 3.
[32] G. H. Haynes, *The Senate of the United States* (1938), Vol. I, pp. 83–85.
[33] Ibid. Vol. II, pp. 106–116.

tives and Presidential electors. When a vacancy occurs in the representation of any State in the Senate, it is the duty of the governor to issue writs of election to fill it; but the legislature may empower the governor to make a temporary appointment until an election may be called.

Whether the change to popular election has resulted in a better Senate may not be answered with assurance. The question is of little practical importance, for the change was inevitable; and whatever the outcome, there could be no turning back.[34] A careful scrutiny of Congressional proceedings, say from 1876 to 1944, seems to indicate a larger percentage of men of high caliber under the old system of election than under the new. The results of the direct primary seem to have been paralleled: the percentage of men of the two extremes is lower, namely, of the able and brilliant on the one hand and the antisocial or predatory on the other. When personal prestige or political influence were sufficient to secure election by a State legislature with no requirement for conducting two campaigns before the people, the primary and the final election, men of distinguished ability were willing to seek the office. Legislative election was capable of producing either an Elihu Root or a William Lorimer. Popular election seems incapable of either. With a dearth of both types one must form his own judgment as to whether or not the Senate is better able now than formerly to perform its functions as a representative assembly of the people and of the States. Much of the air of the dignified club is gone, the more blatant type of party politician has put in his appearance, and the spirit of independence and deliberation is greatly weakened, as is the ancient attitude of condescension toward such passing figures as Presidents of the United States.

TERM AND QUALIFICATIONS · Senators are elected for six-year terms, one third of the membership every two years. This makes the Senate a continuous body adapted to its original purpose of giving stability to the government as a whole and consistency to the legislation of Congress. "It will be of little avail to the people that the laws are made by men of their own choice," wrote Hamilton, "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow."[35] A Senator must have attained the age of thirty years, have been nine years a citizen of the United States, and be an inhabitant of the State from which he is chosen. There have been many instances of the election of naturalized citizens to the Senate. Sometimes the bona fide character of a Senator's State residence has been open to question, as in the case of Senator Sharon of Nevada, multimillionaire

[34]For other appraisals of the quality of Senators, cf. G. H. Haynes, op. cit. Vol. II, pp. 1068–1074, and Lindsay Rogers, *The American Senate* (1926), pp. 72–74, 11–112.

[35]*The Federalist* (Lodge ed., 1895), No. LXII.

owner and operator of mines in that State, whose chief residence actually was in San Francisco. The Constitution provides that "no person holding any office under the United States shall be a member of either house during his continuance in office";[36] but this did not prevent certain members of the Senate Committee on Foreign Relations from acting as delegates to the disarmament conferences at Washington in 1922 and London in 1930, or the United Nations conference at San Francisco in 1945. Evidently a delegate to an international conference is not "a person holding office under the United States," within the view of the Senate, and it is difficult to see how the question could come before a court for a decision.

SALARY AND OTHER PERQUISITES · Congress, subject to the usual veto of the President, has power to set the salaries and other perquisites of its members. For many years members were paid only per diem.[37] Beginning in 1789, the rate was six dollars a day, and eight dollars a day after 1818, but only for the days actually attended. In 1855 an annual salary of $3000 was established by law, which was changed to $5000 in 1865, $7500 in 1907, and $10,000 in 1925. The Speaker of the House, the Vice-President, and the president pro tempore of the Senate, when there is no Vice-President, all receive $15,000 a year and an official car and chauffeur. The more than threefold increase in the salary of a Congressman since 1855 is due to such things as the increased cost of the necessities of life, the greater complexities of Washington social life, and the multiplied demands made on the resources of members by their constituents. The salary, however, is only a part of the income granted from the public treasury. There are allowances for clerical help, $5000 a year for Representatives and $10,320 for Senators; for stationery, $125 each; and for traveling expenses at the rate of 20 cents a mile for one trip each session to and from Washington. In addition, there is the "frank," which is the privilege of the free use of the mails for official business. This is used to send out to the constituents great quantities of documents printed at public expense, particularly campaign material, thinly disguised as speeches on legislation. Summer junkets of Congressmen to investigate wild life in the national parks or the needs of government in Alaska are sources of pleasure if not of profit at public expense.[38] The amount appropriated directly to the use of the two houses for 1943 was $13,375,222, but the entire legislative budget, including the upkeep of the Capitol and the Library of Congress, was over $25,000,000. The item of mileage for members of the two houses was $222,000.[39] The total for salary and clerical expenses is not excessive, but an attenuation of the office extras and of expenses for the entire establishment would comport with that spirit of economy which is associated with republics.

[36] *United States Constitution*, Art. I, sect. 6.
[37] G. H. Haynes, *The Senate of the United States*, Vol. II, pp. 888–900.
[38] W. P. Helm, *Washington Swindle Sheet* (1932).
[39] *The Budget of the United States Government, 1943, Legislative Establishment*, p. 3.

PRIVILEGES OF MEMBERS · Except for treason, felony, or breach of the peace, members of both houses may not be arrested while in attendance at the sessions of their respective houses, nor while going to or returning from them, nor may they be "questioned in any other place" for any speech or debate in either house.[40] These two provisions together safeguard the liberty of the legislator in the performance of his duties. He may not be kept from attending sessions by trumped-up arrests or annoyed in his work by petty criminal actions, nor may he be deterred from expressions in debate by the fear of suits for libel. Sometimes individuals, offended by remarks in Congress, in a spirit of bravado dare the member to repeat them on the outside. A member is restrained in the character of his remarks by the rules of the House, for the flagrant infraction of which he may be expelled, and of course by the desire for the esteem of his colleagues and fear of political repercussions at home.

THE UNITED STATES HOUSE OF REPRESENTATIVES · When the Constitution was framed, all parties were in favor of one house of Congress which should have a close dependence on the people. The Virginia Plan had declared for a popular legislature which would be the controlling body of the central government. Article I of the new Constitution accordingly made provision for a House of Representatives, to be "composed of members chosen every second year by the people of the several States" and apportioned among them "according to their respective numbers."[41] A compromise, important then but now obsolete, provided that in making the apportionment only three fifths of the Negro slaves and none of the untaxed Indians should be counted. Congress was then enjoined to have a census taken within three years and every ten years thereafter, on the basis of which a new apportionment should be made. The Fourteenth Amendment added the further requirement that the representation of each State which denies to male citizens twenty-one years of age or older the right to vote should be reduced by Congress in the same proportion which the number so deprived bears to the whole number of male citizens of that age. Since any attempt to carry out this mandate would reopen the whole question of Negro suffrage in the South, it has tacitly been allowed to become one of the forgotten clauses of the Constitution. The first House was set at sixty-five by the Constitution itself and apportioned among the States roughly according to their estimated population. The first increase was to one hundred and three after the census of 1790; and as States were

[40] *United States Constitution*, Art. I, sect. 6. Senator Couzens of Michigan, April 12, 1928, in the Senate denounced the businesss methods of Howe P. Cochran, an income-tax expert, whereupon the latter filed a suit for damages in the amount of $500,000. Cochran claimed that while the remarks were made in the Senate, they were not in the "discharge of his official duties as a Senator." The ruling of the court of appeals that any remarks made in the Senate were privileged was sustained by the United States Supreme Court. *Cochran* v. *Couzens*, 282 U. S. 874 (1930); 42 F. (2d), 783 (1930). Cited in G. H. Haynes, op. cit. Vol. II, p. 885.

[41] *United States Constitution*, Art. I, sect. 2.

admitted to the Union and population grew everywhere, the number grew at each decennium until in 1900 it had reached 386 and in 1910 433. Two years later, by the admission of Arizona and New Mexico, it had reached the present figure of 435.[42]

By steadily increasing the size of the House it had been possible at each reapportionment, except rarely, to avoid the embarrassment of reducing the quota of any State. It had been clear for some time that the House had reached a point too large for efficient work; and now that the last territory had been admitted to the Union, public opinion would hardly support any further increase. After the 1920 census Congress could bring itself neither to cut down the quota of any State nor to increase the size of the House; and so for the first time in history an apportionment held for twenty years, which meant that the fast-growing States relatively lost both Representatives and votes in the Electoral College. When action was taken in 1930, California's quota was increased from 13 to 22 and Michigan's from 15 to 19. To avoid future embarrassments, Congress in 1929 passed an act to establish a permanent and automatic method of reapportionment. The membership of the House was established at 435, and so the only problem to be solved each ten years was which States were to gain and which to lose.

Superficially this seems a very simple problem.[43] The aggregate population of the United States less the population of the District of Columbia (all Indians now being citizens are counted), which in 1940 was 131,006,184, is divided by 435. The result, 301,163, is the ratio for each Representative. The quota of each State is found by dividing its population by this ratio. The first step in the apportionment is to set aside one Representative for each State (no matter if three, Nevada, Wyoming, and Delaware, have fewer inhabitants than the ratio), which leaves 387 seats to be distributed. At this point the problem changes from one in simple arithmetic to one in higher mathematics. The chances are that the quota for each State, that is, the number of representatives, will always be a whole number and fraction, and that the fraction will run the gamut from small to large; for instance, 4.1, 4.3, 4.5, 4.7, 4.9. On what principle should the last seats be apportioned? It seems eminently fair that the State with a quota of 4.9 is more entitled to 5 seats than the one with 4.2. In the first five apportionments all fractions were ignored, which meant that States falling only slightly below the ratio undeservedly lost a representative; but in 1850 the method was adopted which was used through 1900. States were first given the quotas to which their whole numbers entitled them, and then the remaining seats were distributed to the States in the order of the size of their fractions. Mathematicians have worked

[42] F. M. Riddick, *Congressional Procedure* (1941), Appendix, p. 373.

[43] L. F. Schmeckebier, *Congressional Apportionment* (1941), contains a detailed explanation of the various methods of apportionment used or proposed for the House of Representatives.

out five different methods by which the distribution of the seats beyond one for each State might be made. The act of 1929 requires the President to transmit to Congress a statement showing the quota for each State under each of the two methods called "major fractions" and "major proportions." If Congress thereafter fails to act, the apportionment stands according to the method used at the last apportionment. Congress did fail to act after 1930, and the method of major fractions used in 1910 became effective. When the quotas under the two methods were computed for 1940, it was found that the only difference was a choice between 6 and 7 for Arkansas and 18 and 17 for Michigan, the method of major fractions favoring the latter.

METHOD OF ELECTION · Congress made no use of its constitutional right to legislate on the "times, places, and manner" of holding Congressional elections until 1842, when an act was passed requiring that the choice should be made in single-member districts. Up to this time each State had followed its own pleasure, which sometimes was the above method and sometimes election at large. The difficulty with the latter was that normally the minority was deprived of all representation. The act of 1842, furthermore, provided that the districts should be of contiguous territory and of equal size. A similar act thereafter was passed for each decennial apportionment, with the addition of a clause in 1872 authorizing a State, when awarded an extra seat, as an emergency to retain the old districts and choose the new member at large. States have sometimes resisted the attempt of Congress to control the size and shape of their Congressional districts; but the controversy now sleeps, for Congress has allowed all legislation on the subject to lapse.

THE GERRYMANDER · *Gerrymandering* is the term used to designate the shaping of electoral districts so that one party may secure seats in the legislature in greater number than its voting strength would warrant.[44] In many of the Northern and Western States where the two parties are rather evenly balanced, an unscrupulous drawing of the district boundaries may easily distort the outcome of an election. The first element in the strategy is to throw those areas where the enemy's voting strength is great into as few districts as the law will allow, so that he will carry them by large majorities; and conversely to unite those areas where the strength of the designing party is slightly inferior, with pockets where it has great strength, so that it may carry a maximum number of districts by moderate or small majorities. Given full power and no constitutional limitations, a person with an atlas and population charts might easily give the minority party a substantial majority in the legislature, or, if the voting disparity between the two parties is too great, an unearned increment in its representation. Gerrymandering may be accomplished also

[44]R. Luce, op. cit. pp. 395–404; R. C. Brooks, op. cit., pp. 434–442; L. M. Short, "Congressional Redistricting in Missouri," *American Political Science Review* (August, 1931), Vol. XXV, pp. 634–649.

by laying out electoral districts of unequal size or by failing to redistrict to meet changes in population. For example, Illinois has several districts with a population in the neighborhood of 150,000 and several with a population of over 500,000; Ohio, one of 150,000 and another of 633,678; while New York has one of 90,671 and three of more than 600,000.

Gerrymandering is an ancient if not honored practice, and there is probably not a State of the Union whose electoral map of Congressional, legislative, and municipal districts does not bear its imprint. State constitutions and laws generally and some city charters attempt to put obstacles in its way; for instance, the constitution of Arizona requires that the legislative districts "shall be compact in form, and no district shall include non-contiguous portions of any county." Such statutes are valuable more as expressions of public morality than for their legal effect. The difficulties in the way of successful court action against a representative district already established are almost insurmountable. Topography, population groupings, and existing boundaries of political subdivisions often make it impossible to comply with legislative standards even when there are the best of intentions.

TERM OF OFFICE · It was an expression, well honored at the time of the Revolution, that "where annual elections end, tyranny begins." The Representative was thought of as merely a member of the community, chosen to act for it, whose conduct should be put to the test of frequent elections. Nearly all the States in 1788 had annual legislative elections, and the authors of the *Federalist* were on the defensive not because the term of Representatives was too short but for the opposite reason. Hamilton made the rather ingenious defense that while a State legislator might easily become competent to transact the affairs of his State in one year, the "great theatre of the United States" required at least two years for an equal competency.[45] Today most people would agree with Hamilton or go beyond to urge that the term of the Representatives be lengthened to four years. Studies show that between one fourth and one half of the membership is new at each session. The inherent difficulties of statute-making, the complexity of the rules of procedure, and the overgrown size of the House combine to make it difficult even for the abler men to be effective members in their first terms. The first year they are engaged in "learning the ropes," and the second in "building their fences." Prospects for change, however, are very slight.

The salary, perquisites, and privileges of individual Representatives are the same as those of their brethren of the upper house, but the qualifications for holding office are somewhat different. A person may be a Representative if he has attained the age of twenty-five years, has been a citizen of the United States seven years, and is an inhabitant of the State from which he is elected. Nothing is said concerning residence in the dis-

[45] *The Federalist* (Lodge ed., 1895), No. LIII.

trict which elects him, but that is one of the unwritten rules. It results from a very pronounced American feeling that a public officer from outside is not "one of us." Newton D. Baker expressed it in his complaint against a general-ticket election: "I like to live on the same street with my councilman and talk things over with him occasionally. It is good for both of us."[46] Some part of the strength of the sentiment is doubtless due to the large size of many of the electoral districts. Even persons representing Congressional districts in the congested areas of metropolitan communities are scrupulous to maintain a voting if not an actual residence there. The epithet "carpetbagger" or "outsider" is one which few contenders in an election could successfully stand against.

Each house is the judge of the "elections, returns and qualifications" of its own members.[47] Both often exercise the power to decide disputed elections, and both have several times refused to seat members for other reasons: a polygamist, a Socialist in 1918 accused of obstructing the war efforts, and several persons accused of the illegal use of money in securing their election. The question of whether a House has the legal right to set up qualifications for its members over and beyond those of the Constitution has been warmly argued on both sides. The question is largely an academic one, however; for it is hard to see how the action of the House in a case could be overruled by any other authority.

## *REPRESENTATION IN THE STATE LEGISLATURES*

Forty-seven of the States have two-house legislatures. With class, wealth, and other worldly honors ruled out as possible bases of representation, it was necessary to find something else. The two chiefly used are representation based on numbers and representation based on political units. No State chooses its legislative members by general ticket; but where the electoral units are towns and counties, the more populous ones usually choose several members at large. Naturally, the type of representation used has a direct relation to the size of the legislative chambers.

SIZE OF THE HOUSES · It requires approximately 7500 men to make the laws for the States in any one biennium. In size the various houses show sharp variations, but the legislature of Washington, with its houses of 46 and 99, is at the median.[48] The New England States, because of the system of town representation, lead in the size of their lower houses: New Hampshire, 423; Connecticut, 272; Vermont, 246; and Massachusetts, 240. Upper houses run from the 17 of Nevada and Delaware to the 67 of Minnesota. Other examples of the relative size of houses are as follows: Kentucky, 38 and 100; Ohio, 36 and 138; California, 40 and 60; Texas,

[46]Quoted in F. A Hermens, op. cit. p. 439.
[47]*United States Constitution*, Art. I, sect. 6.
[48]*Council of State Governments, Book of the States, 1941–1942*, Vol. IV, p. 85.

31 and 150. Only rarely, in a few of the newer States and in others which have made drastic overhaulings, does the size of the houses represent any conscious theory of what is proper. In most cases both the size of the houses and the system of representation are the outgrowth of historic compromises.

TYPES OF REPRESENTATION · Two types of representation for the legislative assemblies prevail. One is based on numbers of people; the other, on political units, usually the county or the town. In many instances both considerations are taken into account. The constitutions of nineteen States require that population shall be used as the basis; somewhat more, that each county or town shall have at least one representative. In Vermont each town (township), no matter what its size, is given one representative in the lower house.[49] In Connecticut the towns of 5000 or more have two representatives; those smaller, one each. Thus in 1930 its house of 307 members had one from Hartland, of 296 population, and two from Hartford, of 164,072; one from Warren, of 303 population, and two from Waterbury, of 106,500. Its senate of 35 members is apportioned on the basis of population, except that each county is entitled to at least one seat.[50] Rhode Island gives each town at least one senator; but it was not until 1928 that one extra seat was awarded on the basis of each twenty-five thousand electors, which gave Providence four and Pawtucket two senators, though the body is still grossly unrepresentative of population.[51] Generally less attention is paid to the consideration of population in the upper house. In a few States one seat is given to each county, irrespective of population. In a much larger number the counties are grouped into electoral districts approximately on the basis of population. The fear that one or two centers of population will control the legislature and the State government is reflected in many State constitutions, and here the principle of regional representation is used as a counter. In New York no county may have more than one third of the membership of the senate, nor two adjoining counties more than one half; in Rhode Island no city is allowed more than six members in the senate of thirty-five; and in Pennsylvania no county may have more than one sixth of the members of the senate.[52]

The one feature of uniformity in this general maze of diversity is the underrepresentation of the cities. This arises both from intention and from inertia. In the past thirty years the cities have greatly increased in size and number, while the rural population has remained stationary or decreased. But in many States no readjustments of representation or only

[49] *Constitution of the State of Vermont*, chap. ii, sect. 13.

[50] *State of Connecticut, State Register and Manual* (1939), pp. 88–99, 482–483; "Constitution," Art. XV.

[51] *Constitution of the State of Rhode Island*, Amendment XIX; *Rhode Island Manual* (1939–1940), pp. 188–193.

[52] *Constitution of the State of New York*, Art. III; *Constitution of the State of Rhode Island*, Art. VI; *Constitution of the Commonwealth of Pennsylvania*, Art. III.

partial ones have been made in many years. The use of old-established political units as the basis for representation lends itself naturally to discrimination against the city. Cook County (Chicago) has but 57 representatives in the Illinois lower house, but on a population basis would be entitled to nearly 70.[53] Wayne County (Detroit), with over one third of the population of Michigan, has but 5 out of the 32 senators and 14 out of the 100 members of the lower house. The city of New York elects 32 members of the State senate of 51, and 62 of the 150 State assemblymen, but it has over half the population of the State. Even within the city the distribution of representatives among the five counties is unequal, New York County having 23 assemblymen and 9 senators, whereas on the basis of population it is entitled to only 16 and 6 respectively. This is chiefly at the expense of the more lately urbanized counties of Bronx and Queens.

TERM OF OFFICE · The one-year term, revered at the time of the Revolution, remains now only in New Jersey, and there only for the lower house.[54] Elsewhere it is two years for the lower house, except in Alabama, Louisiana, Maryland, and Mississippi, where it is four years. The two-year term prevails also in the senates of sixteen States; but in thirty-two it is four years, and in New Jersey three. Regular annual sessions now have passed away except in New Jersey, New York, and Rhode Island. Alabama gave up its four-year session in 1939. All others are biennial.

Most of the legislatures are restricted not only to every other year for regular sessions but to so many days for each session, a restriction which is made effective by providing that no salary may be paid beyond that point. Twenty-five States have restrictions: nineteen of them, sixty days, and two, forty days. Thrift and distrust of the legislature were perhaps the two chief motives. The results, however, have been almost uniformly bad: lack of deliberation, hurried and slipshod work, and frequent special sessions. In all but about half a dozen States special sessions may be called only by the governor, and thirty States restrict the legislative program to that specified in the governor's call.

COMPENSATION · In the earlier days of the Republic the American attitude toward the paying of members of the legislatures was much like that in Great Britain: that this was a service which good citizens when called upon should be glad to render without compensation or with remuneration for expenses only. This attitude has not yet lost all force. About twenty States pay a flat sum by the term or the year. In New Hampshire it is $200 and in Connecticut $300 for the biennium; in West Virginia $500 and in North Carolina $600 for the year.[55] Several States pay as much as $1000, Ohio with $2000, Wisconsin with $2400, Pennsylvania with $3000, and Illinois with $5000 topping the list. Twenty-six States pay at a stated

[53] *Council of State Governments, Book of the States*, Vol. V (1943–1944), pp. 145–147.
[54] Ibid. p. 136.
[55] Ibid p. 137.

rate per diem and usually for a limited period; if the session lasts longer, the members must serve without compensation. The top salary is $10; $5 is typical; while Kansas, Michigan, and Oregon set the rate at $3. There is no compensation for extra sessions in those few States which pay the better salaries; but in most of those paying per diem the same rate extends to extra sessions, usually with time limitations such as ten, twenty, or thirty days. In no State are there extra allowances approaching the munificence of those which Congress has given itself. All grant moderate mileage allowances; some, the amount of the actual expenses incurred in going to and returning from a session; and a few, a meager sum for postage and stationery.

PRIVILEGES AND QUALIFICATIONS · The same privileges as are accorded members of Congress with respect to freedom from arrest, except for treason, felony, or breach of the peace, and immunity from suit or other inquisition for remarks made in debate on the floor of the House, are given members of the legislature in all States. Qualifications set by the various States mostly concern residence, citizenship, and age, although eight States do exclude atheists. The requirements of State residence are from one to seven years, and all require residence in the district from which one is chosen, except New York. The minimum age for holding a seat in the lower house is commonly twenty-one years, and for the upper house twenty-five years.[56]

CHARACTER OF LEGISLATORS · Do the legislatures reasonably well represent the people and the various interests of the State? Is the personnel of such caliber as to supply adequately the lawmaking needs of the people? James Bryce in his later writings observed that legislative bodies the world over had declined in prestige and probably in the abilities of their members.[57] Proof of the tendency was the abolition, after his death, of free representative institutions in three of the great Western powers, Germany, Italy, and France, their considerable attenuation in the United States, and the halting of their further development in Russia and Japan. How much this is due to the inherent weaknesses of representative government in dealing with the problems of a highly industrialized society and with international affairs, and how much to the sheer inability of an electorate based on universal suffrage to choose able men, no one can say with confidence.

[56]W. B. Graves, *American State Government*, (1936), p. 36.

[57]Not all critics are agreed on this judgment. For a summary of the views on this subject cf. R. Luce, *Legislative Assemblies* (1924), chap. xiv. Luce quotes E. L. Godkin as saying: "There is not a country in the world, living under parliamentary government, which has not begun to complain of the decline in the quality of its legislators. . . . To get him [a man of serious knowledge] to go to the State Legislature, in any of the populous and busy States, is well-nigh impossible" (p. 298). Luce quotes approvingly Henry Cabot Lodge's statement that "our Legislatures on the average, and as a rule, will compare favorably with an equal number of persons taken from any portion of the community, and the members are usually men of reputation in their own neighborhood for force and capacity" (p. 315).

Several studies of the character of State legislative personnel have been made of late years, necessarily confined chiefly to matters of occupation, education, and age. While illuminative of the tendency toward functional representation, they tell little of personal abilities. All show that lawyers and farmers head the occupational groups. In five Ohio legislatures, from 1927 to 1937, lawyers led in the lower house, with 29 to 49 in a total of over 130, and an average of 35, while farmers were second, ranging from 18 to 34, with an average of 23.[58] In the upper house, of 30 members, lawyers led, with 11 to 17 members; but no other single vocation was able in any session to make a showing of more than 4 members. Thirteen occupations were listed in the two houses, including those of merchants, realtors, ministers, physicians, and insurance agents. In all five sessions merchants maintained a membership in the lower house of 7 to 22, organized labor of 1 to 15. All other occupations were scattered. Farmer strength in the house was due to the apportionment of one seat to each county, irrespective of size; but farmers came near complete exclusion from the senate, with its larger constituencies dominated by the cities. A study of the Texas legislature of 1921 showed in the two houses 76 lawyers, 42 farmers, 21 businessmen, 14 merchants, 7 publishers, 5 bankers, 3 physicians, 3 students, 1 teacher, and 1 mechanic.[59]

The rapid turnover of State legislative personnel and the consequent inexperience have often been remarked. A statistical study of six successive Indiana legislatures, from 1925 to 1933, furnishes a concrete picture.[60] In every session at least half the members of the lower house were new, but in only two sessions were as many as one third of the senators new. Altogether 414 persons saw service in the six sessions of the lower house of 150 members, of whom 187 served in only one session; 127 in two or more, 19 in as many as four, and only 5 in six. For the 102 who served in the senate the record was better. Fifty-nine quit at the end of one term or less, 37 completed two terms, and 12 continued for three or more terms. Since much of a legislature's work is done in committee, the experience of the committee chairman is important. It was shown that on four occasions more than one third and on two occasions more than one half of the committees of the lower house were headed by first-year members, whereas only once were as many as one third of the senate chairmen new members, although many of them had been passed on from other committees. Regularly three fourths of the house chairmen and three fifths or more of the senate chairmen were new each session to their committees.

All these studies reveal that the legislatures represent reasonably well

[58]Thelma Griswold, *Bicameralism in Ohio* (1937), Appendix, Tables I and II.

[59]Tom Finty, Jr., "Our Legislative Mills: Texas," *National Municipal Review* (November, 1923), Vol. XII, pp. 649–654.

[60]Made by Charles S. Hyneman, assisted by Houston Lay, and published in *American Political Science Review* (February, 1938), Vol. XXXII, pp. 51–67; Ibid. (April, 1938), pp. 311–331.

the various economic, occupational, and professional sections of the community, and that the degree of education is above that of the general run of citizens. Observers generally agree that the level of honesty in the legislative bodies is somewhat superior to that of the late years of the last century, when the sudden turn to the concentration of control in manufacturing, transportation, and finance often led to the undercover control of legislators. Nevertheless, the lack of men of outstanding ability as shown in inadequate legislative programs, disorderly lawmaking procedure, and defective draftsmanship is the same from coast to coast.

## *REPRESENTATION IN CITY COUNCILS*

City councils, or, as they are called in some places, commissions, are subordinate lawmaking bodies whose powers are determined by the constitution or statutes of the State. The importance of the legislature in the city government, however, is relatively less than those of State or nation; for the civil law and most of the criminal law which apply to the city's population are State-made. Ordinances of the city legislature are concerned chiefly with matters of city administration. American city governments started out on the English model of legislative supremacy, but by the middle of the last century already had begun to change places with the executive. Particularly in the large cities the legislative body has fallen to a new low in power and in social esteem. If the city is the firing line of democracy, its legislative body is in the warmest sector.

BICAMERALISM V. UNICAMERALISM · With forty-eight different municipal codes in the country, some of them permitting home rule in the building of city governments, it is small wonder that our city legislatures present a bewildering variety in size, types of representation, and methods of apportionment. Writing in 1888, James Bryce in his *American Commonwealth* noted that the cities had legislatures "consisting usually of two, but sometimes of one chamber, directly elected by the city voters."[61] Today none of the cities of 200,000 population or more has a two-house council, which is altogether a rarity. Adopted originally in imitation of the national system, experience showed that the two-house council was ill-adapted to the primarily administrative work of the municipality, and was helpful to the boss and machine rule by obscuring responsibility, while it added complexity without appreciable gain to the government.

REPRESENTATION · The battle between the two principles of general-ticket and single-member-district representation has gone on without ceasing in the more restricted confines of the municipalities. While experience so far has demonstrated that generally the more efficient and responsible government is on the side of the former, the traditional American attitude toward representation by neighborhood people helps to sustain

[61] J. Bryce, *American Commonwealth* (1888), Vol. II, pp. 594–597, 623.

the latter. Every substantial move of a large city for the betterment of its form of government has included the item of a small or smaller council elected at large, either by straight voting, preferential ballot, or proportional representation. New York, Detroit, Cleveland, Cincinnati, Philadelphia, Baltimore, St. Louis, and Memphis are numbered in this list. The approximately five hundred middle-sized and small municipalities operating under the commission plan are governed by commissions elected by general ticket. Nevertheless, by far the greater number of American cities still choose to have their councilmen elected in the wards.[62]

TERM AND COMPENSATION · Annual elections were long the most common for the lower house of the council; today two years is the usual term for the unicameral bodies. Councilmen are subject to recall by petition or election in a considerable number of the home-rule cities. In most of the middle-sized and smaller municipalities no compensation is paid to members of the council. In the larger there is a per diem salary for the sessions actually attended; in a few, a flat annual salary. Members are usually privileged in the matter of arrest and debate as in the national and State legislatures.

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[62] W. A. Anderson, *American City Government* (1925), chap. xiv; A. F. MacDonald, *American City Government* (1941), chap. xii; H. Zink, *Government of Cities in the United States* (1939), chap. xvi.

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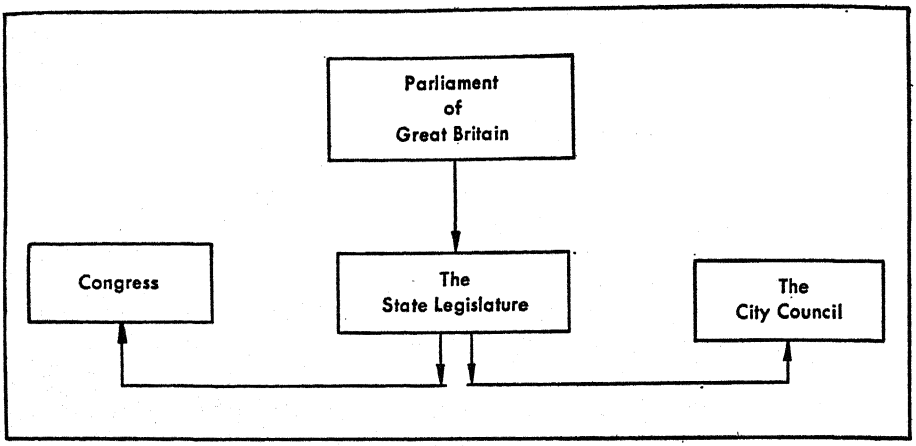
CHAPTER XVIII

# *The Functions and Powers of American Legislative Bodies*

One assumes as a matter of course that the making of laws is the primary function of legislatures; that they may have other regular duties is often lost sight of. The powers to set up an internal organization, to adopt rules of procedure, and to discipline or even to expel their own members belong to most of them. By the passage of ordinary bills or resolutions the legislature establishes the program of work which the government is to undertake. Necessary offices, boards, and commissions are created in the same way. Even then the legislature is not through with the administration, but day by day keeps a critical eye on its work. Criticisms are freely voiced on the floor by members or in outside speeches or interviews. Administrative acts may be made the subject of inquiry before legislative committees. Indeed, the holding of investigations is a distinct function in itself, often spectacular in character, with its train of witnesses and plenitude of newspaper and radio reporting. Finally, there are miscellaneous duties which vary from legislature to legislature, among the more common of which are the impeachment and trial of public officers or their choice or confirmation.

## *THE LAWMAKING FUNCTION*

SPLIT-UP OF THE AMERICAN LEGISLATIVE POWER · No legislature exists in the United States which is competent to deal with all phases of the life and affairs of the citizen. Congress, State assembly, city council, each may legislate to affect everyone within its boundaries; but none may act in all his affairs. It may be said in general that the field of human affairs is allocated among the three levels of legislatures on the basis of topic, or subject matter. Take the case of one John Smith, industrialist, shipper, and businessman of Mobile, Alabama. The use of his warehouse, wharf, and freighters is subject to legislation by Congress, because he is engaged in foreign and interstate commerce; the parking of trucks or the disposition of waste or other offensive materials about his premises is controlled by the ordinance-making power of the city council; while the making of contracts, mortgages, and liens, and matters concerning debt and insurance, are governed by rules laid down by the Alabama legislature. To ascertain with some degree of accuracy the lines which separate these three fields,




*Powers of American Legislature*

it would be necessary to examine the constitution and laws of Alabama, and the charter and ordinances of the city of Mobile.

BASIS OF THE DIVISION OF AMERICAN LEGISLATIVE POWERS · The fields of legislation occupied by the three levels of American legislatures today are not exactly the same as they were when the Constitution was adopted. Some formal changes have been made by constitutional amendments, while custom and practice and judicial decisions account for still more. Nevertheless, the distribution growing out of the events of the Revolution and the adoption of the Constitution still represents the general plan.

Since the greater part of the North American continent was conquered and colonized by the English, the power to legislate for it naturally belonged to their Parliament. Although local assemblies were established by authority of the crown in most colonies, the mother country claimed the right to delegate as much or as little power to them as it might deem wise or to abolish them altogether. Parliament's power to legislate for the colonies, in theory at least, was complete. The Declaration of Independence in 1776 stated that the colonies severally had become "free and independent States" with power "to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." This could mean only that each State had assumed that full legislative power over its territory and people which Parliament had formerly possessed. In the Articles of Confederation each State gave to the new central government a few of its powers; but this was only a "lend-lease": each retained its sovereignty and independence.

In adopting the present Constitution the States surrendered to the Congress of the new government a list of powers most of which are enumerated in Article I, sect. 8. These and others implied from them comprise the field of legislation occupied by Congress. The rest of the great domain

of human affairs, with few exceptions, was left to the legislatures of the States. To quiet any doubt about the matter, the Tenth Amendment was soon adopted, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In ordering its own internal affairs a State might conceivably place all its powers of legislation in one central legislature or apportion some of them to subordinate and local legislatures. The second alternative is the one which has been followed in all States. The actual amount of the apportionment is determined in the State constitution and laws and naturally differs from State to State.

## *THE LEGISLATIVE POWERS OF CONGRESS*

THE ENUMERATED POWERS · The chief of the enumerated powers are found in Section 8 of Article I of the Constitution; but others are found in Article IV and in the amendments, beginning with the Thirteenth. The eighteen separate enumerations of Article I actually constitute only four separate important powers and a fifth short miscellaneous group.[1]

1. *War.* Six of the clauses relate to the subject of war. Congress is given the power to declare war, to raise and support armies, to provide and maintain a navy, and to make the rules for the government of both land and naval forces. It may also make provision for organizing, arming, and disciplining the militia of the States, and for calling it into the service of the Federal government. This simple enumeration of war powers totals to much more than appears on the surface. The powers which may be implied from them seem capable of almost indefinite expansion.

2. *Finance.* Congress is given the general power of taxation with very slight handicapping limitations. It is given the power also "to borrow money on the credit of the United States," accompanied with no limitation whatsoever. No Federal funds may be drawn from the treasury or spent except on authorization of an act of Congress.

3. *Currency.* Another clause empowers Congress to coin money and regulate its value, a power which is safeguarded by a subsequent clause which forbids the States to do that very thing. Congress is specifically authorized also to provide for the punishment of counterfeiting the securities and current coin of the United States.

4. *Commerce.* Three kinds of commerce, namely, with foreign nations, between the several States, and with the Indian tribes, are consigned to the regulation of Congress. The great part played by this clause in the growth of the legislative jurisdiction of Congress will be shown in other connections. The power "to establish post-offices and post-roads" is of the same character and should be classified here.

[1] *United States Constitution*, Art. I, sect. 8.

5. *Citizenship, Freedom, Civil and Political Rights.* Under this heading are various legislative powers conferred in the original Constitution and the Civil War amendments.[2] While the law of citizenship is safely fortified in the Constitution itself, Congress has the sole power to declare who may become naturalized citizens and to establish a uniform procedure for the enforcement of the law. It may legislate to enforce the prohibitions against slavery and involuntary servitude; to prevent the States from denying civil liberties and equality of rights in general to any class of their citizens; and, furthermore, to debar the States from denying the right of persons to vote on account of race, color, previous condition of servitude, or sex. The legal rights, duties, and obligations of citizens are generally reserved for State legislation, subject to the standards set by the Constitution and the laws of Congress.

6. *Federal Territory and Property.* The power of Congress "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States" was conferred by the original Constitution.[3] It has been held to apply both to movable property and to land, and to include the setting up of government for the territories. The clause was cited by the Supreme Court as a basis for the sale of electric power by the TVA;[4] and it doubtless covers the disposition of products of United States forests and mines. Of the same character is the clause empowering Congress "to exercise exclusive jurisdiction in all cases" over the District of Columbia.[5]

7. *New States and State Co-operation.* Congress may admit new States to the Union; but is forbidden to create a new one from any other or two or more others without the consent of the legislatures of the States concerned. Since the admission of New Mexico and Arizona in 1913 exhausted the last remaining territory of the mainland, the chance that Congress may act on this power seems remote.[6] Every State is required to give "full faith and credit to the public acts, records, and judicial proceedings of their sister States"; which means that they must give full honor to and not question the validity of the acts and records which come before them.[7] Congress is especially required to prescribe the manner in which the rule shall be carried out. Finally, its consent is necessary to compacts or treaties made by two or more States.

8. *Miscellaneous.* Three matters concerned primarily with property rights were taken from the States and made a part of the legislative jurisdiction of Congress: the conferring of patents and copyrights on inventors and authors, respectively, and the establishment of a uniform law of

[2] *United States Constitution*, Art. I, sect. 8; also Amendments XIII, XIV, XV.
[3] Ibid. Art. IV, sect. 3.
[4] *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936).
[5] *United States Constitution*, Art. I, sect. 8.
[6] Ibid. Art. IV, sect. 3.
[7] Ibid. Art. IV, sect. 1.

bankruptcy. The reasons for the action are plain to see: patents or copyrights good in one State and not in another would be quite useless to the owners; and bankruptcy laws valid in one State and not in others would offer a tempting means for the evasion of debts. The enumerated power to "ordain and establish" courts inferior to the Supreme Court, to establish a system of Federal courts, would doubtless have been regarded as an implied power if it had not been specifically given.[8]

9. *Criminal Law.* While the establishment of criminal law is chiefly a reserved power of the States, Congress has a share in it. Congress was empowered to legislate on the crimes of counterfeiting the securities and coin of the United States; "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations";[9] and "to declare the punishment of treason" except as limited by the Constitution.[10] This meager list, however, is but a small part of the field of Congress in criminal legislation. Its greater part is implied as a duty of Congress to protect all Federal activities from interference and to enforce all its laws. Thus persons who interfere with the mails or interstate commerce, trespass on Federal property, make false returns to the treasury, or commit offenses against Federal officials in the performance of their duty are guilty of criminal acts and subject to Federal prosecution.

THE IMPLIED POWERS · Following the enumeration of seventeen powers in section 8 of Article I is the clause "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." A stronger invitation to Congress to act broadly under its enumerated powers could hardly have been desired. Perhaps the doctrine of implied powers would have come along in the due course of time without any such blanket authorization. As the growing national unity in economic life has brought an ever-increasing pressure for a widening of national legislation, Congress has not hesitated to go farther and farther afield into the domain of implied powers. The result is that Congress now legislates on many topics which from the beginning had been covered by State laws; which means that those laws of Congress are supplementary to existing State laws or actually displace them.

1. *The Establishment of Federal Administrative Offices.* The only executive office established by the Constitution is that of President of the United States. The present great Federal administrative organization, including the ten cabinet offices, independent establishments such as the Interstate Commerce Commission, and the civilian war organization, was all created by Congressional legislation or under such authorization. Every power

[8]Ibid. Art. III, sect. 1. [9]Ibid. Art. I, sect. 8. [10]Ibid. Art. III, sect. 3.

given to Congress by the Constitution to perform a given function implies a power to create offices to administer it; for instance, the power to levy taxes implies the power to create a treasury department and the proper bureaus to collect customs and internal revenues.

2. *The Establishment of Governments for the Colonies.* When foreign territory is conquered and occupied by American troops, it is governed at first by the army acting for the President of the United States as commander in chief. But in due time Congress acts to provide a permanent government. It may legislate piecemeal or adopt a code of laws much in the nature of a written constitution, as it did for Puerto Rico, the Philippine Islands, Hawaii, and Alaska. The courts have variously held this to be an implied power, derived from the treaty-making power or from the "needful rules and regulations" clause of Article IV of the Constitution. Throughout our history down to 1913 there were several territories within the present United States subject to such legislation by Congress.

3. *Banking.* Upon the foundation of Congressional legislation rests a great series of banking institutions. Some are privately owned, others are under joint private and government ownership, while still others are owned outright and operated by the Federal government. The right of Congress to regulate, charter, or operate such banks is nowhere mentioned in the Constitution; but no power of Congress is more firmly established today. When it was questioned, early in the nation's history, the Supreme Court held that the power of Congress to borrow money implied the power to charter banks to facilitate such borrowing.[11] Upon this slender basis rest now some of the world's largest fiscal institutions.

4. *Paper Money as Legal Tender.* Either consciously or through neglect the Fathers failed to give Congress the power to print paper money and make it legal tender in the payment of debts. Driven to desperation in its search for funds, Congress during the Civil War authorized the issuance of such money without any fixed time for its redemption in gold or silver coin. After several years of wavering and hesitation the Supreme Court finally found such a power implied in the power to borrow and to coin money, and negatively in the provision which forbade the States to emit bills of credit, coin money, or make anything but gold or silver coin a legal tender.[12] Time and usage have combined to give Congress full legislative power in this matter.

5. *National Police Power* · This and the two following fields of legislation are inferred chiefly from the power to regulate interstate and foreign commerce. Although the police power proper, that is, the right to legislate for the health, order, morals, and welfare of the people, was conceded to belong to the States individually as among their reserved powers, Con-

[11] *McCulloch* v. *Maryland*, 4 Wheaton, 316 (1819). A. Beveridge, *The Life of John Marshall* (1919), Vol. IV, pp. 282 ff.

[12] Chaps. XLII–XLVII; J. Alsop and T. Catledge, *The 168 Days* (1938).

gress, through the regulation of interstate traffic, has accomplished somewhat the same object. To forbid the shipment of objects in interstate or foreign commerce is an effective way of curtailing their production within the States. Thus Congress has helped to suppress the adulteration of foods and drugs, the operation of lotteries, the stealing of automobiles, and the production in prisons of goods for the general market by forbidding shipment in interstate commerce. The taxing power also has been used as a basis for regulation, for instance, the high tax on oleomargarine colored yellow to resemble butter.

6. *Hydroelectric Power.* Using its power to regulate navigable rivers as arteries of interstate commerce, Congress has entered the field of the regulation of hydroelectric power. As a proprietor it has built and operates great projects on the Tennessee, Colorado, and Columbia rivers. More sweeping is its requirement of Federal licenses for all power projects on navigable rivers and their tributaries. By this means it is able to establish control over rates and services, superseding the control of State utility commissions. Power plants operated by coal and not sending their current across State lines, remain outside the legislative power of Congress.

7. *National Economic Life.* What the regime of the New Deal, in 1933 and the years following, actually desired was the power to deal with those phases of our economic life which are of significance to the nation as a whole. No constitutional amendments to that effect were introduced; but a broadened interpretation of the interstate-commerce clause was sought as a basis. The traditional application of this clause had been to transportation or communication crossing State lines, and to such instrumentalities as navigable rivers, canals, highways, railways, and ships. But for several decades Congress had been claiming more under the guise of interstate or foreign commerce. Stockyards, packing houses, grain elevators, and warehouses had been regulated. Trusts, contracts, and agreements in restraint of interstate commerce were forbidden. Finally, in the administration of F. D. Roosevelt, the legislative power of Congress was extended to the great manufacturing and producing industries of the country, and the extension was upheld by the courts on the ground that these industries directly "affect" interstate commerce. While so far Congress has acted chiefly as respects monopolies, qualities of goods, and labor relations, otherwise leaving the laws of the States in force, there is now no reason why its legislative powers should be restricted to these matters. The steel industry, automobile manufacturing, shipbuilding, the lumber mills, meat-packing, the fisheries, coal, iron, copper, and zinc mining, and the production of petroleum are among the large enterprises which have fallen within the legislative power of Congress.

8. *Civilian Life in Wartime.* No court or executive has attempted to measure the extent of the implied powers of Congress under the war power. In order "to raise and equip" armies and navies, many of the normal rights

and privileges of the citizen may be set aside and the balance of powers between nation and State sharply altered.[13] Raw materials may be taken from private hands for the use of war factories; food, gasoline, and fuel oil may be rationed; a speed limit for motor vehicles may be set; labor may be conscripted; and maximum prices for food, wages, services, and rents may be set. Such historic rights as freedom of speech, the press, and assembly may be narrowly interpreted. Contracts between private individuals may be set aside or their execution suspended. The reserved powers of the States present only the smallest of obstacles to such legislation of Congress as may be necessary to raise, equip, and support armies.

9. *Powers Resulting from the Spending Power.* The so-called spending power affords Congress an opportunity to legislate on matters which are not among the enumerated powers and can hardly be classified as implied in any of them. It might be said that the expedient was stumbled upon and occasionally resorted to more than three quarters of a century ago, but that it was not visualized as a regular means of increasing the legislative powers of Congress until after 1920. The explanation is a fairly simple one. It must be recalled that there are no constitutional limitations on the amounts of money which Congress may raise by taxation or by borrowing; and it has finally been settled that no means exists to restrain Congress as to the objects of its expenditures. The taxpayer's suit to restrain a city or county official from spending money for objects not entrusted to the care of that unit is a familiar thing to the urban dweller. The United States Supreme Court in the case of *Massachusetts* v. *Mellon* held that a taxpayer's suit could not be entertained against the United States Treasury officials, which means that Congress may appropriate money for objects not within its enumerated or implied powers; in fact, for any object whatsoever, limited only by its own sense of fitness and political expediency.[14] Congress therefore may appropriate money for the use of the States or their political subdivisions with or without attached conditions. A State is under no legal obligation to accept the money, but actually can hardly refuse to take its share of the national income being thus distributed. So far as can be seen, there are few if any objects of State legislation over which Congress may not acquire power by this means.[15]

How the System Works · Down to 1944 such extensions of the legislative powers of Congress had been confined to a few fields: chiefly poor relief, low-cost housing, child welfare, the care of defectives, old-age and unemployment insurance, and the construction of highways and other

[13]See the cases of *Ex parte Milligan*, 4 Wall. 2 (1866), and *Swaim* v. *United States*, 165 U. S. 553 (1897); C. Fairman, *The Law of Martial Rule* (1930); and A. A. Schiller, *Military Law and Defense Legislation* (1941).

[14]262 U. S. 447 (1923).

[15]The Supreme Court, in the case of *Helvering* v. *Davis* (301 U. S. 619) (1937), upheld the right of Congress to tax and appropriate money for the "general welfare" of the people.

public works. All these are considered in other connections in subsequent sections, but a few words here will suffice to explain the working of this system. Congress, for instance, appropriates money for the care of needy mothers, provided the State legislates to set up a plan approved by the Federal government and matches the contribution dollar for dollar; and the greater portion of the returns from a heavy pay-roll tax is returned to the respective States on condition that they set up a system of unemployment compensation which complies with rigid conditions laid down by Congress. Since no State could afford to lose for its workers the sums paid in, all have hastened to enact such laws. Slum clearance and low-rent housing, both clearly outside Federal powers of any kind, have been instituted in the same way.

## *JURISDICTION OF THE STATE LEGISLATURES*

It has been explained that the State legislative power extends to all human affairs not enumerated and turned over to the Federal government nor otherwise banned by the Constitution.[16] To attempt to itemize the State's power would, of course, be impossible, since man's activities are infinitely complex. New inventions and new ideas revolutionize the ways of life and produce unforeseen subjects for legislation. The advent of the airplane, for instance, changed some concepts of the ownership and use of the air rights over land. New occupations create the need for new licensing and regulatory legislation. Nevertheless, to give a general picture of the State legislative field there are listed the following subjects and classes, which, it is to be remembered, in some cases are overlapping and not mutually exclusive.

1. *The Domain of the Common Law.* The common law of England covered the entire range of human activities. It was brought to America, became the law of the colonies, and continued after 1776 as the law of the individual States. The Constitution of 1789 did not alter this situation, except that a few matters, such as copyrights, patents, and bankruptcy, were given to Congress. A few of the subjects with which the common law deals are property rights, contracts, insurance, marriage and divorce, inheritance, and the definition and punishment of crime.

2. *Finance and Banking.* The levying of taxes and the appropriation of money from the treasury naturally belong to the State legislatures, as do also the chartering and regulation of banking institutions.

3. *Police Power.* This is the name applied to the power to legislate for the morals, order, health, and general welfare of the people.[17] Because these may involve so many matters, the power must reside with that body

[16] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."—*United States Constitution*, Amendment IX

[17] E. Freund, *The Police Power* (1904).

which has general jurisdiction, namely, the State legislature. The twentieth century has witnessed a steady increase in police-power legislation. Examples are the laws regulating the safeguards to health and life in the mines and workshops; vaccination and other public-health measures; traffic regulation; milk and food inspection; the prohibition of lotteries and other gambling devices and the sale of intoxicating liquors.

4. *Organization of Administration.* The legislature has power to organize the internal State administration as it pleases, except as limited by the State constitution. This power extends not only to the central State government but to the localities. For purposes of administration it may divide the territory into such units and give them such powers as it finds desirable.

5. *Charitable, Correctional, and Penal Institutions.* The establishment, support, and regulation of charitable, correctional, and penal institutions are legislative functions. The extent to which such matters are undertaken by the State or turned over to the localities is a question for the constitution or the legislature to decide.

6. *Education.* This is one of the primary concerns of State legislation. In almost all States schools from the kindergarten through the university are maintained at State or local expense. The legislature establishes the local school units and may prescribe in general the standards for teachers and the courses of study; but many details of policy are left to the local boards. Privately owned and operated schools are subject to State regulation.

7. *The Professions.* All the professions are subject to the regulatory power of the State legislature. Educational requirements may be set for each, and an examination required before a license is given for practice. Lawyers, physicians, teachers, pharmacists, and, more lately, barbers and cosmeticians are included in the licensing category.

8. *Labor.* The lawbooks of every State have large sections devoted to the subject of labor. The number of pages attests the attention devoted to that subject by the legislatures. Nearly all aspects of labor are the subject of regulation. Included are maximum hours for the day or week, minimum rates, the time of payment, the conditions surrounding work with respect to safety and health, and the protection of the right to unionize and strike. The labor laws in general fall under the police power of the legislature.

9. *Manufacturing, Industry, and Internal Commerce.* Recent Federal regulations in the fields of manufacturing, industry, and internal commerce have served to obscure in the public mind the fact that the laws chiefly applicable to them are in the State codes.

10. *Public Utilities.* State legislation over public utilities has been concerned chiefly with licensing, the regulation of rates and services, and the determination of public convenience and necessity for the inauguration of new services. Federal regulations over railroads, electric lines, busses, and hydroelectric plants which affect interstate commerce have cut down the field of State legislation considerably.

11. *Agriculture.* From the beginning, agriculture has been one of the important subjects of State legislation. Legislatures have concerned themselves with matters ranging from the maintenance of stock fences, the registration of brands, the grading of seeds, and the extermination of sheep-killing dogs to exhibits at county fairs.

12. *Game Laws, Forestry, Conservation, and Recreation.* Legislation on open and closed seasons, and other measures to protect fish and game, are the subjects of State legislation except with respect to national preserves. The general problem of conservation, including forestry, is shared with Congress.

13. *Public Works: Buildings, Roads, and Bridges.* The provision of public works is, of course, a necessary function of State and local governments. The hard-surfaced highway has ranked next to education as an item of State government expense.

14. *Military.* The establishment of organized militia units was a matter of considerable State pride in the early days of the Republic, and during the Civil War much of the responsibility for raising troops fell upon the States. The extension of Federal control by means of the spending power, however, has greatly decreased the necessity for State legislation.

## *LEGISLATIVE POWERS OF THE CITY COUNCILS*

As has been explained already, the city council has only such powers as have been given to it by the State through its constitution or legislature. Generally these are the absolute minimum necessary for the city to care for the matters pertaining to the locality. On a small scale the city council has many of the powers characteristic of Congress and the State legislature; for instance, taxation and the appropriation of funds, and the organization of its own departments and other agencies of government. Its power to make criminal law is confined to small offenses, or misdemeanors. The greater part of its legislation is concerned with the care and disposal of city property and the day-by-day operation of the city administration. The city council, like Congress, has enumerated powers, but its implied powers are few.

## *POWERS RELATING TO THE ADMINISTRATION*

Students of democratic institutions disagree in their estimate of the part legislatures play or ought to play with respect to the administrative arm of the government. It was seen that all grades of legislatures, from the national to the local, perform the task of organizing the administration by establishing the offices and defining their duties; that they levy taxes and appropriate funds to keep them in operation; and, finally, that they adopt and define the policies and define the tasks which the administration is obliged to carry out. Lindsay Rogers holds that the legislatures "super-

vise the administration"; while W. W. Willoughby uses the expression "direction, supervision, and control."[18] Of course, lawmaking and law-enforcing are necessary parts of every government and must go hand in hand; but in the more immediate sense the administration is directed and supervised by the chief executive (the President of the United States, the governor, or the mayor) or by the heads of departments and bureaus. However, legislatures perform some functions directly related to the administration which are important and worthy of note.

OBSERVATION AND CRITICISM · The great need for an extension of governmental power brought about by urbanization, by the new economy based on the machine and power, and by depression and war has thrown the primary responsibility for legislative programs on the chief executive. The legislative body substantially ratifies what the executive asks for. This is not to minimize its power and responsibility; the law must be passed before the executive can administer it. Furthermore, the legislature acts as a forum in which executive proposals are held up for analysis and criticism, with the result that public opinion becomes the arbiter as to what shall be done with the proposed law: whether it shall be amended, adopted, or rejected altogether. Members of Congress make their views known to the public by newspaper interview, radio address, or letters to their constituents. A President, governor, or mayor must gauge his requests for legislation according to the temper and views of the public at the moment. Present in every legislative body are men quick to take political advantage of unwise or ill-advised executive requests. The legislature is, in effect, a grand committee of the people sitting at the capital to observe the day-by-day operation of the government, criticize where criticism is due, and sound a popular alarm if dangers impend.

THE "QUESTION" IN THE BRITISH PARLIAMENT · The "question" was an effective means for the exertion of legislative control over administration in several of the countries of Europe.[19] It was first developed and most extensively used in Great Britain. There the heads of the administrative departments sit in Parliament, most of them in the House of Commons, placed face to face with the people's representatives, where questions may be fired at them regarding the affairs of their departments. Subject to certain guiding rules, every member of the House is entitled to put three questions for oral answer and as many as he may wish for written answer. It requires little imagination to appreciate the value of the device in keeping the administrative chiefs on the alert. Both question and answer are

[18]W. W. Willoughby, *Principles of Legislative Organization and Administration* (1934), p. 113.

[19]A. L. Lowell, *The Government of England* (1912), Vol. I, pp. 331–333. From 1900 to 1933 there were 281,000 questions submitted for oral answer and 80,000 for written answer. In the 1929–1930 session of Parliament 20,638 questions were asked and answered orally and 8000 were given written answers. (R. W. McCulloch, "Question Time in the British House of Commons," *American Political Science Review* (December, 1933), Vol. XXVII, pp. 971–977)

likely to be in the spotlight of publicity. A Secretary of the Interior who connived to hand over government oil lands to private interests or a Secretary of the Treasury who called off income-tax prosecutions for partisan reasons would look forward to the question period with anxiety and foreboding.

ADMINISTRATIVE HEADS IN THE LEGISLATURE · The success of the English parliamentary system in unifying the work of the legislative and administrative branches has led various American observers to advocate a change in that direction here.[20] This might be accomplished by the appointment of the President's cabinet from members of Congress, which would require a constitutional amendment; or by admitting cabinet members to seats on the floor of the House and Senate with permission to debate, which could be accomplished by law, provided the President co-operated. James A. Garfield, Woodrow Wilson, and Herbert Hoover, before they became President, were in favor of such an arrangement; and William Howard Taft while in that office. An able Senate committee in 1881 brought in a report and a bill to that end. The committee said that the advantages of the plan were so obvious and manifest as to make a detailed statement of them unnecessary, although bringing undercover executive influence on legislation into the open was pointed to as one of the more important.[21] Nevertheless, no Congress has shown a serious interest in the plan.

ARGUMENTS FOR AND AGAINST · Proponents of the plan have argued that it would afford an open-and-above-board method for bringing from the executive departments to Congress the information necessary to intelligent lawmaking. Such information would no longer come in driblets from chiefs of bureaus, chief clerks or other subordinates, but officially from the heads of departments. In the course of the consideration of a bill for the War Department, for instance, its head would be forced to explain the working of his department or to defend its acts. A daily question time might be set up which would be the means for explaining the work of the administration to Congress and the country and exposing it to the light of public opinion. The outcome would be a more efficient co-operation of Congress and the President and a greater responsibility of the administration to both Congress and the people.

Those who have opposed the plan dwell on its inconsistency with the Constitution's principle of the separation of powers. Robert Luce, for many years a member of Congress, took this point of view. "In the United States," he urged, "we desire and expect that officials and legislators shall reach independent conclusions, to be reconciled by conference and

[20]For a discussion of the topic cf. W. W. Willoughby, op. cit. pp. 185–195, and R. Luce, *Legislative Problems* (1935), pp. 327–331. Several such proposals have been made in Congress, the latest by Estes Kefauver of Tennessee, in the House of Representatives, November 12, 1943,

[21]R. Luce, op. cit. pp. 328, 329.

compromise as far as may be, with the judgment of the legislators to prevail in case of final disagreement. We reap the benefits of hostility."[22]

Another negative argument is that if opposite political parties control the Presidency and Congress, respectively, the contacts between cabinet members and Congressmen would degenerate into a purely partisan contest, with little chance for constructive work or co-operation.

The arguments for the plan in the States and cities are about the same. No State as yet has adopted or seriously considered it; but in a considerable number of cities governed by a mayor and council the mayor or heads of departments are authorized to appear in the council. Here it is particularly desirable because of the dominantly administrative character of the council's legislation, the greater part of which is drafted in the administrative department. The New York City charter of 1873 provided that heads of departments might sit and debate in the Common Council or Board of Aldermen, though without the privilege of voting; but this seems to have had small effect on the operation of the government.

## *LEGISLATIVE INVESTIGATIONS*

A function of Congress which assumed great prominence after 1925 was that of making investigations.[23] From 1789 to 1925 the total for the two houses of Congress had amounted to 285; but in the Seventy-third and the Seventy-fourth Congress alone (1933–1936) they numbered 165. Such matters as the defeat of General St. Clair by the Indians (1792), John Brown's raid, the purchase of Alaska, the conduct of President Andrew Johnson, the Crédit Mobilier scandal, the Hayes-Tilden disputed election, the Teapot Dome oil-leasing scandal, and the Townsend old-age pension plan called forth such investigations. The famous Dies Committee of the House of Representatives for Investigating Subversive Activities, created in 1938, is one of the best-known.

PURPOSES · Congressional investigations are fact-finding enterprises. Witnesses are called and testimony is taken. The hearings may be held at Washington or in any portion of the country where it is thought the facts may be more readily and completely obtained. One or more of three chief purposes may be served by the investigation. The primary one and that on which the courts based the investigative power is to secure the information necessary for intelligent legislation. M. N. McGeary found that this was the occasion for about one third of the investigations of the period of the first administration of F. D. Roosevelt, among which were those relating to the manufacture and sale of arms and munitions, safety at

[22] R. Luce, op. cit. p. 238.

[23] E. J. Eberling, *Congressional Investigations* (1928); M. E. Dimock, *Congressional Investigating Committees* (Johns Hopkins Studies in History and Political Science, Vol. XLVII, pp. 1–182, 1939).

sea, and the sale and distribution of dairy products in the United States.[24] A second primary purpose is the criticism and control of the administrative branch of the government. Investigations of this type are very numerous and cover almost all fields of administration. They offer the best means now available to Congress of controlling or purifying the administration other than the power of the purse. Inefficiency and dishonesty are brought to light; in the Coolidge administration, for example, investigation compelled the resignation of two members of the cabinet. The third and supposedly incidental purpose of the investigation is to inform public opinion on a given matter. A long-drawn-out investigation, with its train of witnesses and newspaper and radio coverage, is a prime method of keeping a matter before the public. Investigations often are designed to serve party ends or as instruments of social agitation. They may be carried on to maintain popular support for a legislative program; for instance, that of the La Follette committee of 1933 and later. The investigation of the motion-picture industry late in 1941 seems to have been for the purpose of rallying support for the isolationist point of view.

AN AMERICAN INSTITUTION · While the legislative investigation has been employed often and to good purpose in foreign governments, particularly the British, it has had its highest development in the United States. The reason is the constitutional separation of the legislative and executive powers. Congress must cross the line into the realm of the executive or else go out into the community in order to secure the information needed for its work. No qualified administrator sits with it from whom it may learn how the policies laid down by legislation have been executed or to what purposes the money appropriated has been spent. Lacking a means short of impeachment for bringing an erring administrator to account, Congress is left to the device of playing for public support by an exposure of the facts through investigation.

LIMITATIONS OF THE INVESTIGATIVE POWER · The great expansion of the investigative power of Congress in late years has raised the question of its limits. Witnesses have sometimes refused to appear or testify or submit papers. May Congress compel their attendance by punishing them for contempt? As early as 1821 the House of Representatives adjudged one John Anderson guilty of contempt for offering a bribe to the chairman of one of its committees; the Supreme Court upheld this action as a power necessary to preserve the House's dignity and integrity, but restricted the period of imprisonment to the end of the session of Congress.[25] Other decisions have sustained the power of Congress to compel testimony for investigations concerning the election of members and their qualifications for membership. Finally, the legality of investigations undertaken to aid

[24]M. N. McGeary, "Congressional Investigations during Franklin D. Roosevelt's First Term," *American Political Science Review* (August, 1937), Vol. XXXI, pp. 680–694.

[25]M. E. Dimock, op. cit. pp. 121–123; *Anderson* v. *Dunn*, 6 Wheaton, 204 (1821).

in framing legislation was broadly sustained. The misconduct of the office of Attorney-General during the administration of President Harding, particularly the failure of Secretary Harry Daugherty to prosecute persons involved in the Federal oil-lease scandals, was the occasion for a Senate investigation. The refusal of his brother Mally S. Daugherty to appear and bring certain papers brought forth a declaration of contempt on the part of the Senate. The Supreme Court of the United States declared, "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information, recourse must be had to others who possess it."[26] Therefore Congress must have power to compel the giving of the needed information, but it cannot go delving here and there into private affairs. Moreover, the investigation must be in aid of the legislative function. To expedite the investigative function, Congress has legislated from time to time to secure the aid of the courts.[27] Contumacy is declared a misdemeanor and may be cited to the courts for prosecution and punishment in addition to that given by the houses of Congress.

INVESTIGATIONS AND PERSONAL LIBERTY · Many investigations have been animated by partisan considerations, and some by the desire for personal revenge. Since the committees are not bound by the usual safeguards of fairness common to judicial bodies, a person investigated may be subjected to a flaying before the public with little chance for defense. He may be denied legal counsel; he may not summon witnesses; and hearsay evidence is not banned. The committee may serve virtually as a "gossip broadcasting station." Committees on mere suspicion have made extensive searches through the files of telegraph companies, contrary to the spirit of the "search and seizure" guarantee. For purposes of political advantage, persons investigated have been plied with questions relating to their personal or business affairs which had little reference to any pending legislation. Dr. Townsend, whose old-age pension scheme had achieved a high degree of popularity, was subjected to an investigation, attended by great publicity, which seemed to mark the turn in the tide of his political fortunes. After refusing to answer a certain question he strode from the committee room and later was prosecuted and punished for contempt. Other criticisms are that the hearings are not necessarily speedy or public; that the witness or accused is not free to give all the testimony or information which he might desire to give; and that he may be compelled to give evidence which later may be used against him in a criminal prosecution.

[26] *Megrain* v. *Daugherty*, 273 U. S. 135 (1927).
[27] *Rev. Stat.*, sects. 101, 104, par. 859.

## *IMPEACHMENT AND TRIAL OF CIVIL OFFICIALS*

The chief judicial function of American legislative bodies is that of the prosecution and trial of civil officials. Possessed by all the State legislatures and Congress, it was an inheritance from British practice. There the House of Commons was traditionally referred to as the "grand inquest of the nation." In other words, it served as a grand jury on a national scale to scrutinize the work of the administrative officials and lodge charges against them if it detected wrong-doing. In the earlier days, when powerful individuals might escape punishment at the hands of an ordinary court, accusation and trial by a body with the prestige of the national legislature was a prudent device. The crimes which the Parliament was particularly designed to detect and punish were those of a political character, affecting the security and efficient working of the government, rather than the ordinary crimes known to the common law. For instance, the last such case in England was the impeachment of Warren Hastings for maladministration in the government of India. As to impeachment the State legislatures follow Congress closely in method and procedure as well as in purpose.

PARTS PLAYED BY HOUSE AND SENATE · The Constitution divides the impeachment process between the two houses of Congress.[28] The House of Representatives has the "sole power of impeachment"; the Senate, the "sole power to try all impeachments." This means that the House acts as a grand jury to bring the indictment and also manages the prosecution, while the Senate sits as a court to try the case and give the judgment. Those subject to impeachment are "all civil officers of the United States," including the President and Vice-President. Of this total of many thousands no one of a lesser position than President of the United States, Cabinet member, or Federal judge has actually been impeached. Lesser officials who misbehave are much more easily brought to account through removal by a superior officer than through the cumbersome process of impeachment. Military and naval officers are outside the scope of the impeaching power, as are members of Congress. In 1798, articles of impeachment were brought by the House of Representatives against Senator William Blount of Tennessee; but when the case came up for trial, the Senate dismissed it on the ground that a member of that body was not a "civil officer of the United States" and so not subject to impeachment.

IMPEACHMENT · The case against a civil officer may begin with accusations by any member from the floor of the House, or with charges preferred in a petition by citizens or a State legislature or in a message from the President.[29] These, if considered serious, are referred to a standing com-

[28] *United States Constitution*, Art. I, sects. 2, 3; Art. II, sect. 4.

[29] A. Simpson, *A Treatise on Federal Impeachments* (1917); A. Alexander, *History and Procedure of the House of Representatives* (1916), pp. 331–352; *Extracts from the Journal of the United States Senate in All Cases of Impeachment, 1798–1904* (1912), 62d Cong., 2d Sess., Senate Document No. 876.

mittee for investigation. Whatever the committee's report, the final decision on whether to impeach or not is made by the House after debate. The articles of impeachment are drawn up by a committee in the form of a number of specific charges. Those against President Andrew Johnson numbered thirty.

Then the Senate is notified that such articles have been voted and is asked to set a date for their reception. At the appointed time a committee of the House appears at the bar of the Senate, and its chairman reads the articles. Known as the "managers for the House," this committee is in charge of the prosecution throughout the trial. As in an ordinary court the accused person is served with a copy of the charges and required to file a reply.

THE TRIAL · The Senate acts as a judicial body in trying the case, and its members act as judges. For the first five trials it was referred to in the minutes as the "High Court of Impeachment"; but for the trial of President Johnson this was changed to "the Senate sitting for trial of impeachment," in order that the Senate might be free from the usual practices of courts which might hamper it in the trial of its bitter enemy. The new terminology has been retained, but the judicial character of the Senate is not disputed. In the trial of the President of the United States the Chief Justice of the Supreme Court presides for the purpose of ensuring fairness and ability in its conduct. In all other cases the Vice-President of the United States or the president pro tempore of the Senate acts as presiding judge. Members of the Senate are judges, not jurors, and now would comprise an unwieldy court of ninety-six members. During the trial, the presiding officer makes rulings in the first instance on points of law, but the Senate may retain full power to reverse any of his rulings. In one of the most bitterly contested impeachment trials, that of Judge John Pickering in 1804, Vice-President Aaron Burr presided, and all the dignity of a formal court was preserved, with the Senators seated to his right and left on a bench covered with scarlet cloth. Commencing with the trial of Andrew Johnson, the practice has been for the Senators to occupy their regular seats. The person being tried is entitled to all the safeguards and privileges afforded in the ordinary court, including the aid of counsel, the subpoenaing of witnesses, and the cross-examination of witnesses for the prosecution. The House of Representatives, as the impeaching and prosecuting body, has like privileges and may employ special attorneys for the prosecution or leave it to those appointed as managers. The sergeant at arms acts as the executive officer of the court and is authorized to call in such assistance as may be necessary.

*The Judgment and Penalty* · The Constitution provides that judgment, in case the person impeached is found guilty, shall not extend further than removal from office and disqualification thereafter to hold any office under the United States. If he has committed a crime under Federal or

State laws, he may be indicted and tried and punished for that in the ordinary courts. A two-thirds vote of all members of the Senate present is necessary to sustain a conviction. In the trial of President Andrew Johnson only one vote was lacking to make the two-thirds majority; furthermore, the president pro tempore, Ben Wade, who would have become acting President in case of conviction, voted in the affirmative. The roll is called for a vote on each article of the bill of impeachment, and conviction on one count is sufficient for removal from office. The further penalty of disqualification from office-holding in the future requires a separate vote. Persons convicted may not be pardoned by the President of the United States.

USE OF THE IMPEACHMENT PROCESS · Only in twelve cases have impeachments been voted by the House of Representatives, nine of them being directed against members of the judiciary. Four judges have been removed from office in this way. In the latest case, Judge Manton of New York resigned before the trial opened and was not prosecuted further. There are several reasons for the disuse of the impeachment process. The Senate has grown too large to make an effective trying body, and the drain on its time made by a long-drawn-out trial is excessive. Furthermore, the remedy for misbehaving administrative officers is in the hands of their superiors. Two members of the hold-over Harding cabinet resigned under pressure during the Coolidge administration. Officers below cabinet rank may be dismissed by their superiors for sufficient cause. Other than for the trial and removal of the President the chief use for the impeachment process seems to be against the members of the Federal judiciary. Appointed for life, they are subject to no superior capable of disciplining them. Some persons now argue that they might be removed from office for misbehavior upon trial in another Federal court. A bill introduced in the House of Representatives set up a procedure, not applicable to the Supreme Court, for that purpose.[30] Upon notification by the House of Representatives that in their opinion the judge has been guilty of misbehavior, the Chief Justice would be authorized to designate three judges of the Circuit Court of Appeals before whom the Attorney-General should institute a prosecution. Upon conviction the judge should be removed from office. Should an occasion for the removal of a President of the United States unhappily ever arise, impeachment by the House and trial by the Senate as the people's direct representatives afford a means possessing the dignity suitable to such a cause.

USE IN THE STATES · The impeachment method of removing State governors has been used in remarkably few instances. The more recent cases are those of Governor Sulzer of New York in 1913, Governor Ferguson of Texas in 1917, and Governors Walton and Johnson of Oklahoma in

[30]H. R. 9160, by Sumners of Texas, March 29, 1940, 76th Cong., 1st Sess., *Digest of Public General Bills*, p. 116.

1923 and 1929 respectively. Impeachment proceedings were commenced against Huey P. Long of Louisiana in 1929 and T. H. Moodie of North Dakota in 1935, but were dropped in both instances, in the latter because of a ruling of the State supreme court that he was not a citizen of that State and so not qualified to hold the office anyway. The impeachment of Governor Sulzer was undertaken on the orders of Boss Murphy of Tammany Hall because of a schism in the Democratic ranks. The Oklahoma impeachments seem chiefly attributable to the forthright customs of that frontier State and the bitterness of the party divisions.[31] In the first twenty-three years of its statehood thirteen impeachment messages were sent from the house to the senate, and only one governor had not been ordered investigated by the house. State impeachments against officers other than the governor are extremely rare; for in most cases there is adequate provision for ouster proceedings in the regular courts, and in about a dozen there is the means of removal by popular recall.

## *OTHER ADMINISTRATIVE POWERS*

The legislatures possess a few miscellaneous powers of an administrative nature. They usually retain the supervision of the buildings and grounds where they meet. Libraries, restaurants, printing establishments, and other facilities auxiliary to the lawmaking function may remain directly under their control. The United States Senate is associated with the President in the making of certain appointments and the approval of treaties, and the upper house of most State assemblies is associated with the governor in the making of appointments. These functions will be considered in more detail in connection with those aspects of administration.

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## CHAPTER XIX

# *National Legislative Leadership and Organization*

The dominant part played by the political parties in all phases of the American governmental system up to this point is entirely clear. The parties raise issues, nominate candidates, and conduct electoral campaigns. They capture the seats of the representative assemblies and fill the chief executive offices. The majority party potentially is in a position to write the laws of the land and to say how they shall be enforced. The people have given it a mandate to rule. How effectively does it fulfill its mission? In what manner has it shaped the organization of the Senate and the House of Representatives to suit its purposes? What methods of procedure have been devised for carrying ideas formulated in the electoral campaigns through various stages of processing until they become laws? Most important of all, what system of leadership has been established for setting up a program of legislation and carrying it through to fulfillment?

THE INSEPARABILITY OF LEGISLATION AND ADMINISTRATION · It requires but little reflection to understand that whatever may have been the intention of our Constitution's architects, the tasks of legislation and administration may not be performed satisfactorily by bodies of men isolated from each other. One firmly established principle of American law and practice is that the executive can assume no duties which have not been given him by law. Had F. D. Roosevelt, for instance, been compelled to operate his office on the basis of the Presidential duties and powers which he inherited, his administration would have differed little from the one which preceded him. But Congress immediately was called into session and asked to confer on the President certain powers in furtherance of formulated policies. In message after message it was asked to authorize the opening of the banks, extend relief to home-owners, deal with unemployment, alter the currency system, and so on. The chief executive is dependent upon the legislature for the authorization of new policies, the creation of new offices to carry them out, and the gathering and appropriation of funds to meet their cost. One of the most important problems of American government is to establish the necessary co-operation between President and Congress. How Great Britain, our sole surviving competitor among the large states in democratic practices, synchronizes the work of legislation and administration may be suggestive.

THE UNION OF LEGISLATION AND ADMINISTRATION IN GREAT BRITAIN · The British government actually is operated by a committee of Parliament, chiefly of the House of Commons, called the cabinet, whose members man-

age the legislative program and individually serve as heads of the administrative departments.[1] The leadership is centered in the prime minister, whom we may conveniently designate as both chief executive and chief legislator. All important legislation of a general or public character originates with the cabinet; very little is left to the initiative of the individual members. The control of the time and the procedure of the House of Commons is in the hands of the Prime Minister. Government business has the right of way and absorbs all but a relatively few hours of the working time of a parliamentary session. The prime minister is responsible for both the bills that are introduced and those that are not. The more important ones are not even referred to committees but are debated in committee of the whole house. Even less than formerly has the individual member today the power to carry amendments; but if the debate has shown defects in a bill, the minister in charge of it may voluntarily accept the needed changes. It is the fashion to say that the cabinet legislates with the advice and consent of the House, but just as truly does it execute the laws subject to the constant supervision and criticism of the House. The prime minister and his colleagues formulate a policy, initiate the bills needed to fulfill it, submit them for criticism, and adopt such changes as may seem desirable; but otherwise their work must be accepted or rejected by the House as a whole. Failure to pass a bill offered by a minister, or its amendment contrary to his will, or the passage of a vote of censure means a change of administration or the dissolution of Parliament and a new election. It is clear that the conflict between executive and legislature, characteristic of the American system, cannot exist.

THE AMERICAN PLAN · It is probable that the question of who should plan and carry through the annual legislative program of Congress was not visualized by the draftsmen of the Constitution. After all, the two political parties of the time, if they can be dignified as such, were close to agreement on the principle of an inactive government or one of few powers. The subjects which occupied the attention of Congress until recent times were few in number: taxation, the tariff, the currency, commerce, slavery, the organization of the territories, the army and the navy, and the public lands. The framers of the Constitution, moreover, were closely tied to the principle of separation of powers and checks and balances, as shown by the debates in the Philadelphia convention and the *Federalist* papers. The conception of legislative supremacy was dominant: it doubtless was believed that the two houses of Congress jointly would be able satisfactorily to visualize the legislative needs of the day and enact them into law, with such aid as the President might give in submitting data and making recommendations for the administrative departments. Actually, except for periods of emergency or war, the framers' scheme for the diffusion of legislative responsibility worked as had been expected. We can see now

[1] A. L. Lowell, *The Government of England* (1912), Vol. I, chaps. iii, xvii, xviii.

that the Constitution leaves the way wide open for separate leadership in the Senate, the House, and the executive branch, and handicaps any one of the three if it attempts to assert a supremacy over the other two. Personalities and the temper of the times have determined which should stand out above the others. A strong Speaker like Henry Clay, Thomas Reed, or Joseph Cannon may place the House at the top; an able coterie of Senators who have long been in service, as in the decades preceding the Civil War and during the Harding and Coolidge administrations, may give the Senate pre-eminence; while a forceful incumbent of the White House, particularly in a time of stress, may find it possible to assign Congress its tasks. No President has been so strong as to control a legislative program in any such measure as the British prime minister, nor has any Congress been able entirely to ignore the President in making its annual output. The main leadership has been in one place at one time and in another at others.[2]

THE LEGISLATIVE LEADERSHIP OF ABRAHAM LINCOLN · Lincoln's domination of Congress is all the more remarkable because it came between the two weak administrations of Buchanan and Johnson. The cause was the same as with Woodrow Wilson and F. D. Roosevelt, an emergency situation. Lincoln, however, did not succeed so well as they in keeping within the lines of legality, perhaps because there were in later times more settled legal theories of the powers of the President.[3] Hostilities broke out in the first April of Lincoln's administration, but he did not call Congress together until July 4. Meanwhile he had increased the regular army and navy, called for a volunteer army, directed the Secretary of the Treasury to pay over two million dollars to certain private individuals to purchase war supplies, and suspended the privilege of the writ of habeas corpus. Lincoln told Congress when it assembled, "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and public necessity, trusting then as now, that Congress would readily ratify them."[4] This the Congress promptly proceeded to do, and thereafter he had little difficulty in getting the legislation he desired except on his reconstruction policy. Congress made large theoretical claims of power, but was no match for the President. It appointed in the early months a Joint Committee on the Conduct of the War, consisting of three Senators and four Representatives. This body made many investigations, interfered with military operations, and in general served to undermine military discipline. To its credit, however, was the hastened resignation of Simon Cameron as Secretary of War and the appointment of the able Edwin M. Stanton in his place.

[2]W. E. Binkley, *The Powers of the President* (1937), chaps. x–xiv; E. S. Corwin, *The President: Office and Powers* (1940), chap. vii; H. Laski, *The American Presidency: An Interpretation* (1940), chap. iii.

[3]J. G. Randall, *Constitutional Problems under Lincoln* (1926), chap. xx.

[4]J. D. Richardson, *Messages and Papers of the Presidents*, Vol. VI, p. 24 (July 4, 1861).

THE VIEWS OF WOODROW WILSON · Whatever the destiny of Presidential leadership in national legislation may be, the name of Woodrow Wilson will always be prominently associated with it. As a scholar he was the first to see the problem of national legislative leadership in its entirety as it existed at his time, to point out the necessity for a new role for the President, and, finally, to inaugurate a new system and play the leading part himself. It is true that Theodore Roosevelt, who talked much of "my policies," had captured the imagination of the American people and taken a part in legislation not matched since Lincoln; but his was more a gallant warfare with the enemy, which kept the public enthralled but held out no prospect of a permanent change in the legislative function of the President. Woodrow Wilson had become interested in the form of the national government while still in college and embodied his conclusions in an essay called *Cabinet Government in the United States*. Later this was matured and was published in 1885 as a volume entitled *Congressional Government*.[5] As the title suggests, Wilson had concluded that Congress had come to be the supreme organ of the government and the President a clerical officer to carry out its orders. But government by Congress was not a unified, responsible thing; it was, rather, a "government by the chairmen of the Standing Committees of Congress," who together did not compose the associated leaders of Congress but "the dissociated heads of forty-eight 'little legislatures'."[6] "We have in this country, therefore, no real leadership," he concluded, "because no man is allowed to direct the course of Congress, and there is no way of governing the country save through Congress, which is supreme."[7] "Nobody stands sponsor for the policy of the government. A dozen men originate it; a dozen compromises twist and alter it; a dozen officers whose names are scarcely known outside of Washington put it into execution."

These views were doubtless influenced by the Presidents of that period. The office had fallen to its lowest point under Andrew Johnson; and Grant, Hayes, Garfield, and Arthur all were constitutional Presidents who had the normal amount of influence on legislation as partners with Congress. But when Wilson next came to express himself on the question in 1908, a vigorous administration had intervened. Without changing his basic conclusions on the system, he now saw greater possibilities in the Presidency.

He cannot escape being the leader of his party except by incapacity and lack of personal force, because he is at once the choice of the party and of the nation. He is the party nominee and the only party nominee for whom the whole nation votes. Members of the House and Senate are representatives of localities, are voted for only by sections of voters, or by local bodies of electors like the members

[5]W. Wilson, *Congressional Government* (1885), chap v.
[6]Ibid. pp. 102, 103.
[7]Ibid. p. 205.

of a State legislature. There is no national party choice except that of President. . . . He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.[8]

WILSON AS LEGISLATIVE LEADER · Within a half dozen years after expressing these views Wilson was in a position to test their soundness. Even before inauguration he had written to a member of Congress, "He [the President] must be Prime Minister, as much concerned with the guidance of legislation as with just and orderly execution of law; and he is the spokesman of the nation in everything, even the most momentous and most delicate dealings of the Government in foreign affairs."[9] Most of the methods which Wilson employed to further his position as legislative leader had been employed before, but not with so clear-cut a plan. An innovation was his appearance before a joint session of the two houses to deliver a message, which no President had done since John Adams; it was well timed and well designed to catch the imagination of the people and dramatize the new union between executive and legislature. His messages were short, well written, and to the point, in contrast to the conventional ones of great length and many details, which the members of Congress probably had not read in full. He took an important part in shaping the extensive legislative program of his first Congress, often appeared at the President's room in the Capitol, or received delegations of members of Congress at the White House. The party caucus system for the approval of legislation was revived and strengthened. He soon appeared before the two houses in behalf of a particular piece of legislation, the Federal Reserve System bill. "I have come to you as the head of the Government, and the responsible leader of the party in power, to urge action now, while there is time to serve the country deliberately in the clear air of common counsel," he told them.[10] He was able to smother an attempt to set up a Congressional committee on the war. During the Congressional campaigns of 1918, midway in his second quadrennium, with the war still in progress in Europe, he asked the nation to elect another Democratic Congress to back his administration. The request was entirely logical and consistent with the system of responsible government; but it was resented bitterly by Republicans, and even by some Democrats jealous of the independence of Congress. In the reaction the Democrats lost control of both houses, and Presidential leadership came to an end. The war was to be brought to a conclusion and the treaty of peace negotiated by a divided government. It was suggested in some quarters that to be consistent both the President and the Vice-President should immediately resign, after having

[8]W. Wilson, *Constitutional Government in the United States* (1908), pp. 67, 68.
[9]Letter to A. Mitchell Palmer, quoted in W. E. Binkley, op. cit. p. 226.
[10]W. E. Binkley, op. cit p. 233.

appointed some leading Republican (perhaps the party candidate in the last campaign) as Secretary of State, who then would be eligible to take charge of the administration as acting President. Such a course seemed consistent with Wilson's conception of his office; but there was still the question whether the people of the country would have turned out the Democratic Congress if they had known that doing so would be taken as a vote for the termination of the President's office. No one knows, but the probabilities are the other way. Accustomed to struggles between the President and Congress, they doubtless wished to register a mild protest against the increased powers of the former, but no more.

THE LEGISLATIVE LEADERSHIP OF F. D. ROOSEVELT · Two emergencies furnished the setting for another period of Presidential legislative leadership, the depression of 1929 and the Second World War. Woodrow Wilson had furnished the pattern which it was plain that Roosevelt would adopt in 1933. At his first inauguration he said:

> I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption. But in the event that the Congress shall fail to take one of these courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.[11]

The meaning was an adequate program devised by the President, one by Congress which he approved, or government by Presidential decree.

F. D. Roosevelt's first term showed a legislative program far greater in the number of measures vitally affecting all the people than had any similar period. In less than four months eleven major bills proposed directly by the President became law, and the only important one passed in that session which did not originate in the White House was the Glass-Steagall Banking Act. The bills were drawn by a medley of the President's official and unofficial advisers: members of the administrative departments, members of Congress, and people holding no office.[12] Short messages urging the need of a piece of legislation were sent to Congress accompanied by the bill, which was introduced by a friend of the administration. Members of Congress were invited to the White House for conferences on the

[11]F. D. Roosevelt, "First Inaugural Address, March 4, 1933," *Public Papers and Addresses* (1938–1941), Vol. II, p. 15.

[12]R. Moley, *After Seven Years* (1939), chap. vi; E. P. Herring, "First Session of the Seventy-third Congress, March 9, 1933, to June 16, 1933," *American Political Science Review*, Vol. XXVIII, pp. 65–83.

proposals, where they might meet interested administrative officials, such as the director of the budget, the chairman of the Interstate Commerce Commission, the majority and minority floor leaders of the two houses, or the chairman of the standing committees which would handle the measures. If strong opposition threatened in Congress, the President used the radio to appeal to the nation. The leadership and party organization of the two houses were manned by persons close to the President. In a contest for the position of floor leader in the Senate between Senators Pat Harrison and Alben W. Barkley the President intervened in favor of the latter, who won by one vote. In the primary campaigns of 1938 he intervened in an effort to defeat half a dozen or more Congressmen who had not shown sufficient loyalty; but the results, as with Wilson twenty years earlier, were disastrous, for his candidate won in only one of the contests. The President in his early years had every reason to be satisfied with the power over legislation which he had wielded. As he told the nation in a "Fireside Chat,"

> There was no actual surrender of power. Congress still retained its constitutional authority, and no one has the slightest desire to change the balance of these powers. The function of Congress is to decide what has to be done and to select the appropriate agency to carry out its will. To this policy it has strictly adhered. The only thing that has been happening has been to designate the President as the agency to carry out certain of the purposes of the Congress. This was constitutional and in keeping with the past American tradition.[13]

## *THE TOOLS OF THE PRESIDENT'S LEGISLATIVE POWER*

The Constitution furnishes the President with several means of exercising power over legislation. Custom and usage have added several more. These will be briefly considered.

MESSAGE TO CONGRESS · "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[14] The mild phrasing of this passage has very little suggestion of an obligation to shape a session's legislative program. President Washington interpreted it to require an annual message at the opening of the regular session of Congress. Like all his successors, he used other short messages to lay special matters before the houses. Washington and Adams throughout delivered the annual message before Congress in person, after which each house waited on the President and a reply was read by the presiding officer. Jefferson sent his first message by a clerk in 1801, to which no reply from the houses was expected or received; and this arrangement remained

[13] May 7, 1933. F. D. Roosevelt, op. cit. Vol. II, p. 160.

[14] *United States Constitution*, Art. II, sect. 3. For an examination of the general problem cf. E. P. Herring, *Presidential Leadership* (1940).

until another Democrat, Woodrow Wilson, in 1913 appeared before the two houses in person, an arrangement which has been followed by all Presidents since. The messages of the earlier Presidents were short and devoted to matters of particular interest; later they lengthened and usually included factual statements of the affairs of the various administrative departments. Sometimes they have served to announce an important Presidential policy and bid for popular support. Grover Cleveland broke precedent in 1887 by devoting an entire annual message to the tariff question.[15] The messages of recent years have been shortened and their content greatly improved, since they are written to be listened to not only by Congress but, through the radio, by the entire people of the United States.

SPECIAL SESSIONS AND ADJOURNMENT OF CONGRESS · "He may, on extraordinary occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."[16] The First Congress had been called into session by an act of the Congress of the old Confederation, and continued until it had authorized a skeleton administration for the new Federal government. The President customarily explains in the call the purpose of the meeting; but, unlike the governors in many of the States, he may not confine the deliberations to that particular matter. The first special session was called by President John Adams in May, 1797, to take measures to meet French hostility, but special sessions were infrequent until after the Civil War.[17] Lincoln's extraordinary failure to call a special session until the war had been under way for three months has been noted. Wilson's call for a special session immediately after his inauguration, his submission of a full bill of work, and his insistence that Congress remain throughout the hot summer months until the work should be finished were characteristic of his general plan of operation. Although the President may set a day of adjournment if the two houses fail to agree on adjournment (something which has never yet happened), he may not, as in parliamentary countries, dissolve the legislature or send it home.

THE PATRONAGE · The civil offices within the dispensation of the President are of two kinds: those which he needs to build his own administrative machine, which of course include the heads and assistant heads of departments and members of the foreign service, and those which are vital links in the local party machines.[18] Before the advent of the New Deal, the Presidential appointments, numbering about 12,000, were largely dispensed in the Senate on the principle of "courtesy" to the members from each State. By far the greater number had been promised by Senators to

[15] J. D. Richardson, op. cit. Vol. VIII, p. 341.
[16] *United States Constitution*, Art. II, sect. 3.
[17] J. D. Richardson, op. cit. Vol. I, p. 232.
[18] C. R. Fish, *The Civil Service and the Patronage* (1905).

the local bosses who controlled the voting precincts. The President's refusal to honor a Senator's recommendations therefore greatly weakens the Senator on his home ground. Since local leaders will not long support a Senator who stands so poorly with the President, the mandate of Senatorial courtesy is very rarely challenged. Unquestionably the patronage greatly aids the President in his effort to control legislation. No President since Andrew Jackson has failed to use it. Lincoln used it very liberally to build up a loyal following; it was an effective implement in the hands of the first Roosevelt; and even the mild Taft withdrew patronage from the "insurgent" Congressmen involved in the revolt of 1910–1911. F. D. Roosevelt's handling of patronage was masterful, with the aid of Postmaster-General James A. Farley, ex officio Democratic chairman of the national and the New York State committee. One part of the strategy of his first year was to fill only the more necessary offices and to keep the members of Congress in a state of "loyal expectancy." The support of the administration bills was frankly stated as the price of the desired appointments.[19] Farley's confidence in the efficacy of patronage was shown in his remark, during the bitter debate on the President's Supreme Court reorganization bill, that when the talking was done and the smoke had cleared away, the roll would be called and the bill would pass.

THE VETO · The framers of the Constitution were generally agreed that the acts of Congress should be subject to veto.[20] The Virginia Plan had proposed a council of revision composed of members of the Federal judiciary associated with the President, the power to extend to State as well as national legislation. Hamilton characteristically had favored an absolute veto lodged in the President. It had been vested in the governor in all thirteen colonies and before that in the king of Great Britain, who had not exercised it since the time of Queen Anne.

The veto requirements of the Constitution are as follows:[21] All bills and every order, resolution, or vote for which the concurrence of both houses is necessary, except on a question of adjournment, must be presented to the President of the United States. He then has the choice of four lines of action: (1) He may sign it, in which case it becomes law from the moment of his approval unless otherwise specified in the act. (2) He may return it to the house in which it originated, with a message setting forth his objections. Here the bill is reconsidered and a vote taken on the question "Shall House Bill No. —— notwithstanding the veto of the President be passed?" This requires a two-thirds vote of the members present in both houses for approval. (3) He may keep the bill ten days (Sundays excepted) without taking action, in which case it becomes law without his signature, unless Congress adjourns within this period of time. (4) His retention of the

[19]E. P. Herring, *American Political Science Review* (February, 1934), Vol. XXVIII, p. 82.
[20]E. C. Mason, *The Veto Power* (1890).
[21]*United States Constitution*, Art. I, sect. 7.

bill during the last ten days of the session is called the "pocket veto," to distinguish it from the veto with message employed during the rest of the session.[22]

Custom and judicial decisions have combined to smooth the working of these provisions.[23] Until 1920 it had been thought that the President could not sign a bill unless the two houses were in session at the time. The President's appearance at the Capitol at midnight for that purpose was the traditional symbol of the end of the session. However, following a ruling of his Attorney-General, President Wilson in 1920 signed several bills after adjournment, and the validity of the action was upheld by the Supreme Court in a unanimous opinion. The ten-day period within which the President must sign is reckoned from the time the bill arrives at his desk, which may be at the White House, on board a steamship, or in a foreign country, as with Wilson in 1918 and 1919. After some years of inconvenience and confusion it also was agreed that only those acts or votes of the two houses which have the force of law require the President's signature; this excepts concurrent resolutions dealing with matters of internal house organization or the expression of sentiments on questions of the day. Joint resolutions proposing constitutional amendments do not require the signature of the President, on the theory that their passage is a constituent, not a legislative, function.

THEORY OF THE VETO · Hamilton gave two chief reasons for the inclusion of the veto in the Constitution: "The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself [the checks-and-balances idea]; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design," that is to say, to strengthen the checks-and-balances system and to better legislation.[24] The earlier Presidents did not accept so liberal an interpretation. Washington's two vetoes were on the grounds of constitutionality and of bad workmanship in drawing the law. Jefferson thought that out of "a just respect for the wisdom of the legislature" the veto should be confined to constitutional grounds. Andrew Jackson was the first boldly to base his vetoes on grounds of expediency, to place his judgment of the merits of the bill above that of Congress. President Polk, in his message of 1848, justified the practice of Jackson: "The President represents in the executive department the whole people of the United States, as each member of the legislative department repre-

[22]President F. D. Roosevelt, at the close of the 73d Congress, in 1934, sent to the Senate and the press a statement explaining his pocket vetoes of fifty-three bills, explaining that he felt an obligation to take positive action on them. R. Luce, *Legislative Problems*, p. 179.

[23]*Edwards* v. *United States*, 286 U. S. 482 (1932); L. Rogers, "The Power of the President to Sign Bills after Adjournment," *Yale Law Journal* (November, 1920), Vol. XXX, pp. 1–22; K. A. Towle, "The Presidential Veto since 1889," *American Political Science Review*, (February, 1937), Vol. XXXI, pp. 51–55; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899).

[24]*The Federalist* (Lodge ed.), No. LXIX.

sents portions of them." Jackson's action and Polk's theory received general acceptance.[25] The Presidency had won another important tool in the struggle for legislative leadership.

EXTENT OF USE · Two careful studies of the use of the Presidential veto have been made which together cover the one hundred and forty-five years from the beginning of Washington's administration to June, 1934, of the F. D. Roosevelt administration.[26] The total for direct vetoes by message is 652. The number, however, gives a false impression of the proclivity of Presidents to wield the knife. Only 52 were made down to the time of Andrew Jackson, when his struggle with Congress was the occasion for the unprecedented number of 21. Grant's 43 direct vetoes and Grover Cleveland's 343 (in both cases chiefly private pension and "relief" bills) swelled the total to an unrepresentative number. Six Presidents, Jefferson, the two Adamses, Van Buren, Taylor, and Fillmore, made no vetoes. F. D. Roosevelt, despite his firm control over Congress, had vetoed 120 measures up to November, 1937.

The veto and the threat of its use are unquestionably powerful weapons in the hands of the President. It is equivalent today in terms of numbers to fifteen Senators and seventy-two Representatives; but that has never been the true measure of its force, for any use of the veto against a Congress under the control of the President's party signifies a break in party solidarity which few members care to hazard. The 33 direct vetoes of Woodrow Wilson and the repassage of bills over them in six cases indicate the imperfections of his attempt at responsible legislative leadership. In only 51 of the 652 vetoes did Congress succeed in finding the requisite majorities to repass the bills, which again is an exaggeration of the picture, for fifteen of these occurred during the four-year contest between Congress and Andrew Johnson. Only two of the 301 direct vetoes of Grover Cleveland's first term, one of Theodore Roosevelt's 41, and one of Taft's 30 were upset. In fact, in only 40 cases of the 235 from 1889 to 1934 was an attempt made to override the veto by a vote.

The great increase in the number of vetoes is due chiefly to the greater output of Congress and the extension of its legislation into fields hitherto left to the States. It is probably true that party strategy is not entirely absent from some of the instances in which the veto is countered by a reversal in Congress. The public is pleased by the President's courageous devotion to national interests, while the Congressmen gratify local pressure groups by repassing the bills. The veto in a considerable number of cases

[25]R. Luce, op. cit. chap v.

[26]K. A. Towle, "The Presidential Veto since 1889," *American Political Science Review* (February, 1937), Vol. XXXI, p. 51; G. C. Robinson, "The Veto Record of Franklin D. Roosevelt," ibid. (February, 1942), Vol. XXXVI, p. 75; E. C. Mason, op. cit. (1890). The total of all pocket vetoes was placed at 308, but for the period 1789 to 1889 included only those later announced by message.

has had a marked effect on important policies. The creation of a national banking system was long postponed by the vetoes of Jackson and Tyler;[27] Hayes's veto of the Chinese Exclusion Act, which had been passed in derogation of a treaty signed with that nation, saved the national good faith; and Grover Cleveland's vetoes checked fraudulent and extravagant pension policies. Other instances were the joint resolution declaring peace with Germany, vetoed by Wilson; the McNary-Haugen agricultural-surplus bill, vetoed by Coolidge; and the Philippine Independence Act, vetoed by Hoover. Exact measurement of the effect of the veto on the President's legislative leadership is impossible, but it is plain that without it his position would be greatly weakened.

PARTY LEADERSHIP · The most striking difference between the Presidency in 1945 and the blueprint drawn by the framers in 1787 is not the increase in its powers wrought by law, which is great, but the fact that today its incumbent is ex officio the big chief of a national voters' organization which permeates every precinct of the wide land and wields the scepter of power. "Not the authority of Congress, not the leadership of the President, but the discipline and zest of parties, has held us together, has made it possible for us to form and to carry out national programs," wrote Woodrow Wilson.[28] It is the combination of the two positions, those of constitutional President and of party chieftain, which gives the true measure of the office. The picture of the President's address by radio to the party faithful gathered at the elaborately staged Jackson Day dinners from coast to coast is a companion piece to that of his appearance before the brilliant assemblies of the two houses of Congress and the highest civil, judicial, military, and diplomatic officers.

To the President come the party men from every State of the Union as seekers after loaves and fishes, or merely a few words of encouragement which may be repeated back home. His intervention is sometimes asked in local party contests. At election time he is besought to make an appearance in the city or district to help turn the tide against the rival party. To him as to a feudal baron are brought schisms among the party chieftains. Some of these he may decide himself, others he may turn over to the Postmaster-General or the national committee, and for still others he may declare a hands-off policy. No matter how great the emergency, whether of depression or of war, he does not neglect this aspect of party chieftainship.

Not only is the President the party head in the sense of punishing and rewarding, resolving quarrels and giving counsel, but he must also devise or choose its broad policies and proclaim them to the nation. Intricate concepts dealing with financing and banking, foreign affairs, or the relation of government to business, commerce, and labor must be stated in simple

[27] E. C. Mason, op. cit. p. 133.

[28] W. Wilson, *Constitutional Government in the United States*, p. 218.

terms so that they can be handed down to the humblest precinct workers as articles of orthodox party faith. No President ever stood out as an effective party leader who failed to grasp the human problems of his day and to state them on a high plane. The general strategy of the party warfare also is for the President's choosing. He studies the terrain and decides on the objectives. Jefferson effectively placed the label of "monarchist" on the leaders of the opposition, most of whom were his old comrades at arms in the late Revolution. Jackson and both the Roosevelts were adepts at drawing the battle line between the righteous and the enemies of the Republic.

NATIONAL LEADER AND SPOKESMAN · Outstanding success as his party's leader broadens until the President is a sort of national exemplar as well as spokesman of the people generally. The man in the White House has a position unrivaled anywhere from which to preach social morality and the civic virtues. Some Presidents have been so colorless as to play only a small part, but none in character or attitude has been unrepresentative of the national mores, or social code. Half a dozen or more have contributed positively by word or by example to the civic and social ideals which have come to be characteristically American. Washington's lofty disinterestedness, devotion to his country's best interests, and counsel of good faith and justice both at home and abroad; Jefferson's profound belief in the efficacy of democracy and his preaching of "equal and exact justice to all men, of whatever state or persuasion"; Lincoln's example as the backwoodsman who rose to the highest position in the land and ended his term unembittered, "with charity for all": these are the three most conspicuous. But there were others who added notably to the national store of civic moral principles: Jackson by his devotion to the cause of the masses and his opposition to special privilege; Hayes by his stand against the spoilsmen of a corrupt age; Grover Cleveland by his rugged honesty and political courage; and Theodore Roosevelt by his advocacy of the "strenuous life" for individuals and of the conservation of natural resources for the nation. All these men wove new designs in the fabric of American politics. In a broad sense they were creative teachers, as well as politicians and officials; and a certain deference to their programs of legislation followed as a matter of course.

ACCESS TO EXPERT ADVICE AND FULL INFORMATION · Facts and materials and expert advice are readily available to the President for use in the formulation of legislation. As their head he may confer with the chiefs of technical bureaus and require from them memoranda on the operation of their services and on conditions in the regions and industries with which they are in contact. The bureaus concerned with agricultural economics, fisheries, foreign and domestic commerce, education, labor, and the national forests, for instance, know from their work what changes in organization and policy may be desirable. The technicians of the War and Navy

Departments are qualified to pass judgment on the value of the various implements of war and the quantity of each to be procured. American procedure has generally been for the Congress to draw its legislation on the basis of the testimony of representatives of the various services given before the respective committees, the President making recommendations on only a few of the major items. It might well be argued that more of the requests for legislation for the different services should be funneled through the President's office and bills prepared there. This, of course, is generally what happened during the crisis years of F. D. Roosevelt's administration.

The President's chief advisers for legislation are the members of the cabinet, the heads of the ten chief departments; but there is nothing to prevent his going farther afield for his advice, as all Presidents have done. The fame of Andrew Jackson's "Kitchen Cabinet" was more than matched by the so-called "Brain Trust" of F. D. Roosevelt's first administration. The nucleus of this group was formed during Roosevelt's term as governor of New York; it worked with him during his first preconvention and Presidential-election campaign, and continued through the first hectic months after his inauguration as President.[29] The group was heavily recruited from the academic world, including teachers and research scholars in the fields of government, sociology, economics and finance, and law, and others experienced in practical politics and administration. These men not only acted in an advisory capacity but compiled data, drafted speeches, and helped to negotiate agreements for legislation. The personnel of the "Trust" shifted rapidly. Some worked for only a short time and gratuitously, while others were given salaried appointments in various bureaus where their services were merely nominal. Raymond Moley's account of the work of this group is unique as the first detailed account from the inside of the working of any such legislative advisory group. Some idea of the President's legislative work of those days may be gathered from the following statement by Moley:

> On March 16th the AAA bill and message were tossed into the congressional hopper as fast as they could be prepared. . . . There were, in the first 104 days of Roosevelt's administration, ten speeches made, fifteen messages sent to Congress, and fifteen pieces of major legislation sponsored by him—a record of sheer effort, if not achievement, that has no parallel in the history of the American Presidents.[30]

After the first rush year the activities of the President's advisory staff became less conspicuous, but some such group continued. The reorganization act of 1938 gave him six paid assistants who might be employed in legislative work. The birth of an extralegal legislative group came about through the inherent weakness of the Constitution noted by Woodrow Wilson, the lack of a cabinet qualified to act in the legislative field.

[29] R. Moley, op. cit. chap. i. [30] Ibid. pp. 166, 191.

Another source available to the President is the fact-finding commission. This is appointed by the President, serves without pay, and may even have no appropriation for expenses. Generally the plan is to name distinguished leaders of the particular field, who attract faithful workers and serve to mobilize public support. Notable examples are the so-called Wickersham Crime Commission of 1929, the White House Conference on Child Welfare of 1930, the Commission on Unemployment of 1930, the Conference on Home Ownership of 1931, the National Resources Board of 1934, and the President's Committee on Administrative Management of 1936. Some of these made voluminous and exhaustive reports which later served as the basis of important legislation.

## *LEADERSHIP IN CONGRESS AND ITS ORGANIZATION FOR WORK*

Legislatures, like all other groups of men who attempt to act collectively, must divide themselves into those who govern and those who are governed; and in order that the system may not be arbitrary, they must adopt a set of rules for the governance of officials and of members. In the United States an elaborate organization of traditional legislative officers is the answer to the former; a body of parliamentary law, rules and by-laws, and precedents, the answer to the latter. Every person who has attended a mass meeting large or small is familiar with the ease with which it is dominated by a small minority. Majority rule is difficult to organize; the rule of the minority is the line of least resistance, which results from the unwieldiness and incoherence of a numerous group of people. The obligation that Congress perform well under majority dominance is all the greater because Congress is the vehicle of popular will gathered from every neighborhood of the country.

The purposes of legislative organization may be briefly summarized thus: First, to see that the majority party shall rule, have general charge of the proceedings, furnish leadership, and plan the program of the session. Second, to ensure that the minority as a body, and individuals in general, may criticize the administration and all proposed legislation. Third, to establish a legislative machine which operates efficiently, wisely, and comprehensively. In particular, it must prepare a program, choose from among the thousands of proposals the few hundred which are to be given time for consideration, gather information and materials as a basis for the making of decisions, keep pace with the current need for changes in the administrative offices, and furnish money to keep the services operating.

The organization of American legislatures for work is dual in character: (1) the formal, or legal, organization, which is defined in the Constitution, the statutes, and the written and unwritten rules of the houses, and (2) the informal, or political, party organization, which consists of party officers and organs within the membership of the body.

THE SESSIONS OF CONGRESS · The Constitution requires that Congress shall assemble at least once in every year, on the first Monday in December unless otherwise ordered by law. Inasmuch as the term of members of the House of Representatives was made two years, this means two regular sessions for each Congress. Special sessions may be convened by the President for "extraordinary occasions." Until 1881 the expiration of the terms of the President and members of Congress had been held to be midnight of March 3; and late in the evening the clock in the chamber was turned back in order that the work might be finished within the legal time. Weary members were accustomed to while away the time until the President came to the Capitol at midnight to sign the last bills. The House of Representatives in 1881 sustained a ruling of Speaker Randall declaring the expiration of the terms to be noon of March 4, thus preventing any interregnum in the office of President.[31] The Twentieth Amendment, adopted in 1933, placed the end and beginning of the term of members of Congress at noon, January 3, of the odd years, and that of President and Vice-President at noon of the twentieth of the same month and year.

Each term of two years is known as a "Congress," and all are numbered consecutively from that of 1789–1791. Therefore the Congress elected in November, 1900, and running from March 4, 1901, to March 4, 1903, was the 57th; its session meeting in December, 1901, and extending to June, 1902, was its first, or long, session, and that from December, 1902, to March 4, 1903, its second, or short, session. Documents belonging to the two are officially referred to as of the 57th Congress, First Session and Second Session, respectively. Special sessions, when called, are numbered through consecutively with the regular sessions. The short session of scarcely three months, including the Christmas holidays, was almost entirely taken up with the annual supply bills and so was particularly vulnerable to the filibuster. Another disadvantage was that unless a special session intervened, members of Congress chosen in November did not begin to serve until a year from the next December, and the short session following election might well be dominated by men who had lately been rejected by the voters. For this reason it came to be known as the "lame duck" Congress, and the amendment of 1933, which abolished this session and established two of equal length, was given the same appellation.

## *FORMAL ORGANIZATION OF THE HOUSE OF REPRESENTATIVES*

The character and atmosphere of the two houses of Congress were destined from the beginning to be greatly different. The Senate was bound to remain relatively small. The six-year term of its members and the original method of their election, besides the way in which they were associated with the President in certain duties, fostered the concept of the

[31] A. C. Hinds, *Precedents of the House of Representatives* (1907), Vol. V, sect. 6697.

Senate as a place where the friendly, courteous, and unregimented customs of a high-class club would prevail. It was the intention from the beginning that the House should represent the masses. Within a few years it had reached a size beyond that of the Senate today, and the short term kept its membership in a state of flux. With the numbers reading 213 by 1820, 243 by the outbreak of the Civil War, and 391 by 1900, the development of an organization and rules of the restrictive character suited to a numerous body was inevitable.

LEADERSHIP AND CONTROL · Custom and unwritten law might have generated in the House of Representatives an organization which would dominate the entire Federal government had not the Constitution placed obstacles in the way. These, as previously explained, were the Senate, which had been made nearly coequal in legislative power, and the President of the United States, who soon, to all intents and purposes, was popularly elected. Nevertheless, for several reasons the House of Representatives did develop a relatively strong internal organization and leadership. This has been one thing at one time and something else at others, but the Speaker has always played a leading part. Acting with him today are a steering committee, a floor leader, and the chairmen of the six or eight most powerful committees. These together come as near the cabinet of the standard European parliamentary government as anything can. In the background is the majority party and its majority caucus.

THE SPEAKER · The Constitution requires that the House shall choose a Speaker, but leaves its organization otherwise open.[32] The name and basic conception of the office of course were taken from the same position in the British House of Commons. A long list of able men have held the office. One has only to mention Henry Clay, James K. Polk, James G. Blaine, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, and Champ Clark to note the type of successful politician, leader, and parliamentarian. Only Schuyler Colfax and John N. Garner had the distinction of presiding over both houses. During the regimes of Reed, 1889–1891 and 1895–1899, and of Cannon, 1903–1910, the Speakership reached the high tides of its power. Garner, who, as Speaker for the new Democratic House majority under President Hoover from 1931 to 1933, was the vanguard of the new regime, was quoted as saying, when nominated for the office of Vice-President: "I hold the most powerful position in this government excepting that of President of the United States. I accepted the proposed Vice-Presidential nomination with much hesitancy."

The two candidates for the Speakership are chosen in the majority and minority caucuses respectively. On the opening day of a new Congress the clerk of the preceding House takes the chair, calls the members-elect to

[32]C. W. Chiu, *The Speaker of the House of Representatives since 1896* (1928); M. P. Follett, *The Speaker of the House of Representatives* (1905); De Alva S. Alexander, *History and Procedure of the House of Representatives* (1916), chap. iv; H. B. Fuller, *The Speakers of the House* (1909), chap. i.

order, calls the roll of members by States, and announces the changes and vacancies in membership. If a quorum is found to be present, he asks for nominations for Speaker, and the caucus chairmen name their candidates. The roll again is called, and after the anticipated result the new Speaker is escorted to the chair and sworn in. The oath usually is given by the member longest in service.

DUTIES OF THE SPEAKER · The numerous duties of the Speaker are usually classed as judicial and political. The former includes his formal functions under the Constitution and by-laws of the House, which are called judicial because so much concerned with the application of rules of law to individual cases. Like a judge the Speaker is called upon to decide between contestants and to rule on questions of law. His political duties arise from his position as head representative of his party in the House. In the fields established by custom he throws impartiality to the winds and works in close co-operation with his party colleagues. It is precisely here that the office departs from its English prototype. The English Speaker ceases to be a party man when chosen, treats all parties impartially, and holds his office on indefinite tenure.

*Acting as Moderator.* The Speaker performs the ordinary duties of the moderator of an assembly, and others peculiar to the House as a legislative body. He calls the House to order at the time set for opening and, on motion, adjourns it; he announces the order of business; he affords recognition to those who rise and address him; he acts as timekeeper when members are speaking on allotted time; he puts questions and announces the vote; he refers bills, official communications, and other papers to the appropriate committees; and he maintains order and rules on technical questions which come before the House. In general he is responsible in the first instance for the orderly transaction of business.

*The Maintenance of Order.* The preservation of peace and decorum on the floor of the House is one of the Speaker's primary duties. The great size of the House renders this a difficult task. As an extreme measure the Speaker may suspend business until order is restored, call a member by name, or order the Sergeant at Arms to walk about with the mace. He has control of the chamber and halls, lobbies and galleries, and may order them cleared, if necessary, to preserve order. Pounding the marble slab on his desk with the gavel is sufficient on ordinary occasions.

*Ruling on Questions of Order.* It is the duty of the Speaker to enforce the rules of the House. These include not only the concise forty pages of large print found in the House *Manual* but the precedents which comprise the common law. A. C. Hinds, in his eight stout volumes of the *Precedents of the House of Representatives*, includes thousands of cases and incidents taken from the proceedings of both houses, and the rulings on them. The Speaker may rule on his own initiative or on the request of a member who gains recog-

nition and says, "Mr. Speaker, I rise to a point of order." The Speaker has the choice of ruling himself or submitting the question directly to the House. A member may always appeal from the decision of the chair. If the question is unusual or intricate, the Speaker may decline to rule until he has verified the precedents. Fortunately, a parliamentarian sits at his side to whisper in his ear when the going is rough. The elasticity of the rules permits the Speaker in his rulings to give great advantage to his own party. He may hamper the opposition by hewing to the letter of the law or may expedite procedures by ignoring infractions of the rules until a member raises the point of order.

*Control of the Floor by the Power of Recognition.* In the first rules adopted by the House in 1789 was one to the effect that "when two or more members rise at once the Speaker shall name the member who is first to speak." After several decades the Speakers were claiming that this gave them a discretion as to whom to recognize from which there was no appeal to the House. It was not a long step from this claim to the "recognition list" which the Speaker uses as his daily guide. Speaker Carlisle then added the rule that to be entitled to address the House a member should secure beforehand the consent of the Speaker. When a member rises to address the House, it is now usual for the Speaker to inquire, "For what purpose does the gentleman rise?" If for a privileged point of order, he may state it; but if for an item of business, he may be refused if previous arrangements have not been made. The remark of Speaker Henderson to a member attempting to get recognition in 1900 expressed the settled practice: "The gentleman was not recognized, and the Chair may as well state that the Chair will recognize no gentleman unless he has some knowledge of what is going to be called up."[33] It must not be thought, however, that the Speaker generally uses this power arbitrarily. He exercises it as an instrument of the majority party and in fulfillment of its program. Moreover, certain unwritten rules bind him, such as that preference shall be given to the chairman of the standing committee which has introduced a bill, to the chairman of the Ways and Means Committee, or to the majority and minority floor leaders.

*The Appointment of Committees.* The first rules of the House required that the members of the standing committees be chosen by ballot of the whole House, but within a short time this duty was given the Speaker and remained with him until 1910. This was long a main source of the Speaker's power. If, as has been asserted, Congress legislates by means of its committees, then the Speaker, by constituting these committees and naming their chairman, was indeed in a place of power. To him ambitious members must look for the preferment by which alone they could play an important part in the work of Congress. It was a means of enforcing party discipline in the House and expediting its work, for it was a means of reward or

[33] C. W. Chiu, op. cit. p. 169.

punishment. In general the Speaker was bound by the seniority rule and worked in collaboration with the party leaders in making his appointments. By controlling the membership of committees and then choosing the one to which a bill should be sent, the Speaker had very great authority over legislation. This reached its culmination in Speaker "Joe" Cannon, and had its sharpest decline in 1910, when the power to appoint the standing committees was taken from the Speaker and given over to a committee on committees.

*Membership in the Committee on Rules.* In 1858 the Speaker was made a member and the chairman of the committee on rules. This body, which for years had had chiefly the innocuous duty of proposing amendments to the standing rules of the House, thereafter gained in power until it became a leading instrumentality for the control of the work of Congress. Under the tutelage of the Speaker or floor leader the committee on rules may bring in a special rule of procedure applicable only to the bill before the House, on the principle of changing the rules of the game after the game has started. Simply by adopting by a majority vote a report of the committee on rules the House may set aside the regular order and rules. In this way a bill may be taken from the calendar for immediate action, the date and hour for taking a vote may be set, the number of hours of debate for each side and for individual speakers may be allotted, and the kind and number of amendments may be limited. Unlike other committees, the committee on rules may meet while Congress is in session and may report at any time. It has thus become a mechanism by which urgent business can be given the right of way and expeditiously considered and passed. The membership originally was five, three of the majority and two of the minority, but actually only three, the Speaker and "two assistants," since the minority members seldom were called to meet with the entire committee. The Speaker was enabled thus to set aside the rules whenever he thought necessary. The same revolt of Midwestern insurgents in 1910 which took away the Speaker's power to appoint the members of the standing committees also took him from the committee on rules and increased its membership to ten.

OTHER OFFICERS AND EMPLOYEES OF THE HOUSE · Each house has a set of officers and employees of whose necessity it is the judge. The officers are named at the beginning of each new Congress by a resolution. The clerk holds over from one Congress to the next as a bridge between the two. The duties of his office are large, including the keeping of records of all kinds, the engrossment and enrollment of bills and resolutions, the making of disbursements, and the management of the House library, document room, and stationery department. The doorkeeper keeps unauthorized persons out of the chamber and introduces the bearers of messages and official guests. The Sergeant at Arms attends all sittings, and main-

tains order at the request of the presiding officer. Upon order he arrests absent members and brings them to the bar of the House. The legislative counsel aids in writing and drafting bills, studies the effects of new proposals on existing laws, and otherwise advises individual members or the standing committees. The parliamentarian sits at the right of the Speaker and advises him on the rules, precedents, and procedure. There are various reading clerks, journal clerks, and a postmaster, whose duties are self-evident.

THE STANDING COMMITTEES · The house has forty-three standing committees, which correspond in title to the chief subjects upon which it may legislate. A membership of about eighteen, divided between the two parties roughly in proportion to their strength in the House, is typical. Preeminent are the Committee on Ways and Means, from which all revenue bills must emanate, and that on Appropriations, to which all bearing a charge on the treasury must be referred. Those on Banking and Currency, Judiciary, Interstate and Foreign Commerce, Military Affairs, and Naval Affairs obviously stand high in influence.[34]

Members of the standing committees are designated by the party committee on committees, which is chosen by the party caucus. That of the Republicans is made up of one member from each State having a Republican delegation; that of the Democratic party, of the party members of the Ways and Means Committee. The majority dictates how many members each party is to have on each standing committee, and committee members are elected in the House by simple resolutions as designated. In making up the committee slates there is a general but not invariable adherence to the rule of seniority. When a vacancy appears in a committee, the existing members of that party are moved up one notch and a new name is placed at the bottom. Considering the large turnover in House membership, the assignment of places to newcomers is an important task every two years. When there is an overturn in party rule, it may be necessary to drop one or more of the new minority party from each committee and add several of the new majority. The old committee chairman, if re-elected to Congress, becomes the ranking minority member of the committee; the old ranking member of the majority becomes the chairman; and the party colleague next below him becomes the ranking majority member. Criticism is often made that the seniority rule places too great a premium on long service and too little on special abilities and fitness. It is true that some conspicuously unfit and weak persons succeed to committee chairmanships and, what is perhaps more serious, persons who are out of sympathy with important party policies. In some instances these persons are sidetracked, but not often enough or so easily as when the Speaker has made the assignments. Many of the conspicuously weak, however, are weeded out by defeat at the polls before they have a claim

[34]J. P. Chamberlain, *Legislative Processes, National and State* (1936), chap. vi; L. G. McConachie, *Congressional Committees* (1898).

to a chairmanship. Moreover, the specialized knowledge which a member gets by long service on a committee is a great asset; and the simplicity of the plan appeals to the sense of fairness of a great part of the membership. The situation, too, is eased by the designation of about ten committees as "exclusive," which means that a person serving on one of them is not eligible to be a member of any other committee.

SELECT AND CONFERENCE COMMITTEES · In every session there are created a considerable number of committees to perform duties made necessary by special circumstances. Examples are a committee to attend the funeral services of a deceased member or to investigate a stated problem. When the object for which it was appointed has been accomplished, the committee ceases to exist. Conference committees are those appointed to meet similar committees of the other house to agree, if possible, on the terms of a bill which has passed the two in different forms. Both special and conference committees are named by the Speaker subject to certain unwritten rules.

PARLIAMENTARY LAW · Standing in the background of the written House and Senate rules is that great body of law which we may call the common law of legislative bodies, consisting of the rules and precedents which grew up in the British House of Commons. This was ready at hand when the new American legislature got under way. Still published with the Senate *Manual* is Jefferson's *Manual of Parliamentary Practice*, with the composition of which he occupied his time while presiding in a Senate of about thirty members. He had taken the English authorities on the subject (Hatsell, Grey, and others), abstracted the more pertinent parts, and adapted them to American constitutional conditions and practices. Jefferson prefaced his rules with a quotation from Hatsell that "the only weapons by which the minority can defend themselves against similar attempts (improper measures) from those in power are the forms and rules of proceeding which have been adopted as they were found necessary, from time to time, and are become the law of the House." The inheritance of this valuable code of legislative practice was one of the fortunate breaks for the new American democracy. To leave the conduct of each legislative session to the inspiration of the moment would be dangerous. The technicalities of legislative procedure are often incomprehensible and distasteful to laymen; but, as in a trial in the courts, the essence of justice rests in an impartial and rigid application of rules which time and experience have shown to be essential. Legislation without a settled procedure is an example of a government of men without laws, which the constitution-framers of the 1780's viewed with such disfavor. Since Jefferson's time our American legislative experience, with the aid of writers and compilers, has fashioned a new parliamentary law from the old to meet American needs.

## *FORMAL ORGANIZATION OF THE SENATE*

THE PRESIDENT OF THE SENATE · With only one third of its membership renewed every two years, the Senate carries over most of its organization from session to session. Unlike the House of Representatives, it is unable to choose its own presiding officer; for that position the Constitution gives to the Vice-President of the United States. Until the act providing for the succession of cabinet members to the Presidency in case of the death of both President and Vice-President, in 1887, the president pro tempore was named as first in order, and the Speaker of the House second. Since it had always been held that no president pro tempore could be in existence if the Vice-President were in attendance in the Senate, it was the custom from the beginning for him to retire from the chair some days or weeks before the end of the session so that the succession might be provided for. With the question of the succession no longer to be considered, the Senate in 1890 adopted the following resolutions:

> That it is competent for the Senate to elect a President *pro tempore*, who shall hold the office during the pleasure of the Senate and until another is elected, and shall execute the duties thereof during all future absences of the Vice President until the Senate otherwise order.[35]

With a presiding officer of the party in power always at hand, it is now a matter of indifference to the Senate whether the Vice-President attends or not; if he is of the opposition party, his absence is a boon.

DUTIES OF THE PRESIDING OFFICER · The duties of the president of the Senate as moderator are nominally much the same as those of the Speaker of the House; but they are much less vigorously applied, owing to the smaller size of the Senate and to its tradition as a self-governing body.[36] His political duties are so small as not to be comparable. Naturally he has the power of recognition, but he does not use it vigorously for party purposes, although there is a recognition list prepared for him by the majority and minority floor leaders. Not being a member of the Senate, and sometimes not even of the party in control, he is reluctant to impose his will on the Senate. He rules on questions of order, but very readily submits them to the floor for decision. The rules authorize him to maintain order, but his is a small task as compared with that of the Speaker of the House. John C. Calhoun, while Vice-President, disclaimed all right to call a Senator to order for words spoken in debate. The "representative of a State in its sovereign capacity" should not thus be made subject to an officer connected with the executive branch of the government and "wholly irresponsible" to the Senate. After a heated debate on the question the

[35]A. C. Hinds, op. cit. Vol. II, sec. 1417.

[36]L. C. Hatch and E. L. Shoup, *A History of the Vice Presidency of the United States* (1934), chap. vi.

Senate amended its rules to the effect that in case of a transgression of the rules of debate "the Presiding Officer shall, or any Senator may, call him to order."[37] The Vice-Presidents have always used the power very sparingly, however, even hesitating in one case where deadly weapons were drawn on the floor, preferring to leave discipline to the "courtesy" of the fellow members. Calhoun initiated the custom of referring to members as the "Senator from Illinois" rather than the "Gentleman from Illinois." Further rules forbid any member to "impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator" or to "refer offensively to any State of the Union."

*Debate and Voting.* The Vice-President does not engage in debate. Other than a short speech at the end of the session, and occasional explanations of his rulings, his spoken words are confined to those necessary as moderator. He is privileged to give the casting vote when there is a tie, but in practice refrains from doing so except when his vote would carry in the affirmative. The president pro tempore, being a member, may indulge in debate and may vote whenever he wishes; but unless the issue is close, he is likely to confine himself to the task of presiding.

*Appointment of Committees.* Only for a few years was the Vice-President empowered to appoint committees. The rule now is that they shall be chosen by the Senate unless otherwise ordered. Customarily, special committees, such as those to notify the President of the beginning and the end of the session, committees of conference, and those for special occasions, are appointed by him, but his discretion in this is largely guided by custom and by the advice of the floor leader. Vice-President Garner, because of his long legislative experience and his high standing in the counsels of the party, exercised a freer discretion than any other Vice-President of recent years.

OTHER OFFICERS AND EMPLOYEES · The other officers and the employees of the Senate correspond generally to those of the House of Representatives. The Sergeant at Arms and Doorkeeper has the duties implied by the title. He preserves order in the Senate and its environs; when ordered, arrests and brings absentees into the chamber to make up a quorum; brings witnesses before the Senate; investigates ballot-boxes in case of a disputed election; and acts as property custodian and storekeeper. Directly responsible to him are a deputy and two assistants. The secretary of the Senate keeps the official record of its proceedings, issues all writs and other legal processes required by the Senate, makes contracts for Senate supplies and labor, supervises the clerical force, and is the disbursing officer, paying salaries, mileage accounts, and stationery bills.

[37]February 11 to February 15, 1928. *Register of Debates*, Vol. IV, pp. 278–341, 20th Cong., 1st Sess.

He makes up the roll of Senators and certifies it for salaries and other compensations. The chaplain must be present at the opening of the day's session to offer prayer.

THE STANDING COMMITTEES · Thirty-two standing committees make up the Senate list, four of which are joint with the House. They run in size from three to twenty-three, with fifteen as typical. The Senate rules provide that the chairman of each committee shall be elected by ballot, and then the remainder of each committee on one ballot. The actual choice is effected in another way. In each party the committee on committees fills the places allotted to it, which, after ratification by the party caucus, are presented to the Senate and there ratified by resolution. About a dozen of the committees overshadow all others in importance, and their chairmen and ranking members include most of the key men of the Senate. These are the committees on agriculture and forestry, appropriations, banking and currency, commerce, finance, foreign relations, interstate commerce, the judiciary, manufactures, naval affairs, military affairs, post offices and post roads. To these go most of the important bills, and they draft others. The chairmen are in charge of the bills in their journey through the Senate. As in the House, the committee on rules is the right arm of the Senate majority in hewing out the way for the passage of its bills.

## *THE INFORMAL, OR PARTY, ORGANIZATION OF CONGRESS*

The constitutional and legal structure of Congress is in itself nothing but an instrumentality. There is no specification as to who should use it or what objectives should be aimed at. Almost from the beginning this lack has been supplied by an internal party organization paralleling all parts of the structure of Congress.[38] This organization may correctly be described as the spearhead of the power and will of the people of the nation; or, following another figure, it is the clutch which connects the generated power of public opinion with the wheels of the governmental machine. Its structure has changed from decade to decade to meet changing requirements.

THE MAJORITY AND MINORITY CAUCUSES · There is much more to the three hundred or more Representatives and Senators who constitute the majority party in the two houses than first meets the eye. These men are the measure of victory in a recent contest which has involved tens of millions of voters and whose dust has hardly cleared away; they are Democrats (or Republicans, as the case may be), but they are also the government of all the people. Only they can give direction to the course of government for the next two years and furnish it the material means of carrying on. The slant which the work of a million civil servants will take is dependent

[38]G. R. Brown, *The Leadership of Congress* (1922); P. D. Hasbrouck, *Party Government in the House of Representatives* (1927), chap. ii.

on their judgment and will. Quite to be expected, then, was the establishment of an organization for action within each house. The Democrats use the word *caucus* to designate the organization of their membership in House and Senate; the Republicans have adopted the more dignified term *conference*. To save confusion, the former will be used in referring to both.

A day or two before the opening of each Congress the members-elect of each party meet to organize the respective caucuses.[39] Each caucus chooses a chairman and a secretary, who is now paid a salary from the treasury. The chief duties of the party caucus are three: (1) to agree upon nominations for certain legislative offices; (2) to choose party officers; and (3) to decide on questions of legislative policy and party strategy. Nominations are agreed upon for Speaker, Sergeant-at Arms, clerk, chaplain, and other offices. A floor leader, committee on committees, steering committee, and patronage committee are elected. A member entering the Democratic House caucus is bound to abide by its decisions if these decisions have received the approval of two thirds of its membership, provided, however, that he is not bound upon questions involving a construction of the Constitution or upon those on which he has made contrary pledges to his constituents before the election or received contrary instructions by resolution of the nominating authority. On all nonpartisan matters and all things "not involving fidelity to party principles" the member is left free. The caucus, in short, is the authority for the determination of party organization and policy in Congress. Complaint has often been voiced that it is too little used, that it is only rarely called, and that too few questions are submitted to it. The complaint, however, loses some force when the difficulty of action by a large body is remembered, and the fact that the caucus of one house must share its legislative policy-making with the caucus of the other and with the President of the United States. Delegation of large powers of discretion to the responsible leaders of the party in Congress is inevitable.

THE FLOOR LEADER · The majority floor leader is the second most important person in the House and the most important in the Senate.[40] In each he is the responsible leader of his party. In this capacity he performs many of the duties which in a parliamentary government fall on the prime minister. He is the chief executive officer in charge of the program which his party has decided upon. He works in close collaboration with the steering committee and the chairmen of the chief standing committees; and if his party controls the executive branch, he works closely with the President and serves as his spokesman in the House. The "Dear Alben" letter sent to Senator Barkley by President Roosevelt, which resulted in his election over his senior, Pat Harrison of Mississippi, was evidence of the necessity for such close collaboration. He is in charge of majority

[39] P. D. Hasbrouck, op. cit. chap. i; G. R. Brown, op. cit. pp. 92–94.
[40] P. D. Hasbrouck, op. cit. pp. 104–107, 109–112.

strategy, must keep constant watch over the designs of the minority, and put counter measures into effect as necessity requires. He chooses speakers to support various bills as they come up before the House or to reply to specific charges brought by the opposition. He makes the routine motions necessary for keeping business moving, such as motions to go into committee of the whole, to suspend the rules, to go into executive session (in the Senate), to recess or adjourn, and to call the roll to ascertain if a quorum is present, or he delegates someone else to do so. Joseph W. Byrns, majority floor leader in 1934, thus summarized this aspect of his duties:

> It is the task of the Floor Leader to formulate a program for the House from day to day subject to the approval of a majority of the House membership. He advises from time to time the order in which legislation will be taken up. This, obviously, demands a profound acquaintance with the legislative bills which might have been reported from any of the committees. He is closely affiliated with the Rules Committee as to matters of party policy.[41]

The minority floor leader is the leader and spokesman of the opposition. It is his task to marshal the opposition forces for the attack on the majority policies, to single out promising issues, to plan opposition parliamentary strategy, to allocate speakers to oppose particular measures. He keeps in close touch with the majority leader with respect to the legislative program and makes informal agreements with him as to the length of debates on specific measures. Bertrand H. Snell, minority leader in the House in 1934, regarded his duties as "hardly less responsible and exacting than those of the majority leader, such differences being only in kind and degree."[42] Owing to the scattering of legislative power among three agencies in our system, neither majority nor minority floor leader has the control over his followers which characterizes their counterparts in the British Parliament.

THE STEERING COMMITTEE · The majority party maintains both in the House and in the Senate a steering committee, of which the floor leader is chairman. The Democratic steering committee of the House of late years has numbered fifteen members, chosen by the representatives by regions (such as New England and the middle Atlantic States), and four ex officio members: the Speaker, the majority leader, the chairman of the caucus, and the chairman of the committee on rules. While the first purpose of the committee is parliamentary, it is also and unavoidably a policy committee, making decisions on what bills should be introduced, pushed, or dropped. Early in F. D. Roosevelt's first term the Senate set up a separate policy committee of thirteen members to take over that aspect of the work, and in the House the Republicans broke precedent by maintaining

[41] Statement made March 1, 1934, quoted in F. M. Riddick, *Congressional Procedure* (1941), p. 344.
[42] Ibid. p. 346, March 5, 1934.

a minority steering committee. Usually the committee meets once a week, when it may decide on a program.

THE PATRONAGE COMMITTEE · The patronage of the House is distributed through a committee of three members elected by the majority caucus on the recommendation of the committee on committees. The patronage of the standing committees is controlled by the respective chairmen. Other offices are distributed as equitably as may be among the membership of the House.

THE WHIPS · Both parties have in House and Senate an official known as "the Whip," who is responsible directly to the floor leader. Assistant whips are appointed as needed. In 1933 the Democrats, in view of their unwieldy majority, appointed fifteen assistant whips, each one responsible for the Representatives of a geographical region.[43] In both parties an assistant whip or key man is responsible for a group of members, and so messages sent down by the whip speedily reach the entire membership. The whip relays word of the legislative program for the coming days or week and discloses the official party stand on each important bill. He and his assistants also gather the sentiment of the party members on various items of legislation for transmission upward to the floor leader. The original function of the office, to whip the party members into line and see that they are present when the votes are taken, still remains. In the House the Democratic whip is appointed by the floor leader, and the Republican whip by its committee on committees; in the Senate both are appointed by the floor leaders.

SUMMARY · Such is the general picture of party organization and leadership in the two houses of Congress. In the House it is not so clear-cut as it was in the days of Speaker Cannon. Robert Luce, who served many years as a Representative from Massachusetts, stated that the most striking difference between the two regimes is that then the leadership was in the open and now it is under cover.

> Then the Speaker was the recognized center of authority. Now nobody knows who in the last resort decides. There is a Committee on Rules, the chairman of which evidently has much influence. Behind this is a steering committee of the majority party, which is supposed to advise. And each party has a floor leader who guides in matters of technical detail, though as a matter of fact most of the floor work is handled by committee chairmen as the measures in their charge come along for action. It might be said that nowadays the leadership of the House is in commission, with the membership of the commission more or less fluctuating.[44]

Either the House, Senate, or President, within the bounds of the present Constitution and laws, may produce the supreme leadership. The actual system of control depends greatly on where the dominant personalities are located.

[43] E. P. Herring, op. cit. p. 66.

[44] R. Luce, *Congress—An Explanation* (1926), p. 117.

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CHAPTER XX

# *The Process of Lawmaking in Congress*

If the problem of legislation were chiefly how to compose sentences with a legal meaning, the task might better be turned over to a committee of lawyers, who could act with speed and technical skill. But no such simple or inexpensive agency is employed in a democracy: the function is tied up with the machinery of representative government. The typical legislative body is the meeting place of all sorts of social and economic philosophies and interests. It must reach agreement on policies and details not only conformable to its own conceptions but acceptable to the people at home. The process by which a bill is turned into a finished law is intricate and involved. It is said that only the exceptional House member acquires a fair understanding of the process by the end of his first two-year term, and expertness comes only after a dozen years or more of service. Happily the knowledge needful for the layman or student of democratic processes is not that of the expert parliamentarian. It avails him little to know the technical effect of each of a large number of motions or questions of order; but in order to pass judgment on the accomplishments of a Congress or his representative there he must understand the general process by which a bill proceeds through to the statute books.

There are five aspects of the legislative process of which clear pictures must be had if a judgment is to be passed on the whole. The first is how the proper bills are introduced and the thousands of undesirable ones, which would wastefully absorb the attention of the legislators, thrown out; the second, what facilities there are for the collection of facts and figures needed for the drawing or the reshaping of bills; the third, the means for amending the bill if the debate and investigations show that amending is needed; the fourth, the opportunity for debate by both the minority and the majority in order to inform the country of the proposal or to bring about amendment; the fifth, what machinery is available to the majority for taking bills, demanded by the needs of the day, with reasonable speed through all the stages to completion.

FORMS OF CONGRESSIONAL ACTION · Only by the use of special forms is a numerous assembly able to take up a question, deliberate on it, arrive at a conclusion, and take action. These forms have long been more or less standardized by the common law of parliamentary bodies and adapted to the peculiar needs of each.[1] A *motion* is a simple proposition, initiated by a member, which, if accepted by the assembly, commits it to an act or

[1] H. Walker, *Law-Making in the United States* (1934), pp. 317, 318.

judgment. It is the form by which the assembly makes progress in the performance of its work and is therefore only an auxiliary in the process of legislation. Under American legislative practice it does not require a second. An *order* is the form by which a legislative body issues a command, as, "*Ordered*, that the hour of daily meeting of the House shall be 12 M." The *resolution*, of which there are several types, is used simply to express an opinion or purpose. A *concurrent resolution* is used to express a fact, principle, opinion, or purpose in which the two houses join. In its modern form it is not a means of lawmaking and consequently does not need the approval of the President. It is introduced in the two houses in identical form and is not binding on either until passed by both. A simple *House resolution* or *Senate resolution* is one employed by only the one house, for purposes related only to itself, such as expressing an opinion on a subject or thanks to an individual. A *joint resolution* goes through the same procedure as a bill and actually is a form of lawmaking, but is restricted to "incidental, unusual, or inferior purposes of legislation." Examples of the use of the joint resolution are these: the extending of national thanks to an individual, notice to foreign governments of the abrogation of a treaty, correction of an error in an existing act of legislation, and making special appropriations for minor and incidental purposes. The annexation of Texas was carried out by joint resolution, which with a willing President needed only a majority vote of the two houses, whereas a treaty would have required a two-thirds vote of the Senate, which then could not have been obtained. The annexation of the Hawaiian Islands was consummated in the same way. All joint resolutions go to the President for approval except those proposing amendments to the Constitution; when one, by mistake, was sent to Abraham Lincoln in 1865, he returned it without his signature. A *bill* is the draft of a proposed statute and may properly cover any matter within the competence of the legislative body in which it is introduced. Most of the work of Congress centers around the bills that have been introduced. This is no small task in view of the fact that they comprise the greater part of the more than twenty thousand measures placed before the two houses in each biennium.

PLAN OF CONGRESSIONAL WORK · The ground plan of the tangled rules and procedure by which a legislative proposal in each house becomes law is shaped around two things set by the rules: the daily order of business and the steps through which a bill must pass on its way to the statute books. No matter if the "regular order" is seldom observed, it is the base line from which all deviations are made. The lawmaking process in the House will first be followed, after which the Senate variations will be noted.

## *THE HOUSE OF REPRESENTATIVES*

THE DAY'S ORDER OF BUSINESS · The first written rule on this subject was adopted in 1811 and had developed into the present form by 1890.[2] The means by which the day's program is made flexible will be explained presently. On the first day of each session, immediately after the election of the new Speaker, the rules and practices of the preceding session are adopted by House resolution and remain in force until amended or set aside by special rule brought in by the rules committee. On the other days the introductory prayer by the chaplain is followed by reading and approval of the *Journal*.

*Correction of Reference of Public Bills.* At this point attention may be called to the wrong reference of a bill at the time of its introduction, and the correction made by a re-reference. This is now customarily done only by notation in the *Congressional Record*.

*Disposal of Business on the Speaker's Table.* The business on the Speaker's table consists of matters which have been addressed to him as the presiding officer and spokesman of the House. Chief among these are such portions of messages from the Senate as require House action, all messages from the President except those transmitting his objections to bills, and all communications and reports from the heads of administrative departments. Rules and precedents determine how these various matters shall be disposed of. Simple Senate resolutions, House bills returned with amendments that do not need consideration in the committee of the whole, and the President's messages are laid at once before the House for action, the last-named being read by the clerk and printed in the *Record*. All other business is referred to the appropriate standing committees. The annual message of the President is usually referred to the Committee of the Whole House on the State of the Union.

*Unfinished Business.* Next, business left unfinished at an adjournment is taken up for consideration, and is resumed each day at this time until disposed of. The rule refers to the regular legislative business of the House, not to unfinished business from the committee of the whole, from Calendar Wednesday, or from those days set aside for special business, such as private bills, District of Columbia bills, or bills from the "consent calendar."

*The Morning Hour.* This period of the day's business was long known as the "morning hour" and was a device to enable the House to devote an early part of the session to a specific class of business. Until 1885 the reports of committees were received at this time, but the redraft of the rules in 1890 provided that thereafter committee reports should be filed with the clerk. Since then this hour has been devoted to the roll call of committees of the House, at which time each may call up one of its bills from a calendar

[2]*House Manual*, 78th Cong., 2d Sess. (1945), Rule XXIV, pp. 414–423.

of the House for consideration. If, at the close of an hour, not all the committees have been called, the call is resumed next day at the point where it was interrupted.

*Committee of the Whole.* At the close of the "morning hour" it is in order to entertain a motion to go into Committee of the Whole House on the State of the Union to consider a designated bill on the "Union calendar." The motion may be made by any member, but the consent of the committee which has reported out the bill is necessary. The purpose of this order of business is to afford an opportunity for the individual member to get before the House a bill in which he is interested. It is not used for highly privileged bills, like appropriation and revenue bills, in the hands of committees which have been given leave to report at any time.

*Orders of the Day.* At this point the House takes up the business which it has previously voted to consider as a special order.

THE STEPS IN THE PASSAGE OF A BILL · The rules of the House of Representatives enumerate a maximum of twenty-two steps through which one of its bills must pass in becoming a law.[3] These are: (1) introduction; (2) reference to a standing committee; (3) the hearings of the committee and its report; (4) placing on one of the calendars; (5) consideration in the committee of the whole; (6) second reading; (7) engrossment and third reading; (8) passage; (9) transmission to the Senate by messenger; (10) consideration and passage by the Senate; (11) return from the Senate without amendments; (12) return from the Senate with amendments; (13) consideration of Senate amendments by the House; (14) settlement of differences by a conference committee; (15) enrollment on parchment; (16) examination by the committee on enrolled bills; (17) signing by the Speaker and the president of the Senate; (18) transmittal to the President of the United States; (19) approval by the President of the United States; (20) disapproval by the President of the United States; (21) in the latter case, action by the House on the President's veto; (22) filing with the Secretary of State. Each of these steps will be given a brief explanation.

1. *Introduction.* In the earlier days of the American and British legislative bodies individual members were not free to introduce bills, and the right is still greatly restricted in the latter because of the necessity for cabinet control of the legislative program. In the Continental Congress and during the early days in Congress and the State legislatures, bills were brought in by committees or by individual members after passage of a motion of leave to introduce, which often meant that the individual should take his project to a committee for its working out. Today every member is free to introduce as many measures as he may wish and on whatever subjects he likes. This is done by dropping the bill into the "hopper"

[3] Ibid. pp. 473–476.

at the clerk's table. Many bills are introduced by members on the request of friends or interested parties and are so marked. They may merely introduce a petition outlining the purpose and substance of a piece of legislation, which then is referred to the proper standing committee for drafting. Communications from the President or administrative departments requesting action may be similarly disposed of.

2. *First Reading and Reference.* English parliamentary practice called for three readings of a bill on separate days before it could be called up for final passage. The three chief purposes of the rule were deliberate action, so that a measure might not be rushed through the legislature without careful consideration and a snap vote taken while some of its opponents were absent; adequate information, repetition of the reading serving to acquaint all the members with the bill's contents; and orderly discussion, the minimum of three days allowing both sides of the question to be presented fully. The earliest statement of the rule in America was in an order of the General Court of Massachusetts in May, 1657.[4] It read:

> Whereas it is found by experience that the passing and enacting of divers grants, orders and laws upon the first proposal, hath occasioned many inconveniences which might have been prevented by mature deliberation, and that it is the laudable custom of the Parliament of England to pass no bills which have not been there read and debated, it is therefore ordered and enacted by this Court, that no grant of land, law or order (except transient acts) shall henceforth be of force but such as, after reading and mature consideration on three days, shall be approved and consented to by the major part of the Magistrates and Deputies.

The first rules of the Senate, requiring three readings for every bill on separate days, are now softened to read "unless the Senate unanimously direct otherwise," which it usually does. One of the readings may be by title only. Those of the House were the same, with the proviso that no two readings could be on the same day without a special order. Today they are modified so that only the second reading is required in full unless the third reading in full is demanded by a member. In the early days of Congress when bills were few and brief, and printing facilities inadequate, the rule was not an unreasonable one. When these conditions changed, various subterfuges were employed to evade it: a rapid mumbling or coffee-mill singsong by the clerk of only parts of the bill; a reading of the first and last paragraphs, with mumbling in between; or a reading of the title only. In the State legislatures at least one full reading is the custom; in the British Parliament a brief is attached to the bill, which is read and explained, but no bill is read entirely through. In Congress full reading is required on second reading in both the House and the Senate, although this may be dispensed with by unanimous consent or by suspension of the rule. Luce estimated that the time consumed in one session of the 65th

[4] R. Luce, *Legislative Procedure* (1922), p. 206.

Congress in reading measures totaling 840,000 words amounted to seventy hours at least, or more than twelve working days or two weeks.[5] With printed bills now available to all members the reading in full is a sheer waste of time. The requirement of a first reading is met by a printing of the title of the bill in the *Journal* and *Record*.

The *reference* of a bill is its assignment to a standing committee. The task, usually a simple one determined by its content (for instance, a bill authorizing a new battleship is referred to the committee on naval affairs), is performed by the clerk under the supervision of the Speaker. If an error in reference has been made, it may be corrected at the "morning hour." A private bill is referred to the committee endorsed on it by the introducer. At this point the bill is given the number by which thereafter it is known. The only information which a House member has of the introduction, first reading, and reference of a bill is the appearance in his daily copy of the *Congressional Record* of a notice in the following form: *By Mr. Lanham: H. R. 8540. A bill to authorize an increase in the White House police force; to the Committee on Public Buildings and Grounds.*[6]

3. *Bills in Committee.* The standing committees are sometimes called "little legislatures," because only rarely does the House act on any measure which has not come from one of them. Speaker Reed called them "the eye, the ear, the hand, and very often, the brain of the House."[7] The committee quorum consists of a majority of all its members. Open meetings may be attended by members of the press and the public in general; in closed, or executive, meetings the proceedings are confidential. The purposes of committee action are several: to collect the information on the subject requisite to intelligent legislation; to make a decision on the expediency of passing the bill at a given time; to ascertain whether as drawn it will accomplish what was intended and how it affects existing laws on the subject; and to analyze and reshape the bill from a technical standpoint. There are generally three stages in a committee's consideration of a bill: the open hearings, deliberation and argument in executive session, and report to the House. The hearings are not only to secure information but to give interested parties the feeling that they have had their day in court. Heads of departments, bureaus, offices, or commissions may be summoned to appear by the committee or directed to do so by House resolution. Hearings on questions of wide public interest are well covered by the press. Often they are used to arouse public support for a bill or to discredit opposition to it. Generally persons appearing before a committee first deliver a prepared statement and then are closely questioned by the members.

Each committee has a room and clerical staff. It has regular hours of meeting, announced in the *Congressional Record*, which are usually in the

[5]Ibid. p. 215.
[6]*Congressional Record*, 76th Cong., 3d Sess. (February 19, 1940), p. 1674.
[7]T. B. Reed, *Parliamentary Rules* (1897), p. 53.

forenoon, although for limited periods it may have permission to sit during the session of the House. Special meetings may be called by the chairman or upon a request signed by a majority of the members. Printed reports of the committee hearings are made which often show more of the background of a piece of legislation than do the debates in the House.

*The Committee Report.* The committee keeps a calendar, which is a list of all the bills referred to it, with the title, number, name of author, and time of introduction and reference.[8] There is no obligation to consider the bills in their order on the calendar. It is to be remembered that this is the point at which the great flood of bills is stopped. The committee is a major instrumentality of the majority party for enforcing its legislative program both positively and negatively. As many as 90 per cent of the bills of some committees never again see the light of day. The process is variously called "smothering," "chloroforming," or "pigeonholing." The bill which is acted upon is the subject of a written report to the House recommending that it pass without change or with amendments. The changes recommended may be slight or so numerous as greatly to alter the bill, or the old bill may be entirely discarded and an entirely new one brought in as a substitute. The report of the committee, with which are printed the views of the minority, is filed with the clerk of the House for printing, after which it is attached to the bill when it is sent to the proper calendar. Reports follow stereotyped forms such as the following:

> The Committee on the Judiciary to whom was referred the bill (H. R. 1527) to provide for the appointment of three additional district judges, etc., having considered the same, report it to the House (with amendments specified, if there be any) with the recommendation that it do pass (or do not pass, or be laid on the table).

Reformers often have condemned the secret meetings of committees as tending to encourage subterranean action detrimental to the public interest. On the whole, however, more seems to be gained by secrecy than by having all meetings open. The same considerations which led the Fathers to maintain secrecy in the Philadelphia convention of 1787, the Presidents of the United States and the prime ministers of Great Britain in their cabinets, and the heads of administrative departments in their departmental meetings have force for the committees of Congress. In open meetings members stand committed before the public and find it difficult afterward to enter into any sort of compromise. Often, for a proper adjustment of the question, confidential information is necessary which could not be had if it had to be made public. The rules declare that all decisions and reports must be made in the presence of a quorum, but custom permits an individual polling of the members for the decision of minor questions.

[8] J. P. Chamberlain, *Legislative Processes, National and State* (1936), pp. 65–73; F. M. Riddick, *Congressional Procedure* (1941), pp. 121–124.

*The Discharge Rule.* Persons whose bills are defeated simply by the inaction of a committee often are deeply resentful and hurl charges of unfairness and tyranny. Attempts to secure a kind word from the Speaker or the floor leader to the chairman of the committee usually are of no avail. Appeal doubtless is sometimes made to the President of the United States as party leader, but such intervention, if made, would be behind the scenes. Such Presidents as the two Roosevelts and Wilson, of course, have been influential in both bringing bills out of committee and keeping them in. The doctrine of party responsibility, however, did not prevent the enactment of a rule by which the individual may attempt to rescue a bill from committee imprisonment. This is the procedure under the so-called "discharge rule."[9] The present rule was preceded by five others, which were the outcome of minority agitation, the rule of 1910 coming out of the revolt against Speaker Cannon. A member who wishes to release a bill from committee files a petition to that effect at the clerk's desk, after which the petition must be signed by a specified number of members, which has varied from 145 to the present 218. It is then placed on the special Calendar of Motions to Discharge Committees. No motion to discharge a committee may be filed unless the bill has been held thirty days or more, and it must have been on the calendar five legislative days before action can be taken on it. Then on the second and fourth Mondays of each month, immediately after the reading of the *Journal*, it is in order to make the motion, which may be debated for twenty minutes. Immediately thereafter a motion is in order to consider the bill and take a vote on its final passage; or it may be placed on the proper calendar for later consideration, just as though it had been reported out by a committee.

Sharp differences of opinion on the general principle of the discharge rule have existed since the rule was first proposed. To some it seemed essentially a blow to responsible party leadership; on the other hand, it was supported as a mild corrective necessary to keep the House leadership sensitive to House opinion. During the 68th to 75th Congresses (1923–1939) 134 discharge motions were filed with the clerk, nineteen were placed on the discharge calendar, thirteen were brought up for hearing, and eight were adopted, recalling bills from committee, of which four passed the House and only one, the important Wages and Hours Bill, passed the Senate and became law. In the 76th Congress the controversial bill for the reorganization of the Federal administration was in this way rescued from committee and passed. The indirect influence of the rule may be much more than these figures indicate, but of course is difficult to estimate. At least it seems now firmly established as a part of the House procedure.

4. *The Calendars.*[10] It is desirable that members of the legislature have

[9]F. M. Riddick, op. cit. chap. xiii.

[10]Ibid. pp. 163–167; De Alva S. Alexander, *History and Procedure of the House of Representatives*, chap. xiii.

knowledge of the program of business so that they may be properly prepared for discussion and voting. For this purpose the bills as they come from the committees are placed by title and number on lists called calendars, and, unless otherwise ordered by special rule, are considered in that order on the days set aside for that particular calendar. The House classifies its bills by placing them on three different calendars, each of which is corrected and published daily.

The *Union calendar*, or Calendar of the Committee of the Whole House on the State of the Union, receives all bills raising revenue, general appropriation bills, and bills of a public character directly or indirectly appropriating money or property. The *House calendar* is for all public bills not raising money or requiring an appropriation of money or property. The *private calendar*, or Calendar of the Committee of the Whole House for Private Bills, receives all bills of a private character. On the first and third Tuesdays of each month the Speaker announces "Private Calendar Day." The clerk reads the first bill by title and asks whether there is any objection to its consideration. If there is none, a short time is allowed for amendment and discussion, and the motion on its third reading, engrossment, and final passage is taken. By this means the noncontroversial bills can be disposed of speedily. The *consent calendar* is a device for expediting action on bills already on the Union or House calendar. Any member may file a notice with the clerk that he wishes a certain bill so transferred. On the first and third Mondays of each month immediately after the reading of the *Journal* the roll of the bills on the consent calendar is called in numerical order. If an objection is made to the consideration of any bill, it is carried over to the next occasion of the call of this calendar, when, if three or more members make objection, it is immediately stricken from the calendar for the remainder of the session. The *discharge calendar*, compiled from bills unreported from committees, was described above.

5. *Second Reading in the Committee of the Whole on the State of the Union. Committee of the whole* is the name for the entire membership of the House acting in a special and informal capacity.[11] It comes into being upon the adoption of the motion "Mr. Speaker, I move that the House resolve itself into the Committee of the Whole on the State of the Union for the (further) consideration of the bill H. R. No. ——." The Speaker then names a member to act as chairman, takes his seat on the floor, and the Sergeant at Arms removes the mace from its stand to show that the House no longer is in session. The existence of the committee is terminated by a vote to rise and report to the House, upon which the Speaker resumes the chair. The purpose of this committee is to permit a greater flexibility and informality in debate than can be had under the regular House procedure. One advantage is that a smaller number than the constitutional majority may be made to constitute a quorum, now set by the rules at one hundred.

[11] F. M. Riddick, op. cit. pp. 144–162.

Two committees of the whole have been established: the Committee of the Whole House on the State of the Union, to which all bills belonging on the Union calendar must go, and the Committee of the Whole House, which considers all bills on the private calendar. The order of consideration is according to the place on the calendar or as determined by the committee, unless previously determined by special order of the House.

Debate in the Committee of the Whole House on the State of the Union is allowed a large latitude. It is at this stage that the House has acquired its reputation for a love of discussing everything under the sun from the most trivial to the sublime. Discourses on city politics, the qualities of Andrew Jackson or Henry Clay, poetry, the Einstein theory, and the last Presidential campaign would all be considered relevant to a bill to deepen the harbor of Duluth. Latitude in time, however, is much less than in subject; for the general rules restrict each member to one hour on one question. After the close of the general debate the committee proceeds to a consideration of the bill paragraph by paragraph or section by section under a rule which restricts each member to five minutes. It is at this point that the bill gets its second reading in full. Amendments are offered, discussed, and made. The informality permits colloquies, questions and answers, and a general give-and-take in discussion which are effective in shaping the bill. Since most legislation requires appropriations, the House is in committee of the whole most of the time, and its most effective work outside the standing committees is done there. After the committee of the whole is through with the bill, it rises and reports to the House, the Speaker resumes the chair, and a motion to adopt its report, accompanied by the closure of debate by use of the previous question, is made.

6. *Second Reading in the House.* This step in the procedure is usually alternative to the one described in the section preceding. Bills which do not go to the committee of the whole, those from the House calendar, are taken up in the House, given a second reading in full, discussed, and amended. In rare cases bills go through the committee of the whole without the previous question's being moved on report to the House, and so again are subject to debate and amendment. If the committee of the whole has done its work thoroughly, this is repetitious and a waste of time. The stage of second reading in the House lacks the informality and the effectiveness which characterize that in the committee of the whole.

7. *Engrossment and Third Reading.* With the bill again before the House, the Speaker puts the question "Shall the bill be engrossed and read a third time?" The text at this stage often has been considerably changed from the form it had when taken from the calendar, the printed copy marred with handwritten or typewritten interlineations.[12] In the early days of legislatures all bills were inscribed in longhand. The purpose of engrossment as used by Parliament was to transcribe the text of the bill from the

[12] *House Manual*, 78th Cong., 2d Sess. (1945), Rule XXI, sect. 1, p. 384.

amended and soiled copy to a new and clean piece of parchment. In both the American and the English practice, engrossment now means a reprinting of the bill as amended; if no alterations have been made, the motion amounts only to the progress through one more step on the road to the enactment of the statute. At this stage, if special orders do not prohibit, the bill is open to discussion and amendment; but seldom are any changes accepted, and those offered relate to the general plan of the bill and not to textual changes. Reading is by title only; but on the demand of a member the engrossed bill must be read, which means a delay until the engrossment has actually taken place. Members who would insist on a full reading at this point would find themselves subject to the keen displeasure of their colleagues. Engrossment is a precaution ensuring that the bill, when sent to the other house for approval, is exactly as drafted, amended, and passed. The question on Senate bills before the House is simply on passage to third reading, since engrossment already has taken place in the Senate. Failure of a bill to get a majority vote at this stage kills it as effectively as would a later vote on final passage.

8. *Passage.* After the bill has had its third reading and been engrossed, the Speaker, without a motion from the floor, at once puts the question on final passage. A majority of all voting, if a quorum, is sufficient for the passage of all measures; but a joint resolution proposing a constitutional amendment requires not only a quorum but a two-thirds vote of all present. The clerk certifies the passage of all bills and resolutions.

9. *Transmission to the Senate.* Immediately after final passage the bill is sent to the Senate by messenger, but until 1911 only when both houses were sitting. The Senate will receive a message at any stage except while it is dividing, the *Journal* is being read, or a question of order or a motion to adjourn is pending; the House, at all times except while a question is being put or during a vote by rising or by tellers. A messenger salutes the presiding officer, who takes the message, lays it on the table, and refers it to the appropriate committee, as later indicated in the *Journal* and *Record.*

10. *Consideration by the Senate.* The Senate normally refers a House bill coming to it to a standing committee, from which it proceeds through the usual legislative route. Peculiarities of Senate procedure and practice will be discussed in a succeeding section.

11. *Return of the Bill from the Senate without Amendment.* When a bill is returned by the Senate without amendment, the procedure is very simple. The returned bill goes to the clerk of the House and never comes before the House again for action.

12. *Return of the Bill from the Senate with Amendments.* A bill returned by the Senate with amendments, like all such communications, comes to the table of the Speaker, who refers it to the standing committee having jurisdiction over the subject matter of the bill. This committee then reports the bill with recommendations, after which it goes to the Committee of the

Whole on the State of the Union, if it is of a nature to fall to that committee, where it is debated and reported to the House itself. If the Senate amendment does not require action in the committee of the whole, it goes directly to the House from the Speaker's table.

13. *House Consideration of the Senate Amendments.* The House takes up and debates each amendment in turn and may vote agreement, qualified agreement, or entire disagreement. In case of entire disagreement it may ask for a conference with the Senate, or leave it to the Senate to recede from its amendments, or insist on them and ask for a conference.

14. *The Bill in Conference Committee.* The conference committee is the logical outgrowth of the bicameral system.[13] A bill to become law must pass the two houses in identical form. Without an intermediate body it might pass endlessly back and forth between the two before an agreement could be reached. The conference committee is in effect a third legislative body representative of the two houses. Its members (three, five, or seven from each house) are appointed on the principle of seniority by the presiding officers from the standing committees in charge of the bill. The meetings are always held at the Senate end of the Capitol. The "managers" for each house vote separately under the guidance of the senior member. The deliberations are secret and may not be referred to on the floor of either house. The task, of course, is to redraw those portions of the bill which passed the two houses in different forms. If the bill has been amended in the second house by striking out all clauses after the enacting clause and inserting an entirely new text, the task is a difficult one and gives the committee the opportunity to redraw the entire bill. The conference committee affords an opportunity for perfecting a bill which has been battered out of shape by many amendments in its passage through the House and Senate. It also enables the majority management of the two houses, which always keeps an easy majority on the committee, to exert a final influence on the bill.

The dangers in the system were apparent almost from the beginning and were the subject of bitter complaint. Special interests which had met defeat in the two houses might bring pressure to bear on the committee in an attempt to undo the work of weeks or months of deliberation. For instance, Senator John Sherman of Ohio, an experienced legislator, complained: "By our practice we have gradually extended the powers of conference committees until a proposition to send a bill to conference sometimes startles me. I feel that both Houses ought to make a stand against the attempt to transfer the entire legislative power of Congress to such committees."[14] Before the Civil War it had become the rule that these conference reports, signed by the managers, be printed in the *Journals* of the Senate and House and lie over one day before being considered.

[13]F. M. Riddick, op. cit. pp. 197–208; J. P. Chamberlain, op. cit. chap. xiii.
[14]Ibid. pp. 284, 285; *Congressional Record*, 48th Cong., 1st Sess., pp. 3974, 4098.

Rules and custom since that time have added other safeguards. Matters not included in the disagreement between the two houses cannot be considered, and if included in a report may be ruled out on a point of order. The House frequently has given its managers concrete instructions, but the Senate generally has opposed the practice. Before a conference-committee report is considered, it must have been printed in the *Congressional Record* with a statement explaining the matter of disagreement and the proposed compromise. New matter not germane to the bill or under disagreement may not be introduced, nor may old matter be stricken out. Because of its constitutional prerogatives in matters of finance, the House will recognize no Senate or conference-committee changes in appropriation bills except those to retrench. These rules have combined to keep the conference committee in reasonable control, but it necessarily remains a powerful influence on legislation. The requirement that the reports must be accepted or rejected in the houses in toto is a guarantee against further delay, but in extraordinary cases they may be altered by a concurrent resolution.

15. *Enrollment of the Bill on Parchment.* The bill as finally passed by the two houses is turned over to an enrolling clerk for transfer to parchment. Until 1893 this was done by writing; thereafter, by printing. The clerk may make no change in the text of the bill as passed, not even correct obvious errors; but errors of a technical nature may later be corrected by a concurrent resolution.

16. *Examination of the Bill by the Committee on Enrolled Bills.* A committee composed of seven members of the House and three Senators examines all bills after their enrollment on parchment to see that they are identical with the bills as passed. The text is gone over line by line and word by word. Each section of the committee then attaches a certificate to the bill attesting to its accuracy.

17. *Signing by the Presiding Officers of the Two Houses.* An enrolled bill, no matter in which house it originates, is first laid before the Speaker of the House for signing, and this must be done in the presence of a quorum. It is then transmitted by messenger to the Senate, where it is signed in the presence of a quorum of that body by the Vice-President or president pro tempore. The Secretary of the Senate thereupon returns the bill to the committee on enrolled bills of the house in which it originated.

18. *Transmittal to the President of the United States.* Formerly the entire joint committee, now only the chairman of the section, from the house where the bill originated, takes the bill to the White House for the President's approval or rejection. Each committee reports daily for recording in the *Record* and *Journal* the list of enrolled bills transmitted to the White House.

19. *Approval by the President.* The President's approval may validly be signified in only one way, by his signature. For pieces of noteworthy legislation the act of signing is sometimes made a public ceremony, with

the notables interested in it as witnesses, with flashlight pictures, and with a gold pen (which is kept as a memorial of the occasion) for the signing. Bills passed at the close of a session (formerly the morning of March 4) are dated as being approved on the day before, which has been held to be the last legislative day of a Congress. Unless otherwise stated in the bill, the statute is valid and in effect from the moment of its signing by the President. Presidents a few times have attached to a bill memoranda giving reasons for their action or interpreting it. These Congress looks upon unfavorably, but messages of the President explaining the reasons for the approval are regarded as one of his prerogatives. When the President approves a bill, he indicates the calendar day and hour of signing and notifies the house in which it originated. If a bill becomes law by the passage of time without his signature, he informs the house in which it originated.

20. *Disapproval by the President.* If a President disapproves a bill, he is required to return it to the house where it originated, together with his objections. The objections are in the form of a "veto message," which is spread on the *Journal* of that house.

21. *Action on a Vetoed Bill.* The Constitution provides that after the veto message has been entered on the *Journal*, the house shall "proceed to reconsider it." In practice this reconsideration may take the form of referring it to a committee for examination, of postponing it to a certain day, or of an immediate vote. The question is then put: "Will the House on reconsideration agree to pass the bill, the objections of the President to the contrary notwithstanding?" A two-thirds vote of those present and voting, as well as a quorum, is necessary to pass it. If this is not forthcoming, the bill is dead; if it is passed, the bill is sent to the Senate for similar action. The house which last passes the bill then sends it to the Secretary of State.

22. *Filing by the Secretary of State.* The Secretary of State receives the official copies of all bills which have gone through all the required steps and promulgates them as laws. Each law is given a "chapter" heading and is published, in the order of its approval by the President, in the annual volume of session laws. The copy in the Secretary's possession, however, remains the official one, to which reference must be made in case of controversy as to the correct text.

## *HOW THE DAY'S PROGRAM AND THE STEPS IN LEGISLATION ARE VARIED*

If the day's program and the steps for the passage of a bill as outlined by the rules were followed regularly, it is clear that Congress would be able to perform only a small part of the work expected of it. Various parliamentary expedients exist for securing the flexibility needed to bring forward the important measures and make the short cuts necessary for speedy passage. Indeed, for days at a time work goes on without any

attempt to follow the schedule laid down in the rules; but when the authorized variations from them have been carried out, the House automatically goes back to the "regular order." Similarly, the stages for the passage of a bill may be telescoped or some of them entirely left out.

SPECIAL DAYS · Certain days of the week or month may be reserved for designated kinds of business.[15] On the first and third Mondays of each month the "consent calendar" is called, and all bills to whose consideration no objection is made are considered, put through all stages (including the third reading), and passed. This is a means for the rapid disposal of bills of a noncontroversial nature. On the first and third Tuesdays the clerk calls the bills and resolutions on the private calendar, and those not objected to are considered and disposed of. On Wednesday of each week, which is known as "Calendar Wednesday," no business is taken up except that provided under the order of the "morning hour." On a call of the committees under this rule, bills may be called up from either the House or the Union calendar; when they are from the latter, the House automatically resolves itself into the Committee of the Whole House on the State of the Union. It is further provided that not more than two hours of debate shall be allowed on one measure and that no committee may occupy more than one Wednesday with its business unless by a two-thirds vote of the House. On the second and the fourth Monday in each month, bills pertaining to the District of Columbia have the right of way. Moreover, special orders brought in by the committee on rules may in general disrupt the regular program of any day.

THE LEGISLATIVE DAY · Congressional custom has established the fiction known as the "legislative day," which in effect is another device for setting aside the regular order of business. It is brought about by taking a recess rather than an adjournment at the close of a calendar day, leaving the House when it reassembles, regardless of the setting and rising of the sun, in the same business "day." A legislative day may continue for several calendar days, weeks, or even months. The advantages of the device are obvious: the House is able to take up the business of the day before where it has been interrupted, without the delay which would come from going each day through the whole order of business down to that point. Strangely enough, the legal fiction is marred by an observance of the regular order each day down to the "morning hour."

PRIVILEGED BUSINESS · The third general way in which the order of business is varied from day to day lies in the preference given by the rules to designated matters.[16] Committees are named which may report at any time on certain things: the committee on rules reports on rules and order of business; the committee on elections, on the right of a member to his seat; the committee on "ways and means," on bills for raising revenue;

[15] *House Manual*, 78th Cong., 2d Sess. (1945), Rule XXIV, sects. 6, 7.

[16] F. M. Riddick, op. cit. pp. 176–178, 219–220; *House Manual*, Rules XI and XXIV.

the committee on appropriations, on the general appropriation bills; and several other lesser committees on specified matters. The matters named in this rule are called "privileged reports" or "privileged questions," and they interrupt the regular order of business. When the chairman of any privileged committee is recognized to bring up a matter of privileged business, the House proceeds at once to consider it; but if any member raises the question, the motion is put: "Will the House now consider it?" and without a majority vote the House continues its work under the general order of business.

SPECIAL ORDERS · The committee on rules acts in conjunction with other privileged committees to control the order of business in the interests of the leaders' legislative program. A "special order" may include a surprisingly large number of provisions which set aside regular rules and practices of the House.[17] It may specify the hour at which the consideration will begin and at which the vote will be taken, as well as the number of hours of the debate and the allotment of time to both sides. It may specify the kinds of amendments which may be offered or may prohibit all except what may be offered by a designated standing committee. It may prohibit the making of all points of order during the consideration or may require that when the committee of the whole rises and reports on the bill to the House the previous question will be considered as having been moved and adopted as on third reading and final passage. An extreme example of the application of the restrictive power of such a special order occurred in the Seventy-third Congress, throughout that Congress no amendment being in order which would conflict with the economy part of the appropriation bill to which it had been applied. The content of the special order is naturally the result of an agreement entered into by the floor leader, the steering committee, the chairman of the standing committee in charge of the bill, and the rules committee.

SUSPENSION OF THE RULES · Opportunity for the speedy passage of bills called up out of their regular order is afforded by the "suspension of rules" procedure for the first and third Mondays of each month.[18] A House member or a committee may make the motion "to suspend the rules and pass the bill, H.R. No. ——." If no second is demanded, an immediate vote is taken without debate; and a two-thirds vote both suspends the rules and passes the bill. A majority of the members present is necessary to second the motion, after which it is debated for forty minutes, when a two-thirds vote is sought for suspension of the rules and for passage. The whole procedure is under the control of the Speaker, who recognizes only persons agreed upon. Suspension of the rules as a device for expediting business has lost ground to the device of the special report of the committee on rules, which can be adopted by a simple majority vote.

[17]De Alva S. Alexander, op. cit. pp. 216, 217; F. M. Riddick, op. cit. pp. 207–210.
[18]Ibid. pp. 189–191; J. P. Chamberlain, op. cit. p. 109; *House Manual*, Rule XXVII

UNANIMOUS-CONSENT AGREEMENTS · If no one objects, there is no reason why the House or any other body should not proceed with its business without respect to the rules. When a member rises and asks unanimous consent that "Bill No. 500 on the Union Calendar be now considered," he is in effect asking that the rules be set aside for that purpose.[19] The objection of one person, of course, is sufficient to deny the request and bring back the regular order. But the procedure of unanimous consent is a most valuable device for speeding the work of the House. The Speaker naturally has the procedure well under control, for he may show his denial of it by refusing to entertain the motion. There are few limits to what it may accomplish: the reference of bills may be changed; personal explanations may be made; remarks may be "extended" in the *Record*; actual debate and discussion may be carried on; requests may be presented to the House; and bills may be called up for consideration and vote. Since a single objection sets it aside, the cure for the abuse of the procedure is in every member's hands. Unanimous-consent agreements may be entered into between the majority and the minority floor leaders covering the procedure of a bill through to its passage; but they cannot be obtained for all bills, and naturally are not entered into unless it seems certain that all members will respect them. It is particularly well adapted to the work of the Senate, because of the Senate's smaller size and more informal procedure.

PRECEDENCE IN MATTERS OF BUSINESS · Business in the House of Representatives is conducted largely on a system of priorities.[20] One piece of business must give way to a more highly favored one, and the more highly favored one to another still more highly favored, and so on. An authority on House procedure has ranked the matters which might come before it in thirty-four categories, from the most highly favored to the least highly favored. Heading the list is the reception of messages, usually those of the President or of the Senate, for which current business is immediately interrupted; then come the administration of the oath to a new Representative, the question of the existence of a quorum, and the presentation of conference reports. The establishment of a daily order of business by the standing rules is the beginning of the system of priorities, which itself is alterable by the various means described above; but the system is mostly the result of rulings of the Speaker of the House built up over many years. There are priorities not only for the matters of business that may come before the House but also for the kinds of motions. These range from the most privileged, which is one to adjourn, to a number which the Speaker may refuse to entertain, such as to admit outside persons to the floor or to expunge an item from the *Record*. At what point in the order of precedence a proposed piece of business or a motion falls is often a most per-

[19] F. M. Riddick, op. cit. pp. 194–196; *House Manual*, Rule XIII, sect. 3.
[20] F. M. Riddick, op. cit. pp. 167–168, 194 ff.

plexing question, but one which must be decided promptly if the House is to proceed with its business in an orderly and efficient manner.

SOME MOTIONS USED IN THE CONDUCT OF BUSINESS · Motions are variously used to speed a bill on its way, to alter it, or to defeat it altogether. A few of these are worthy of note.[21] If a matter of business is proposed, any member may rise and say, "Mr. Speaker, I raise the question of consideration," which brings an immediate vote on whether the motion or proposition shall be considered. This gives the majority a convenient means for keeping from the House matters which are outside its program of legislation. Motions to amend are naturally the most frequently used of all while a bill is before the House. The motion to amend may propose to add to the bill, subtract from it, or substitute an entirely new one. No amendment, however, is in order unless it is "germane" to the bill; that is to say, unless what it proposes is directly connected with its subject matter. This is to prevent hodgepodge legislation or the destruction or warping of the purpose of the existing bill. Another favorite instrument of the majority is the "previous question," which, if carried by a majority vote, shuts off debate and brings the question or bill to an immediate vote. The motion to "lay on the table," which is of the highest privilege, brings quick and painless death to the matter under consideration; for no motion to take off the table is subsequently entertained. A vote "to postpone indefinitely," if carried, finally disposes of the pending proposition without a direct vote on its merits. It is of low privilege and seldom used. "To postpone to a day certain," on the other hand, is of high privilege and is often used to set a time for the consideration and final disposition of a proposition. The motion to "refer," "commit," or "recommit" removes a bill from the floor of the House and sends it back to a committee. The motion may be either hostile or friendly. It may specify that the committee report it back "forthwith," or with certain general changes, or without any instructions. Bills which have been distorted by successive amendments may be recommitted for redrawing, but more often the motion is a means of killing the proposition. That drastic instrument of the majority, the motion "to suspend the rules and pass the bill," which requires a two-thirds vote, already has been explained. The last threat to a bill in its journey through the House is the motion "to reconsider the vote by which H. R. No. —— passed the House." If made, it remains indefinitely a privileged motion which any member may call up. It is therefore the custom of the bill's sponsor immediately after passage to move that it be reconsidered and that the motion to reconsider be laid on the table. So important is the motion that the Speaker will not sign the bill until reconsideration has been moved and the motion laid on the table.

[21]Ibid. pp. 235–253.

## *THE SENATE*

The methods of lawmaking used in the Senate are enough like those of the House to make unnecessary their description in detail. Both houses drew their basic rules and practices from the same historical source: both include Jefferson's *Manual* as a collateral part of their rules. There are, however, some noteworthy differences between the two. These are chiefly that the Senate has fewer and simpler rules; that it depends more on custom than on written rules; and that it more readily sets its written rules aside in favor of short cuts. These stem not only from the much smaller size of the Senate but from the tradition of dignity derived from the original mode of election by the State legislatures, the six-year term, and the association with the President in certain executive functions.

THE DAY'S ORDER OF BUSINESS · From the opening at twelve o'clock until one o'clock there is much the same order of businesss as in the House at the corresponding time. The Vice-President calls the Senate to order, the presence of a quorum is ascertained, and the *Journal* is read and corrected if needed.[22] Petitions and memorials are received and are noted by the printing of their short titles in the *Congressional Record*. Bills and resolutions likewise are introduced, read the first and second times, and referred to the proper standing committees. At the conclusion of this "morning business" at one o'clock the calendar of bills and resolutions is called; and if no objection is made to a bill, it is taken up, discussed, and voted on under the five-minute rule. This permits the rapid disposal of noncontroversial bills.

At two o'clock, or sooner if all bills not objected to have been called, the "morning hour" is concluded, and the bills and resolutions on the calendar of special orders are called. Several privileged motions are available to enable the Senate to take them up out of the calendar order: to proceed to the consideration of an appropriation or revenue bill; to consider any other bill named on the calendar; to pass over the pending subject; or to place that subject at the foot of the calendar. In this way the Senate leaders are able to push through the more important items on their program. Unfinished business left over from the preceding day is next privileged for consideration in the period following the "morning hour." Sessions for the transaction of executive business are usually ordered for the late afternoon.

THE CALENDARS · The business of the Senate is not classified and placed on calendars according to its content, as in the House, but rather according to the stage of its legislative progress.[23] The calendars of executive and special orders are self-explanatory. That of general orders includes all bills and joint resolutions reported out by standing committees or ordered

[22] *Senate Manual*, 78th Cong., 2d Sess. (1944), Rule VIII, pp. 13–14; F. M. Riddick, op. cit. pp. 321–327.

[23] *Senate Manual*, 78th Cong., 2d Sess. (1944), Rules VII, VIII, pp. 9–14.

placed on the calendar by the Senate. The "calendar of resolutions and motions over under the rule" consists of propositions introduced or made during the legislative day but not laid on the table or referred to standing committees. These are due to be called up in the "morning hour" of the next day. The "calendar of subjects on the table" contains measures placed there by request of their sponsors, which later may be called up for immediate consideration or for reference to a standing committee. Business on the calendar of motions for reconsideration is stalled unless called up by a majority vote of the Senate.

THE STEPS IN LEGISLATION · These vary from those of the House chiefly in the direction of simplicity.[24] A bill is introduced from the floor by a member, and the title is read by the secretary, after which the presiding officer announces: "First reading of the bill. This bill will be considered as having been read the second time, if there be no objection, and referred to the Committee on Naval Affairs." When reported out by the committee, the bill goes to the calendar of general orders, from which it is called in its regular order, if not sooner by a special order. Formerly all bills were then considered in the Senate in committee of the whole, but with the president of the Senate remaining in the chair. In 1930 the committee of the whole was abandoned except for the consideration of treaties in executive session. The bill at this stage is open to debate and amendment and thereafter passes through the same stages as the House bills.

VARIATIONS FROM THE REGULAR ORDER · Almost all the devices of the House for short-circuiting the regular order, except the closure of debate by the "previous question," are available in the Senate. Any subject may be made a special order by a two-thirds vote. Motions to suspend the rules cannot be voted on unless made in writing and after one day's notice. The rules may be set aside, however, at any time by unanimous consent. Indeed, the distinguishing feature of the Senate procedure is the free improvisation allowed by the frequent use of unanimous consent. "The rules of the Senate are few and simple" and "the Senate rules are only made to be broken" are expressions not infrequently heard on the floor. The Senate proceeds from day to day as the majority of the moment desires; hence there is smaller need than in the House for rigid calendars and order of business, or for days set aside for special matters.

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[24] F. M. Riddick, op. cit. pp. 321–327; J. P. Chamberlain, op. cit. pp. 154–159.

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CHAPTER XXI

# *Some Aspects of Lawmaking in Congress*

The preceding chapters have explained how the legislative program of a session of Congress is formulated; the system of control set up by the majority party; the organization of the houses for work established by the rules and by-laws; the daily order of business; and the steps through which a bill must pass in order to become law. This one is concerned with an elaboration of several of the phases of legislation which were treated briefly as links in the whole process.

## *DEBATE AND DISCUSSION*

The purpose of debate in a legislative assembly is to examine and elucidate the provisions of the pending proposal.[1] In the course of the attack on a bill and its defense a better understanding of its implications may be reached by both those for and those against it; amendments may be formulated to strengthen demonstrated weaknesses; and the information and analyses brought forward may prepare the membership for a more intelligent vote. Not to be ignored, too, is the relation of the debate to the general public, whose attitude may well force favorable or adverse action on the bill and its amendments. Not often, it is said, does legislative debate lead to the conversion of members who already have made up their minds. It is usually most effective on the general merits of the bill; but discussion in committee of the whole, paragraph by paragraph, often results in important technical improvements. Congressional debates also serve the important purpose of arousing and educating the public on the leading issues of the day. Newspapers and periodicals carry accounts, and discussion begun on the floor of Congress is often continued by Congressmen on the radio, with the nation as audience.

THE CUSTOMS OF DEBATE · When a bill comes before the house, recognition is first given to the chairman of the standing committee which has reported it out; next, to the ranking minority member, and thereafter alternately to those favoring and those opposing. In the House of Representatives the time allotted for the discussion, and its apportionment among parties and members, is controlled by a special order brought in by the committee on rules. In the Senate similar agreements for the more important bills are reached by the majority and minority floor leaders, although, owing to the rule of unlimited freedom of debate, they

[1] R. Luce, *Legislative Procedure* (1922), chap. xi.

cannot be enforced if individual members object. Members desiring to debate a bill must rise and address the Chair and receive recognition. They do not refer to each other in the second person but in the House as, for instance, "the gentleman from Indiana" and in the Senate as "the senior Senator from Alabama." They usually address the house from their seats on the floor and need not face the presiding officer. Senators may not speak in debate more than twice upon any one question on the same day without leave of the Senate; while members of the lower house, except for the introducers of the matter pending, may speak only once. Senators are forbidden by the rules to impute to another Senator "any conduct or motive unworthy or unbecoming a Senator," or to refer offensively to any State of the Union[2]; while the rules of the lower house enjoin the members to confine themselves to the "question under debate, avoiding personality." Some of the celebrated orators of the pre-Civil War days wrote out their speeches in full; then some delivered their speeches from memory, while others read them. Today long speeches are fewer, and they often are delivered from notes.

QUALITY · Congress in most decades has performed reasonably well its function as a forum for the discussion of pressing issues.[3] There were memorable debates in the early 1830's, in the pre-Civil War and reconstruction years, and in the 1890's and in 1919, when the tariff and the League of Nations issue, respectively, were agitating the country. The Senate's size, character, and functions have always given its debates pre-eminence over those in the House of Representatives. The freedom of debate there, while sometimes abused, has established it as the one place in which every issue of any considerable interest may obtain a hearing. The names of Webster, Hayne, Clay, Calhoun, Benton, Sumner, Davis, Hoar, Bacon, and Borah are reminders of issues and views eloquently stated and defended. The effect of popular election on the character of Senate debates is problematical. The Senate has become more immediately responsible to the people, and this has encouraged more speeches of the type designed for the next election. The old spirit of courtesy is not as apparent as in the past; but observers had noted a change in the character of the Senate even before popular election, probably attributable mostly to its increased size and the democratizing influences of the times. The intrusion of the more democratic tactics into the Senate has not excluded in recent years debates which have risen to the level of the best in earlier times.

The House, with the restrictive rules necessary because of its greater size, never was the forum to which the nation looked for a trial of strength among its leading issues. Yet it performed its debating function reasonably well until late in the 1870's. Woodrow Wilson, writing in 1884, at a time when its membership had reached 320, observed that "the theatre of

[2] *Senate Manual*, 78th Cong., 2d Sess. (1944), Rule XIX, sects. 2, 3, p. 25.
[3] R. Luce, op. cit. chap. xi.

debate upon legislation" had shifted "from the floor of Congress to the privacy of the committee-rooms"; that "the House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible."[4] With the growth of the membership to 435, and the great tightening of the rules restricting individual freedom, beginning in the late 1880's, the House today is still less a discussion chamber than at the time Wilson wrote. Most members tend in voting to follow the lines of their party's vote in the standing committees. One who traces in the *Record* the debate on a bill is struck by the fact that hardly half a dozen men speak with the appearance of a thorough knowledge of its content and purport. Bills which evoke the widest and sharpest interest of members are those considered dynamite in the forthcoming election. In the early years of the F. D. Roosevelt administration, influenced by the national economic emergency, examination and debate of proposed legislation reached a new low. Bills of so sweeping a nature as to affect drastically the affairs and fortunes of large portions of the population were brought in, time after time, under a rule which limited debate to a few hours. Restricted or perfunctory debate on bills brought before a legislative body by a cabinet or by other leaders directly responsible to it and of its own choosing does not give the same opportunity for bad legislation as where, as in the United States, the responsibility is divided among three agencies: Senate, House, and President of the United States.

## *FILIBUSTERING AND THE CLOSURE OF DEBATE*

*Filibustering* is the term applied to the tactics employed by a minority in a legislative body to prevent the bringing of a pending bill to final vote.[5] The usual object is to prevent its eventual passage or to bring about its amendment in a way favorable to the minority party. A less defensible motive is to secure the inclusion of items favored by individual members; for instance, in 1903, Senator Ben Tillman threatened to talk indefinitely unless the bill under consideration should include an appropriation to pay a war claim to South Carolina, and began reading Byron's *Childe Harold*.[6] A theoretical objection to the filibuster is that it denies the right of the people's majority to rule. Set over against this is the principle that ours is a limited government which must confine itself to acts within the delegated powers; that the filibuster is an instrument of the minority for the assertion of its reserved rights, as is the judicial review of legislation. Natural rights and reserved rights have a common basis in conscience: they relate to things on which there can be consensus as a basis for general

[4]W. Wilson, *Congressional Government* (15th ed.), pp. 79, 81.

[5]F. L. Burdette, *Filibustering in the Senate* (1940), p. 5. For a summary of filibustering in the Senate cf. G. H. Haynes, *The Senate of the United States* (1938), Vol. I, pp. 396–405.

[6]R. Luce, op. cit. p. 293.

legislation. For instance, even if there were no legal guarantees of freedom of religion and association, men would always be found in Congress ready to filibuster against restrictive legislation in these fields. Again, Southern leaders are agreed that there should be no national regulatory legislation on the race question and have shown themselves ready to resort to filibustering against any such proposals.

LEGITIMATE FILIBUSTERING · Senator Theodore E. Burton, of Ohio, in February, 1915, stated three grounds on which he believed a filibuster was justifiable.[7] First, when it involves a vital principle of constitutional right. Since a constitution is nothing less than the basic rules of political life, that is, a "social contract," as the eighteenth-century philosophers said, the attempt of a majority to alter it at their whim is properly open to resistance. Second, when a measure is plainly the result of crude or inconsiderate action. Extended opposition in the Senate will bring out such weaknesses and focus the attention of the country on them. Third, when it is evident that the house is voting under some form of compulsion and against its convictions. Instances of such bills are those made as the result of trades and bargains, bills shot through rapidly at the behest of the inner organization, and bills drafted outside Congress in the administrative departments or by the President and sent to Congress as "must" legislation. Justification for such filibustering, however, should not extend beyond the point of such debate and delay as would call the attention of the two houses and the country at large to the nature of the bills, after which the majority should be permitted to assume the responsibility for disposing of them.

METHODS OF FILIBUSTERING · The means used to delay and obstruct proceedings in Congress fall chiefly under three headings: (1) making dilatory motions, (2) raising the question of a quorum, and (3) indulging in excessive talk. Each of these deserves some consideration at this point.

*Dilatory Motions.* The technicalities of parliamentary law offer much the same opportunity for delay as those of the common law offer in the courts of justice. An opposition with a leadership skilled in parliamentary practices has a great fund of resources for delaying or perverting the legislative process. Motions to adjourn, to adjourn to a day certain, to go into committee of the whole, to amend, to strike out the enacting clause, to recommit, to lay on the table, and a long list of others are available as time-

[7] 63d Cong., 3d Sess., February 13, 1915, p. 3708. Franklin L. Burdette, in his *Filibustering in the Senate*, p. 233, lists six defenses offered by its supporters for filibustering: "(1) that minorities have rights which no majority should override; (2) that a Senate majority does not necessarily represent a majority of the people or even of the States; (3) that it has become the special duty of the Senate carefully to inspect legislation, a duty not readily performed without freedom of debate; (4) that filibusters really do not prevent needed legislation, because no important measure defeated by filibuster has been enacted later; (5) that it is the peculiar function of the Senate to act as a check upon the executive, a responsibility too easily thwarted if Senators could be prevented from speaking fully upon all matters; and (6) that the constitutional requirement for recording the yeas and nays is a protection of dilatory tactics."

consuming expedients. A light form of filibustering appeared even in the First Congress; there was a fully developed one in 1809 on the proposal to revive the Nonintercourse Act, with a galaxy of dilatory motions; but it was not until the early 1880's that members of Congress forsook old codes of conduct to take full advantage of the freedom given them by the rules to stop the machinery of legislation. Republicans filibustered throughout the three terms of Speaker Carlisle, 1883–1889; and when the Republicans had won the majority in the House, a Democratic House leader announced, "We do not propose that the Republican majority shall pass a single measure without our consent; in other words, we propose to exercise the control of the House just as much as though we were still in the majority, because we know our minority is strong enough to make us the virtual rulers."[8] Already in 1877, during the count of the electoral votes, Speaker Randall of the House had refused to put dilatory motions; and a few years later Speaker Keifer sustained a point of order made by Thomas B. Reed that dilatory motions could not be entertained while the House was considering a proposition from the committee on rules.

Late in January, 1890, with a stormy filibuster completely tying up the business of the House, Speaker Reed refused to put certain dilatory motions. Angered by this, one of the movers strode down the aisle toward the Speaker and declared the intention of the minority "to dispute every inch of ground, burn every blade of grass, and the last instruments of liberty shall be our graves."[9] The Speaker answered the challenge by a declaration of his intention not to entertain dilatory motions.

> There is no possible way by which the orderly methods of parliamentary procedure can be used to stop legislation. The object of a parliamentary body is action, and not stoppage of action. Hence, if a member or set of members undertakes to oppose the orderly progress of business, even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained, and to cause the public business to proceed. . . . When a gentleman steps down in front, amid the applause of his associates on the floor, and announces that it is his intention to make opposition in every direction, it then becomes apparent to the House and to the community what the purpose is.

The House, on appeal, upheld Reed's ruling, and two weeks later the present rule was adopted: "No dilatory motion shall be entertained by the Speaker." The committee which framed it admitted that no satisfactory definition of the word *dilatory* could be drawn and that it must be left to the Speaker. It declared that, nevertheless, this in the end would be "a power exercised by the House through its properly constituted officer," who,

[8]Roger Q. Mills of Texas, October 7, 1889, quoted in R. Luce, *Legislative Procedure* (1922), pp. 287, 288.

[9]*Congressional Record*, 51st Cong., 1st Sess., January 31, 1890, p. 999; R. Luce, op. cit. pp. 287, 289.

because there was no other body on earth "so jealous of its liberties and so impatient of control" as the House, would never act until it was fully evident that he would have its support.[10]

*Quorum Calls.* A quorum of a legislative body is the minimum number of its members required to be present in order that business may be transacted. It is set by the Constitution at a majority for both houses of Congress. This unduly stringent rule (the quorum in the English House of Commons is 40 for a house of over 600 members) is the constitutional peg on which some of the most effective filibustering has been hung. The validity of a law which, as shown by the records, had passed through any of its stages in the presence of fewer than 49 Senators or 218 Representatives could be questioned later in the courts. To keep such a number of members in their seats at all times was obviously impracticable; so the rule applied was to presume the presence of a quorum unless there was a written record to the contrary. The names on a roll call constitute such a record; but motions passed by a rising vote or viva voce carry no evidence of the number of members present. As a matter of fact, much business is transacted and many noncontroversial bills are passed in the presence of a mere handful.

In view of the constitutional requirement, it is plain to see why any member of one of the houses should be privileged to raise the question of the presence of a quorum; but the possibilities of this means of delaying proceedings were not to go unappreciated. The roll call of the House alone consumes from twenty-five to forty minutes, and that of the Senate from ten to fifteen. Robert Luce estimated that the roll calls in the House consume the equivalent of from four to six weeks of the working time.[11] The procedure in the use of the quorum call in a full-fledged filibuster is about as follows. A member rises in his seat to make the point of order that a quorum is not present, and other proceedings are then suspended. The roll is called, and on the ascertainment that no quorum is present a motion is made that the doors be closed and the Sergeant at Arms be ordered to find and arrest the absent members and bring them to the House so that they may be recorded as present. This may involve getting the members out of bed or even bringing them from outside the city. When what appear enough to make a quorum have been brought in, the Sergeant at Arms makes an official return to the presiding officer, summarizing the results of his quest. The roll is called again and a quorum declared to be present. No sooner, however, has the debate got well under way than members begin quietly to withdraw from the room, which gives the alert filibusters the opportunity again for raising the question of the presence of a quorum and permits a repetition of the entire procedure.

[10] *Cong. Record*, 51st Cong., 1st Sess., February 6, 1890, p. 1107.

[11] R. Luce, *Congress—An Explanation* (1926), p. 27. In the twenty-six-weeks special session of the 66th Congress (1919) there were 129 roll calls averaging thirty minutes each, together accounting for two weeks of working time. R. Luce, *Legislative Procedure* (1922), p. 377.

*Speaker Reed and the Quorum Rule.* The height of absurdity was reached, however, during the 1880's, when members present would concertedly fail to answer a roll call, so that at one moment a quorum would be present and at the next moment no quorum. The usual motion to send out the Sergeant at Arms on a quest for members would be gone through, even though they were in the room. The question came to a head on January 29, 1890, after the Democratic minority had all but stopped the wheels of the legislative machine.[12] A filibuster had started that morning on a highly privileged matter, a committee report on an election contest. The Democratic floor leader asked for a vote on whether the report should be considered, which in itself was a dilatory motion, and asked for the ayes and nays. The call showed ayes 162, nays 3, not voting 163, which was two votes short of the quorum. When two or three Republicans entered the room and asked to be recorded as voting, the same number of Democrats asked that their votes be withdrawn, whereupon the Democratic floor leader Crisp triumphantly shouted, "No quorum."

Speaker Thomas B. Reed then said, "The Chair directs the Clerk to record the following names of members present and refusing to vote," and began calling, "Mr. Blanchard, Mr. Bland, Mr. Breckenridge . . ." There then broke out one of the most disorderly scenes in the history of Congress. One member stated a short time after on the floor of the House that the yell which went up on Speaker Reed's ruling "had not been duplicated within twenty-five years." Members jumped to their feet; some stood on desks, waving their hands for recognition; some hid under the seats; and others fled from the room. During the Speaker's recital of the names of those present and during the sessions of the next day he was subjected to more unparliamentary language from the floor of the House than any presiding officer of Congress before or since has experienced. "I deny your right, Mr. Speaker, to count me as present," shouted one member. "The Chair is making a statement of the fact that the gentleman from Kentucky is present. Does he deny it?" asked the Speaker. "I am very much obliged to the Speaker for recognizing me as being present," another informed him. "The Chair is very glad to be able to recognize that the gentleman from New York is present vocally," the Speaker countered. On a motion for the previous question the vote was 160 to 1, although but a moment before over 300 votes had been cast on another matter. The Speaker directed the clerk to read a list of 24 members who were present and had not voted, and then declared, "The roll call discloses the fact that 160 members have voted in the affirmative and 1 in the negative, which, in addition to the gentlemen present and declining to vote, constitute a quorum, and the previous question is ordered."

The following February 14 the House added to its written rules the

[12] 51st Cong., 1st Sess., January 29, 1890, pp. 948–950.

Reed ruling on counting a quorum.[13] The counting may be upon the demand of any member or on the initiative of the Speaker. The constitutional requirement for a quorum has been further interpreted to mean that while a majority of the House must be present for business to proceed, action may be taken by a total affirmative and negative vote less than a majority. Another change directed against the filibusterers was setting a quorum for meetings of the committee of the whole at one hundred, which was constitutionally justified on the ground that this actually is a committee, not the House, and so not subject to the requirement of a majority of the House members. These rules, plus the arbitrary power of the Speaker over recognition of members, have made the way of the filibusterer hard in the House of Representatives, although he is not entirely devoid of opportunity. The right of one fifth of the membership to demand the ayes and nays on any motion still remains, since it is specifically guaranteed in the Constitution.

*Excessive Talk.* Another method of filibustering, perhaps less reprehensible than the one just described because it requires more personal effort both mental and physical, is excessive talk or discussion. As early as April 16, 1604, the English House of Commons adopted a rule to the effect that "if any superfluous motion or tedious speech be offered in the House, the party is to be directed and ordered by Mr. Speaker." Jefferson embodied in his *Manual* the rule that "no one is to speak impertinently or beside the question, superfluously, or tediously."[14] A rule of the House today requires that a member "shall confine himself to the question under debate," but the House has seldom suppressed superfluous or tedious speaking except under general rules limiting debate.[15] A similar Senate rule is likewise a dead letter, as indicated in a ruling of Vice-President Schuyler Colfax that "under the practice of the Senate he [the Chair] cannot restrain a Senator in remarks which are, in the opinion of the Senator himself, pertinent to the issue before the Senate."[16] Long and tiresome speeches were usual from the beginning, if the observations of contemporaries are to be given credence; but for some years the press of business was not sufficient to suggest their use as a means of delay. During Jefferson's administration, however, such tactics began to be employed, and soon after his retirement the Sage of Monticello suggested a rule to curb them.

There were some notable instances of excessive debates in both houses as a means of obstruction in the period before the Civil War, but this means was not consistently resorted to until late in the century. In 1893

[13] In the heat of a bitter filibuster on the Aldrich-Vreeland Banking Bill, May 29, 1908, Vice-President Fairbanks counted a quorum and was sustained by the Senate, a precedent which since has been followed. *Congressional Record*, 60th Cong., 1st Sess., May 29, 1908, p. 7196.

[14] *Jefferson's Manual*, sect. xvii.

[15] *House Manual*, 78th Cong. (1944), 2d Sess., Rule XIV, sect. 1, p. 341.

[16] F. L. Burdette, op. cit. p. 220.

the Senators from certain Western States attempted to talk to death the bill repealing the silver-purchase statute, and William V. Allen of Nebraska established a new record of sixteen and a half hours for one speech.[17] This was exceeded by Robert M. La Follette's eighteen-hour speech on the Aldrich-Vreeland Banking Bill in 1908, but a total of thirty quorum calls very considerably lightened his effort. Senator Reed Smoot's twelve-hour speech against the Ship Purchase Bill in 1915, unrelieved by interruptions, was a greater endurance test, as was the fifteen-and-a-half-hour speech of Huey P. Long, of Louisiana, in 1935, against the National Industrial Recovery Act when the stricter Senate rules forced him to perform without time for rest.[18] His discourse ranged over a wide field from the Constitution, that collection of "ancient and forgotten lore," to the best recipes for frying oysters and making "potlikker." Denied the privilege of rest by the Senate majority, he sipped milk, nibbled at sandwiches, ate candy, and playfully tossed caramels to near-by Senators as he spoke. On numerous occasions combinations of half a dozen or more Senators, speaking in relays, have succeeded in killing legislation sponsored by the majority.

CLOSURE IN THE HOUSE OF REPRESENTATIVES · The remedy for the evil of premeditated debate for the purpose of obstruction is some parliamentary device by which the majority may shut off debate and force a vote on the pending measure. Such a one is known as *closure* or *cloture*. That used in the House of Representatives is known as the "previous question," meaning the "main question." Beginning in the House of Commons in 1604, the motion to close debate has undergone changes in wording until today it is used in the House of Representatives as follows.[19] A member rises and says, "I move the previous question"; and the Speaker puts it thus: "The gentleman from —— demands the previous question. As many as are in favor of ordering the previous question will say Aye; as many as are opposed will say No." If the motion is carried, and no debate has taken place on the measure, forty minutes is now allowed, at the end of which a vote is taken. The previous question may be moved by the member in charge of the measure, or by any other person if he can get the floor. If the measure before the House is an important one, the floor leader or the steering committee will have made the decision as to when closure should be brought about.

The original rules of both the House and the Senate carried the "previous question," and Jefferson included it in his *Manual*. In the early years, however, it was used very sparingly in the House, only four times between 1811 and 1828, one of which was to break a filibuster against a declaration of war with Great Britain in 1812. Several attempts had been

[17]R. Luce, *Legislative Procedure*, pp. 277–292.

[18]F. L. Burdette, op. cit. pp. 182–189.

[19]*House Manual*, 78th Cong., 2d Sess. (1944), Rule XVII; F. M. Riddick, *Congressional Procedure* (1941), pp. 245–248.

made to abolish it altogether; but the growing volume of business, the increase in the size of the House, and the perfection of the rule by amendments in 1840 and 1860 made it ultimately a settled part of the House machinery. It now may be moved in a single motion or a series of motions, on an amendment or amendments of the principal motion, or all motions or amendments, and cover everything concerned with the pending bill.

Other closure or speech-limitations rules are the motion to lay on the table, which must be decided without debate; the use of special orders brought in by the rules committee, discussed above; the rule, adopted in 1841, that no member may speak longer than one hour on one question except the one reporting the measure, or more than once unless he is the mover, proposer, or introducer of the matter, in which case he may speak in reply, but only after all other members so desiring have spoken. The talking potentialities of 435 Congressmen are great, but the experience of the past decade or so shows that the majority organization has ample means to cap the well when the majority desires to stop the flow.

CLOSURE IN THE SENATE · The Senate has treasured none of its traditions more highly than that of the freedom of debate. Its "previous question" rule was used occasionally during the first years, but dropped from the list in 1806. Until 1917 nothing but a Senator's sense of the fitting and proper or his respect for the Senate's air of courtesy and gentlemanliness restrained him in the length of his utterances. In this matter, as well as in its other parliamentary practices, Senators were wont to praise the body's lack of rules and its government by individual self-restraint. When the membership approached a hundred, and especially after the new method of popular election, fewer utterances in this strain were voiced on the floor. For many years there was little abuse of the privilege of talking. Such displays of oratory as those in the Webster-Hayne debate in 1830 contained no element of deliberate delay. The first instance of deliberate delay was exhibited by the Democrats in the special session of the Senate in 1841, when the political situation had been sharpened by the death of Harrison and the succession of Tyler, a Virginia Democrat, whom the Whigs had nominated to catch Democratic votes.[20] With Calhoun brilliantly leading the filibuster, Clay's program was stalled for the time; but the Senate had not yet come to the point of defeating legislation by preventing measures from coming to a vote. Clay's attempt to introduce the "previous question" was defeated; and proposals for a closure rule thereafter were brought forward in every decade (the extended filibuster on the Force Bill in 1890–1891 led to a serious attempt), only to be defeated.

War emergency finally was responsible for the adoption of the Senate closure rule. A few days before the March 4 adjournment of Congress in 1917 President Wilson requested authority to place guns on merchant vessels for their defense against German submarines.[21] The House voted

[20]R. Luce, *Legislative Procedure*, pp. 289, 291. [21]Ibid. pp. 294, 295.

403 to 13 for the bill. In the Senate eleven men held the floor until the session expired, among whom were Senators La Follette, George Norris of Nebraska, and William J. Stone of Missouri, who but two years before had denounced a "little coterie of Senators" for filibustering. President Wilson declared that "a little group of willful men have rendered the great government of the United States helpless and contemptible," and called upon the Senate to reform its rules.

Without enthusiasm a partial closure rule was adopted. By its terms, if a motion to close debate on any pending bill is signed by sixteen Senators and presented to the presiding officer, it becomes his duty immediately to state the motion to the Senate.[22] One hour after the Senate convenes on the following day, any member may call up the motion and the question is put: "Is it the sense of the Senate that the debate shall be brought to a close?" If decided by a two-thirds vote, that measure becomes the unfinished business to the exclusion of all other matters until it is disposed of. Each Senator is entitled to speak no more than one hour on the motion, its amendments, and motions relating to it; after the vote to close debate has carried, no amendments may be brought in except by unanimous consent; no dilatory motions are in order; and all points of order and appeals from the decision of the Chair must be decided without debate. It is easy to see that this closure rule would not have rendered ineffective the filibuster which brought it into being, or many of the others which had broken out in the last days of the short sessions.

The new rule has been used sparingly and not in a spirit designed to break with the Senate's ancient tradition of individual freedom.[23] In the twenty-two years to 1938 closure was attempted thirteen times but carried only four. It was used after adequate debate had taken place to bring a vote on the Treaty of Versailles in 1919; on the World Court in 1926; and the following year on the Pepper-McFadden Bill and the Prohibition Reorganization Bill. Two attempts of recent years to apply it to anti-lynching bills failed. In all but three of the cases where it failed, a majority but not a two-thirds vote had been obtained. That the Senate remains the nation's greatest forum of debate today is due to its refusal to be stampeded into an ironclad closure rule in the exciting days of 1917. Today a proposal for such a rule would probably meet with smaller chances of success than at any time within two generations.

THE CASE HISTORY OF A FILIBUSTER · The filibuster in the Senate against the rivers and harbors bill in the summer of 1914 makes a good case study for the student for several reasons. It included most of the normal methods and techniques; it was conducted with dignity and decorum; it was mostly the work of two men; and it falls in the category of legitimate filibusters, if there are any such.

[22] *Senate Manual*, 78th Cong., 2d Sess. (1944), Rule XXII, p. 28.
[23] F. M. Riddick, op. cit. chap. v.

Rivers and harbors bills are traditionally known as "pork barrel" bills; for in the appropriations there is an opportunity to pay the political debts of all the majority members in dozens of communities scattered from coast to coast. This was the first session of the new Democratic administration (the first Democratic administration in sixteen years) and the first opportunity of the kind to pay campaign debts. The House bill was introduced in the Senate June 18, and came out of committee loaded with increases.[24] Senators Theodore E. Burton, of Ohio, and William S. Kenyon, of Iowa, led the attack on it as "the climax of waste and injudicious expenditure." The bill carried cash appropriations of $43,330,404, with additional commitments which increased the sum by at least ten millions, a total which Burton said had been exceeded only three times previously; but those had been two-year appropriations, whereas this was for only one year. The debate continued at intervals throughout the summer months, and was renewed in earnest as the bill was pressed for passage in September.

Burton and Kenyon were the chief actors, the brunt falling to the former. His long speeches were noteworthy in that they were not padded by reading from irrelevant works but included detailed descriptions of river and harbor facilities and volumes of traffic. Item after item of the bill was picked out for examination and the requested appropriation compared with the needs. For instance, $100,000 was provided for a certain 475-mile stretch of the Red River on which 44,967 tons of freight had moved the year before. Of these, 42,540 were logs and lumber, which do not need an improved river, and only 1227 were miscellaneous freight. Fifty thousand dollars was appropriated for another stretch of the Red River on which two years before 13,832 tons of freight had been carried, all of which consisted of logs except 582 tons of miscellaneous freight.

The session of September 18 began at twelve o'clock; discussion of the rivers and harbors bill began about two hours later and continued without respite until half past five the next day. Senator Burton began his principal speech at six o'clock in the evening and continued with brief interruptions until half past six the next morning, when Senator Kenyon took his turn. Senator Reed Smoot and one or two other Republican members aided chiefly by suggesting the absence of a quorum or making other motions. In the nearly twenty-nine hours of the debate fifteen roll calls were ordered, all but two on the question of a quorum; but most of them seem to have been for the bona fide purpose of keeping a majority of the Senators out of their beds since they had decreed the night session. A quorum call in the small hours of the night led to a wrangle over a parliamentary point, but an order was finally given for the arrest and bringing in of absentees. At two in the morning Burton resumed: "Mr. President, just before the untoward interruption which occurred some time ago, I was speaking of the different varieties of rivers. . . ." At one point he of-

[24] 63d Cong., 2d Sess., September 18, 1914, pp. 15,308–15,419.

fered as an amendment a substitute bill which occupies nearly five pages of fine print in the *Record*, and which was read twice by the clerk.

Opposition Senators lectured the filibusterers on the wickedness of their course, but as usual the culprits solemnly denied that a filibuster was in progress: the bill simply required time for discussion. Senator Stone piously said:

> Mr. President, it has been astonishing to me that three or four Senators should put themselves in this strange attitude of strenuous, persistent, and uncompromising opposition to this great measure of such wide national importance. There is not a State in the Union that is not interested in it; the commerce of the world is greatly interested in it; yet we find a little coterie of Senators here, whose names can almost be counted on the fingers of one hand, banded together to defeat this measure, to strangle it, to destroy it. I do not think this is a legitimate procedure.

In answer Senator Kenyon read from the *Record* of May, 1908, evidence that Stone had been a leader in a filibuster on a ship subsidy bill and, as one contribution, had read into the *Record* the *Pilgrim's Progress*. Floor Leader John Sharp Williams likewise denounced the filibusterers and declared the intention of keeping the Senate in session until they dropped in their tracks. Strangely enough, he was one of "the little group of willful men" whom less than two years later President Wilson denounced for filibustering the Armed Ship Bill to death.

Meanwhile the falling off in treasury receipts had alarmed the majority; the press of the country was generally hostile to the "pork barrel" bill; and the Democratic leadership dared not carry out Senator Williams's threat. An adjournment was taken at five-thirty Saturday until Monday, when, after a continuation of the discussion, a motion was made and carried to recommit the bill. On Tuesday it was reported back with the appropriations reduced to $20,000,000; and this passed without even a roll call, although, with only two worn-out filibusterers to face, each under the rules entitled to speak only twice on one bill in a legislative day, a vote could soon have been forced. By holding up the bill and calling the country's attention to it, the filibusterers had succeeded in forcing the authors to abandon their own work.

## *VOTING*

Five methods of taking a vote have been used in Congress.[25] (1) By that known as viva voce the presiding officer puts the question: "As many as are in favor of the question as stated, say Aye," and then, "As many as are opposed, say No." Judging by the volume of the responses, he announces the result. (2) If he is uncertain, or there is a call for a "division," those in the affirmative rise from their seats and are counted, and then those in the negative. (3) If still uncertain, he may use another method of

[25] R. Luce, *Legislative Procedure*, chap. xv.

division, that by tellers. He appoints two members, one from the affirmative side and one from the negative, who stand in front of the presiding officer's chair; those in favor of the affirmative first file between the tellers and are counted, and then those in the negative. One fifth of a quorum may order tellers in the House and its committee of the whole. (4) A vote by ballot occasionally was used in the earlier years, but has been discarded. (5) The roll call of members, to answer aye or nay, is the established method where the Constitution or rules of the body require a set number of votes to carry a measure, such as to sustain a Presidential veto, to pass a joint resolution for amending the Constitution, or (in the Senate) to convict an officer on impeachment. It is used also to ascertain the presence of a quorum, and on any motion when demanded by one fifth of the membership of the house. The roll call is now often used to put members on record on measures for political purposes. It frequently will reverse the vote on a measure taken viva-voce; for members genuinely opposed to a bill on its merits may yet fear to go on record against it. Roll calls in Congress are made more time-consuming because the names are called twice, and members' votes are added as they stroll into the chamber and up to the moment of the announcement of the result. Those in the Senate require a minimum of fifteen minutes each; those in the House, a minimum of thirty minutes. In any session of Congress a considerable proportion of the working time is thus absorbed.

The rules of both houses require that a member must vote unless excused; but so distinguished a legislator as ex-President John Quincy Adams defied the House on this rule and was followed in later years by many others, until custom now may be said to give a member the right to silence. The custom of "pairing" began in Congress about the year 1840. A Congressman who was ill at home, or out of the city for another reason, formed an agreement with a member of the opposite party not to vote on certain measures or on any measures while he was absent. This was a courtesy which preserved the balance of power in the house but permitted members to be absent. At first roundly denounced by leaders, it grew into a custom which finally was recognized in the House of Representatives rules in 1880. Those who expect to be absent notify the clerk in writing, and the clerk offsets the absentee Republicans with an equal number of Democrats when a roll-call vote is taken; these are published in the *Journal* and *Record* as "paired." This is a fictitious pairing, but genuine pairs may be arranged by individual members or the party whips.

## *THE LOBBY*

*The Lobby* is the name given to that aggregation of individuals who hang about a legislature with the purpose of influencing its work. The Congressional lobby is particularly strong, because many national organizations

find it advantageous for other reasons to maintain well-staffed headquarters at Washington. The lobby is an entirely logical outcome of a democratic system which permits all interested persons or organizations to have their say and present their views with respect to governmental policies. The word *lobbyist* carries in general an unpleasant connotation, a suggestion of underhanded and illegal methods of work; *legislative agent* and *public-relations officer* are now the preferred terms. Some forms of lobbying probably existed from the beginnings of Congress. Bryce, writing in 1920, observed, "That the Capitol and the hotels at Washington are a nest of such intrigues and machinations, while Congress is sitting, is admitted on all hands";[26] and a Senator at about the same time said: "They are becoming as numerous as the lice of Egypt. A stone casually thrown in the streets of the city would probably hit half a dozen of them."[27]

A "THIRD HOUSE" OF CONGRESS · So large, comprehensive, and able is the Washington lobby that it has often been referred to as the "Third House" of Congress; and Pendleton Herring has pointed out that it is constituted on the principle of group or functional representation.[28] At the time of his study (1929) there were an estimated five hundred associations of national scope which maintained representatives in Washington. A list of their names today would represent a fair cross section of the industrial, commercial, professional, agricultural, and civic organizations of the country. To mention only a few, there were the National Chamber of Commerce, the National Association of Manufacturers, the American Federation of Labor, the Committee for Industrial Organization, the Federal Council of Churches, the American Legion, the American Association of Railway Executives, the National Federation of Federal Employees, the League of Women Voters, the National Brewers' Association, and the Anti-Saloon League. Among the less well known were the Anti-Steel-Trap League, the Longevity Legion, the National Milk Producers' Association, the League for the Larger Life, and the National Illiteracy Crusade. It excites one's curiosity to speculate what manner of legislation would come forth from a house organized from the representatives of these special-interest groups!

THE LOBBYISTS · Persons from the headquarters staffs of these special-interest groups compose the greater part of the lobby, but others are brought to Washington for short periods when particular pieces of legislation are pending. Some are ex-members of Congress who are valuable because of their easy entree into the circles of influential members and their understanding of legislative procedure. Newspapermen, because of their skill in publicity and propaganda, are found in considerable numbers, as

[26]J. Bryce, *Modern Democracies* (1920), Vol. I, p. 161.

[27]Senator C. S. Thomas, of Colorado, February 2, 1921, 66th Cong., 3d Sess., p. 2413; cited in E. P. Herring, *Group Representation before Congress* (1929), p. 21.

[28]E. P. Herring, op. cit. p. 19.

are experts in the various fields of commerce, finance, and manufacturing or other particular group interests. In the lobby, too, are a considerable number of professional "fixers," who are willing to act for any cause but whose effectiveness is generally much lower than their pretenses.

METHODS OF WORK · The lobbyist works typically by interviewing members of Congress, presenting arguments and furnishing facts and figures.[29] Sometimes he helps to organize a campaign among the home folks, which results in a flood of telegrams to members of Congress. If he has friends on the inside among members of Congress, his task is easier. His influence may be exerted at each stage of the progress of the bill through the houses. He may place members under obligation to him for various favors, such as entrance into desirable social circles. Reprints from the Government Printing Office of favorable discussions in Congress may be procured at cost and sent out under the frank of a friendly member. Since the fortunes of most bills are determined by the action of the standing committees, their hearings offer the lobbyist his supreme opportunity. Here he may appear in person with supporting data or bring persons from a distance to represent his association.

INFLUENCE OF THE LOBBY · Many observers have viewed the activities of the lobby with great alarm. It has been bitterly denounced by Presidents and by experienced members of both houses of Congress. Even so practical-minded a man as ex-Speaker "Uncle Joe" Cannon commented: "Now the lobbyist comes to you and says, 'We want this,' and generally he gets it. I ask you whether legislation of today is anything more than hodgepodge?" Bills have been introduced to regulate the Congressional lobby, but have had little support. The difficulty is to define a lobbyist and to distinguish between the good and the bad ones and their practices. Certainly no one could seriously contend that individuals or corporations or associations should be deprived of the opportunity to present their cases at Washington. Members of Congress freely acknowledge their indebtedness to the lobby for the data and materials given them as aids in legislation. Some critics are inclined to believe the lobby's influence overrated, considering members more susceptible to the currents of opinion in their home districts than to pressure at Washington. Several Congressional investigations and the publicity given their activities by the press went far to deflate certain lobbying interests and brought more circumspection in others.

## *PUBLICITY AND REPORTING OF LEGISLATIVE PROCEEDINGS*

Secrecy was originally the rule with respect to proceedings in both the British Parliament and the American colonial legislatures. As to the former, by keeping a knowledge of the debates and the motions from the king, members were protected from the consequences of his displeasure,

[29] E. P. Herring, op. cit. chap. iv.

and a greater independence for the House was assured. In the last quarter of the eighteenth century visitors began to be tolerated in the House of Commons; but under the rules, if a member should "espy strangers," it was the duty of the Speaker to clear the gallery. In 1875 a new rule required for each occasion a vote without debate on the question of excluding strangers, which in effect opened the proceedings to the public.

It was some years before the connection between the publicity of governmental proceedings and the ideas of freedom of the press and democracy was well understood. This was well stated by Elihu Root in the New York State constitutional convention in 1915 in support of a proposal to require the assembly to keep a record of its debates:

> This measure is designed to make the reasons for action on the part of the Legislature matters of public record. It is designed to enable the people of the State to know why the Legislature passes bills and why it refuses to pass bills. . . . We ought to proceed on the theory that the arguments that are made here, for and against measures of public interest, are worth being known to the people of the State.[30]

Nevertheless, the sessions of the House of Representatives were open to the public from the beginning. Those of the Senate were closed, as more befitted its mixed executive, judicial, and legislative character. In February, 1794, a resolution was passed, effective for the next session, throwing the legislative sessions open to the public; but it was many years before adequate space for visitors was provided. Executive sessions of the Senate were generally closed to the public until 1919.

REPORTING · The United States Constitution requires that each house of Congress shall keep a journal of its proceedings and from time to time publish such portions as do not require secrecy. The journal, of course, does not record the debates but only the motions and votes. At the beginning of our Congress, Englishmen had just won the right to know what occurred in their national legislature. For instance, in 1741 a member of Parliament who had published his speeches at his own expense was expelled from the House of Commons and imprisoned in the Tower, and the book was ordered burned by the common hangman. The House of Representatives from the beginning permitted its debates to be taken down by shorthand writers and printed in the *Annals of Congress*, a privately owned and managed journal. The reporters were given space on the floor of the House where they could hear, but until 1802 their privileges were entirely subject to the will of the Speaker. The Senate, consistent with its general policy of secrecy, permitted only meager résumés of its proceedings to be reported, and until 1802 all reporters were kept in the visitors' gallery, where they could hear the debates only with difficulty. Not until the middle of the

[30]Remarks in the New York State constitutional convention, 1915, quoted in R. Luce, *Legislative Procedure*, pp. 345, 346.

century had the art of shorthand developed to the point where verbatim reports of speeches could be made. The great orations of Webster and others of the 1830's were written out afterward from memory or else delivered from manuscript.

THE CONGRESSIONAL RECORD TODAY · *The Annals of Congress* was displaced in 1824 by another privately owned publication, the *Register of Debates*, and in 1833 the *Congressional Globe* appeared. In 1873 Congress finally established its own official corps of reporters and its own publication, the *Congressional Record*, which purports to give the debates in full. The proceedings are printed day by day, and advance copies are available to each member of Congress at the opening of each day's session. The text of the *Record* does not always reproduce accurately what took place, because of a custom which, with the consent of the Speaker, permits a member to "revise his remarks" before the copy goes to the printer, and other rules by which he is given "leave to print" or "to extend the remarks," which often means the inclusion in the *Record* of an entire speech or document that has never been delivered or read on the floor. The Senate permits members to revise their remarks but not to "extend" them.[31]

The Speaker and the Vice-President have supervision of the work of the official reporters and appoint and dismiss them. Both houses set aside a part of the gallery nearest the presiding officer's desk for the use of newspaper and press-association correspondents; and a few representatives specified by the rules are permitted on the floor. Control over admission to the press galleries is given to a standing committee of the correspondents. With the multiple facilities for publicizing and recording, it is small wonder that the character of the speeches in the modern legislative assembly is so greatly changed from that of the early days. The ornate speeches of Webster, Benton, Hayne, and Everett have given way to a type more readily quotable for daily newspaper audiences. At the same time the Congressman is frequently more interested in the effect of his speech on the people at home than on his fellow members.

THE UNITED STATES LAWS · It has been pointed out that every statute, when approved by the two houses, is enrolled on parchment and, if signed by the President or repassed over his veto, is sent to the Secretary of State for safekeeping. In order that its contents may be known to the officers of the government, the courts, and the citizens in general, the statute is at once printed for distribution. At the close of each Congress all its products are published in the volumes of the *Statutes at Large of the United States*. In the earlier years one volume would hold the output of several Congresses; the first one included all the laws from 1789 to 1795. But since the Fifty-seventh Congress, 1901–1903, the biennial publication includes two stout volumes, the first containing all the *public laws*, the second containing *private laws*, as well as resolutions, treaties, and Presidential proclamations.

[31] *House Manual*, 78th Cong., 2d Sess. (1945), sects. 923–929, pp. 447–450.

If a student should take down Volume I, he would find that the first statute to receive the signature of a President of the United States, dated June 1, 1789, was "An Act to regulate the Time and Manner of Administering certain Oaths," providing the oath to be given to members of Congress; the second was our first tariff act, "An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States."[32]

THE CODE OF LAWS OF THE UNITED STATES · The Federal laws in force today are the work of Congresses all the way from the First, in 1789, to the current one. Since it has been held that "ignorance of the law excuses no man," the obligation of the citizen with respect to the laws of Congress is no light one. Must the citizen, the executive officer, the judge on the bench, search the many and bulky volumes of acts of Congress back to the beginning in order to find the law? The task would be a hopeless one; for the greater number of the old statutes are obsolete or have been repealed. Even for those of later times, to separate the live from the dead parts and reconcile them with current statutes would be beyond the time or skill of all but a few persons. In 1845 for the first time the Federal statutes in force were sorted out and officially published. At the beginning of his administration President Lincoln urged that the statutes be codified and revised, but work on the project was not undertaken until after the close of the Civil War. Finally, in 1875, the volume of *Revised Statutes of the United States* was published, followed in 1878 by a second and further revised edition. In 1926 Congress published a *Code of Laws of the United States*, and further editions based on this plan have been published officially and by commercial houses. This Code is an orderly arrangement of the laws in force by subject matter. Statutes as passed by Congress are torn apart, if necessary, and their contents placed under the proper headings. Some of the topics, for example, are "Agriculture," "Banking," "Currency," "The President," "Interstate Commerce." Each paragraph is given a code number, so that when Congress passes a new statute dealing with a topic, such as "Post-Offices," the compilers will know at once where to place it in the Code. Supplements are published annually, with the new legislation appropriately arranged under its subject headings. By the use of an index the citizen may quickly find the live Federal statutes covering the subject in question. All that remains thereafter in the processes of government is for the proper officials to administer the laws and the citizens to give them obedience.

## *READING LIST*

For a reading list consult the footnotes of this chapter and the lists following Chapters XVII, XVIII, and XIX.

[32] July 4, 1789, 1 Stat. 24.

## CHAPTER XXII

# *Lawmaking in the States*

The broad extent of the State's field of legislation has been described in an earlier chapter. All States have decentralized to some degrees their legislative power. The greater part of it is exerted through a central legislature; but certain minor portions are given to city and village councils, county and other boards, various commissions, and, in nearly half the States, to the people as a whole by means of the initiative and the referendum. A word of caution is again appropriate here as to the various meanings of the term *legislation.* As used here it refers to the entire product of so-called "lawmaking bodies." Only a small portion of their enactments alters "the law," that body of rules relating to the personal and property rights of the citizens in general; a much larger part is made up of the rules relating to the current operation of the government, its officers and institutions. The State legislature, and, by the initiative and the referendum, the people in general, may deal with all kinds of law. The county commissioners and the State, regional, and township boards, with few exceptions, are concerned with the second class of legislation. They actually are administrative bodies, properly speaking, not legislative. City councils stand in a sort of intermediate position between the two, but their work is more administrative in character than legislative. Nevertheless, it is logical to class all these bodies together when considering the problems of State legislation; for in some States the central legislature passes rules and regulations which in others are given over to subordinate boards and councils, and conceivably a State might abolish all such bodies except the legislature, vesting in it all law and rule-making powers.

## *THE STATE LEGISLATURE*

LEGISLATIVE LEADERSHIP AND PLANNING · The States present the same problems in legislative leadership and planning as the national government, except on a smaller scale. All are organized on the separation-of-powers basis of three independent departments, and all except Nebraska have bicameral legislatures. The most striking difference is the weaker position of the chief executive. Differing in character from State to State, the chief agencies of leadership are the governor, and the presiding officers and their coterie of party aids in the two houses, with a third, the legislative council, in a few States.

If the democratic principle is to be carried out logically, the main

features of a legislative program should be determined in the course of the campaign for the election of legislators and the governor. Candidates for the legislature usually campaign on the basis of certain laws which they promise to sponsor; and gubernatorial candidates characteristically place more emphasis on innovations in legislation than on the manner in which they propose to administer the government. Legislative issues often are vague and spectacular and designed more to attract votes than to present a coherent legislative program. An obstacle to securing the voter's decision on forthcoming legislation is the confusion of State with national issues and personalities. Most of the State parties are merely regional sections of the national parties. Their candidates talk more about national issues than about those of the State, blithely ignoring the fact that national issues will lie outside their jurisdiction as State officials. Candidates often succeed on the basis of their promises to support or oppose the President, a virtue which will have little to do with their acts in the Legislature; and they consequently go into office with little commitment upon the questions of State policy upon which they will have to act.

## *THE GOVERNOR*

LEADERSHIP OF THE GOVERNOR · By far the most important authority in fashioning the State's legislative program, normally, is the governor. To him has been applied the apt title of "chief legislator," and a careful student of the question concludes that in many States he "exerts a more powerful and beneficial check upon legislation adopted by both Houses than either House upon that adopted by the other."[1] The governor's legislative ascendancy has resulted chiefly from three factors: first, the advantage that a single individual has in any contest for leadership over a group, committee, or council; second, his position as titular leader of his party in the State; third, certain constitutional powers which he has over the legislature and legislation. A governor, even if of mediocre ability, may easily make himself the leader of his party in the State for the term of his office. He now has a rather wide patronage which he may use to build up a political organization; and his is the most conspicuous office in the State, and one to which party members are accustomed to look for leadership. He is regarded as the State's spokesman when an emergency affecting numerous persons in the State arises. If of the same party as the President, he may be one of the main wheels in the national party machine. The movement for administrative centralization, which has had effect in about half the States, has served to enhance the political importance of the governor.

CONSTITUTIONAL LEGISLATIVE POWERS · The governor's position of legislative leadership is well buttressed by explicit constitutional powers. He

[1]A. N. Holcombe, *State Government in the United States* (1931), p. 356.

may call special sessions of the legislature, which in about thirty States must confine its attention to the program specified in the call. About one fourth of the States limit the length of such special sessions, twenty or thirty days being the usual period.[2] He may adjourn a legislative session in cases where the two houses are unable to agree on a date.

THE MESSAGE · The governor is required to lay before the legislature a program of work; in the language of the Virginia constitution he must "recommend to its consideration such measures as he may deem expedient."[3] His message at the opening of the session usually reviews the accomplishments of the past two years, if it is his second term, and makes specific proposals for legislation. These may cover any matter within the competence of the legislature, such as new taxes, highway improvements, redistricting of the legislature, the conservation of natural resources, the establishment of a highway patrol, or provision for postwar planning. Sometimes the governor takes the opportunity to condemn the previous administration and exalt his own accomplishments. The message may either be sent to the respective houses to be read or be presented by him in joint session. A program laid down by the governor has a claim on party loyalty and has a better chance to attract support than that put forward from either of the houses. Short messages, later in the session, proposing single bills are often effective in resolving differences which have arisen between the two houses. If the legislature shows reluctance to follow his lead, the governor may "swing around the circle" delivering speeches, or he may address the people of the State through the radio. All the outstanding governors of the twentieth century have used these methods; and it is not difficult for a vigorous personality in the governor's chair by these means to prevail against a legislature, short as its members usually are of vision, leadership, and plans.

THE VETO · But the governor's most effective weapon is the veto, which he now possesses in some form in all the States except North Carolina.[4] A bill passed by the two houses is sent to the governor for his approval. If he disapproves, the bill is returned to the house in which it originated without his signature and with his objections in writing. These are spread upon the journals, and a vote is then taken on its repassage. Usually a vote of two thirds of all members elected to the house is required for its repassage; in Ohio and a few other States, three fifths. If the governor fails to return the bill within a period of days (from three to ten, but usually the latter), the legislature remaining in session, the bill becomes law without his signature. *Pocket veto* is the term used to describe the killing of bills by the

[2]Council of State Governments, *Book of the States, 1943–1944*, p. 137.

[3]*Constitution of the State of Virginia*, chap. ii, sect. 20.

[4]For a summary of the provisions of the State constitutions concerning the governor's veto power cf. R. Luce, *Legislative Problems* (1935), pp. 144–170. Cf. also G. R. Negley, "The Executive Veto in Illinois," *American Political Science Review* (December, 1939), Vol. XXXIII, pp. 1054–1057.

failure of the governor to sign them within the constitutional period (usually ten days) at the end of the session; for he is under no compulsion to return them, and the legislature has no opportunity to pass them over his veto. Since legislatures habitually pass a large percentage of their bills during the last two weeks of a session, this serves to give the governor an absolute veto over a major part of their work. To place more responsibility on the governor, the constitutions of many States now provide that bills left in his hands by the adjournment of the legislature shall become law unless the unsigned bills, together with his written objections, are filed by him in the office of the Secretary of State within a specified number of days, which runs from five in a few States to thirty in a few others.[5] In a few States the rule reads that no bill left in his hands shall become a law unless signed by him within thirty days. The governor is thus enabled to go carefully through the legislative product and weed out the refuse. Governor Alfred E. Smith of New York, at the end of the "last-minute rush" of one legislative session, found 856 bills on his desk, which he estimated would require a twelve-hour day on his part for their intelligent disposal within the limit of thirty days.[6]

Another type of executive collaboration in legislation is found in Alabama, Massachusetts, and Virginia. Instead of vetoing a bill the governor may send it back with his proposals for amendment. If the legislature agrees to these, the amended bill goes back to the governor for his signature; if not, the bill again is sent him for his approval or rejection. Experience has shown that this procedure tends to reduce the number of vetoes. In Alabama, for instance, from 1903 to 1915, only 27 acts were vetoed before adjournment, and 156 were returned with suggested amendments, of which the legislature rejected only six.[7]

THE ITEM VETO · Often a governor has been placed in a quandary by an otherwise good piece of legislation to which indefensible provisions have been attached. Sometimes he has used the veto, and sometimes he has returned the bill signed but with a message voicing his objections, or has kept it more than ten days, thus allowing it to become law without his signature. Bills carrying appropriations are particularly susceptible to abuse by "riders." The remedy lies in the item veto, which permits a governor, while approving a bill as a whole, to veto appropriation items.[8] The item veto first appeared in this country in the Confederate constitution in 1861; was adopted by Georgia in 1865 and by Texas in 1866; and now exists in thirty-eight States.[9] The section of the Ohio constitution

[5]*Book of the States, 1943–1944*, p. 143.

[6]Alfred E. Smith, "How We Ruin Our Governors," *National Municipal Review*, (May 1921), Vol. X, p. 280.

[7]A. N. Holcombe, op. cit. p. 356.

[8]R. H. Wells, "The Item Veto and State Budget Reform," *American Political Science Review* (November, 1924), Vol. XVIII, pp. 782–790.

[9]*Book of the States, 1943–1944*, p. 143.

embodying it, adopted in 1912, is typical: "The governor may disapprove any item or items in any bill making an appropriation on money; and the item or items so disapproved shall be void, unless repassed in the manner herein prescribed for the passage of a bill."[10] The States of Washington and Oregon extend the power to veto items to matters other than appropriations.

USE OF THE GOVERNOR'S POWERS · The tools are at hand in most States for a governor to make himself an effective leader in legislation. How have they been used? A review of the past decades shows that the chief weakness has been not so much in the laws surrounding the governor's office as in the type of men who have occupied it. That the office offers an excellent opportunity for constructive statesmanship in the hands of a person of ability has been many times demonstrated. Governor Hiram Johnson, of California, in 1903–1909 framed and put through a program of legislation which went far toward modernizing the laws of that State. At about the same time Robert M. La Follette in Wisconsin and Charles Evans Hughes in New York accomplished somewhat the same end. In later years Frank O. Lowden in Illinois, Woodrow Wilson in New Jersey, and Alfred E. Smith in New York gave effective leadership. They framed programs of legislation, in consultation with able counsel, went to the people when the legislatures became recalcitrant, and in the end saw the greater part of their proposals written into the statutes. All made effective use of their positions as party leaders and of their constitutional legislative powers.

The power exerted by the governor over legislation piecemeal may be imagined from the use of the veto in a few States. According to figures collected by Holcombe in Pennsylvania for the years 1899–1919, 1396 bills were vetoed and none repassed; in New York, between 1900 and 1920, 4083 were vetoed and 2 repassed; the totals for Massachusetts for 1900–1918 were 205 and 31; for South Carolina, 112 and 25; and for Washington, 87 and 22. Furthermore, in the sessions of 1923 over 1100 acts were disapproved, and only 104 overridden by the legislatures.[11] In the session of 1929 the governor of Ohio vetoed 25 bills out of 223 passed, and in 1933 he vetoed 109 out of 333 passed. In the twenty years from 1916 to 1936 there were 431 full and 33 item vetoes of bills in Illinois during regular sessions of the legislature, and not one of these vetoes was overridden or a single bill amended and repassed.[12] The difficulty in repassing over the governor's veto compels the leaders of the majority in the two houses to consult with him in formulating the program of the session.

[10] *Constitution of the State of Ohio*, Art. II, sect. 16.

[11] A. N. Holcombe, op. cit. pp. 353–355.

[12] G. R. Negley, op. cit. pp. 1049–1057. For data on the use of the veto in other States cf. R. Luce, op. cit. pp. 156–158.

## *LEADERSHIP WITHIN THE HOUSES*

The States generally have followed the model of the nation in establishing control of the legislature on party grounds. This control is vested in an extralegal set of party officers and entails domination of the regular offices of the legislature. The chief of the former are the majority and minority floor leaders, the party steering committees, and the "whips." These in general are chosen by the respective party caucuses, mass meetings of the party members, and are subject to their control. Usually, however, informal meetings of party members soon after the biennial elections have chosen slates of these party officers, and the action of the caucus at the beginning of the session is in effect a ratification of what already has been determined. The chief advantage of the majority party, however, is its ability to name its leaders to all the key legislative offices: the speakership of the lower house and the office of president pro tempore of the senate, the chairmanship of all the standing committees and majority membership on these committees, and the post of Sergeant at Arms and other paid employees of the houses.

Sometimes an outstanding member of the majority, who may be a floor leader or a member of the steering committee, becomes known as the "boss" of the house. His authority is likely to be based on both party lines and a combination of powerful outside interests. Sometimes the leadership represents a bipartisan and irresponsible organization which often is supported by a powerful lobby. The California legislature after 1911 was led by "progressives" drawn from both parties, a situation duplicated at intervals in the Wisconsin legislature.[13]

A series of studies made in 1923 by competent students independently of each other approached unanimity in their findings of weak or deficient legislative leadership. Lack of effective party control rendered much of the legislative product the result of a bargain and trade process between the two houses, the governor, and various powerful special interests. The governor's vetoes more often amounted to a piecemeal attempt to enforce his ideas on scattered pieces of legislation rather than an attempt at a coherent program. The Wisconsin legislature at that time was found to have an able personnel, and yet its achievements were disappointing. Lacking party organization and responsibility, it was little more than a "medley of individuals, groups, factions, and competing interests."[14] In the 1923 session of the Illinois legislature there was "no organized leadership," and at no time had a "systematic program of legislation" been laid before it.[15]

[13]Victor J. West, "Our Legislative Mills: California, The Home of the Split Session," *National Municipal Review* (July, 1923), Vol. XII, pp. 373–374.

[14]W. Thompson, "Our Legislative Mills: Wisconsin," *National Municipal Review* (October, 1923), Vol. XII, pp. 600–610.

[15]L. D. White, "Our Legislative Mills: The Legislative Process in Illinois," ibid. (December, 1923), pp. 712–719.

In the Texas legislature there had been little in the way of definite and continuous leadership for twenty years.[16] In Oregon, the same year, the governor had been elected on a promise to reduce the State budget by 50 per cent; but after making an eloquent inaugural address urging tax reduction, he had left the pledge to the initiative of the legislature.[17] The weakness of the party organization in the legislatures is indicated by the fact that in 1941 thirteen States reported neither majority nor minority floor leaders in either the lower or the upper house.[18]

## *THE LEGISLATIVE COUNCIL*

Eight states now have legislative councils, the oldest being that of Kansas, set up in 1933.[19] The functions of these bodies include the collection of facts pertinent to legislation, the planning of legislation, and the drafting of bills. Obviously, if the councils attempted the political function of cultivating sentiment for certain pieces of legislation, they would soon be opposed as trenching on the prerogatives of the governor and the majority party in the two houses. The emphasis therefore is on the discovery of needs through a study of the administrative departments, the collection of factual material, and the making of studies, the bringing forward of proposals being left to the proper leadership in the legislature. The legislative councils, meeting periodically throughout the biennium, are able to keep an eye on needed legislation; while members of a legislature elected in November, entering upon their duties in January, many of them for the first time, and confronted with a limited and short session, are generally unprepared to visualize the legislative needs and carry them out in the one short session of the biennium. The legislative council therefore is a valuable supplement to the governor and the leadership of the two houses in planning and preparing the output of the session.

ORGANIZATION · The legislative council typically is composed of several members of the upper and lower houses, to whom in some States certain administrative officers are added. That of Kansas is composed of sixteen representatives and ten senators, including the Speaker of the house and the lieutenant governor; that of Kentucky, of eight senators, eight representatives, and five administrative officers; while the Connecticut legislative council has five members, consisting of two from each house and the governor. Usually the members are chosen by the respective houses. Periodical meetings, quarterly or monthly, generally are prescribed. Acting for the council the year round is a permanent research staff or else subcommittees.

[16]Tom Finty, Jr., "Our Legislative Mills: Texas Makes Haste," Ibid. (November, 1923), pp. 694–654.

[17]Elbert Bede, "Our Legislative Mills: Oregon," ibid. (September, 1923), pp. 536–541.

[18]*State Government*, Vol. XIV, No. 3 (March, 1941), p. 73.

[19]*Book of the States, 1943–1944*, pp. 148–150.

THE KANSAS LEGISLATIVE COUNCIL · This, the oldest and most active of the present councils, may serve as an illustration of legislative councils in general.[20] The lieutenant governor acts as chairman, and the Speaker of the house as vice-chairman. The fifteen representatives and ten senators are chosen from the party membership in proportion to the party strength in house and senate respectively. The council is boldly authorized "to prepare a legislative program in the form of bills or otherwise" to be presented at the next session of the legislature; but the governor's prerogatives are safeguarded by an authorization given him to send messages of recommendation to the council. The program of the council must be completed and made public at least thirty days before the meeting of the legislature, and copies must be mailed to each of its members. The council deliberates under a formal set of rules; proposals are submitted to committees, and must be adopted by a majority vote before being recommended to the legislature. Meetings are held as often as necessary, at least quarterly. The research staff under the direction of Professor F. H. Guild annually turns out a series of important studies, such as "The Kansas State Financial Administration." The council submitted to the 1941 session fourteen fully drawn bills to revise the existing tax code; in 1943 it submitted a miscellaneous list of thirty bills.[21] No topic of research is undertaken except on direction of the council itself, although the suggestions may come from the governor, the legislature, or administrative officers. Unquestionably the Kansas legislative council has done much to improve the legislative program in scope and character.

## *ORGANIZATION OF THE LEGISLATURE FOR WORK*

Rules adopted by the houses of the legislature establish the organization machinery by which their work is carried on. This formal or legal organization consists chiefly of the presiding officers, the standing committees, and a miscellaneous corps of employees, including the Sergeant at Arms. The informal, or party, organization was described above in connection with the problem of legislative leadership.

THE PRESIDING OFFICERS: THE SPEAKER · The presiding officer in all the lower houses is called the Speaker, and in all is elected by the house itself.[22] In all but thirteen of the States, where the office does not exist, the lieutenant governor is the constitutional presiding officer of the Senate.[23]

[20]F. H. Guild, "Kansas Legislative Council Considers War Legislation," *State Government*, Vol. XVI, No. 2 (February, 1943), p. 35; ibid. "The Legislative Councils in Action," p. 34. Several other legislative councils, particularly that of Illinois (J. F. Isakoff, Director), have turned out important studies of State administrative problems.

[21]*Report and Recommendations of the Kansas Legislative Council*, December, 1940.

[22]A. F. Macdonald, *American State Government* (1934), pp. 210–214; A. W. Bromage, *State Government and Administration in the United States* (1936), chaps. vii, viii.

[23]*Book of the States, 1943–1944*, p. 135.

At the beginning of a new session that body elects from its own membership a president pro tempore, who presides in the absence of the lieutenant governor or when the latter is acting as governor.

The powers of the Speaker closely parallel those of the Speaker of the national House. He has the power of recognizing members wishing to speak and may use that power to further the progress of bills which he favors or to retard those to which he is opposed. During the rush season of the legislature he is apt to use a recognition list made up by the majority leader. While most bills automatically go to a standing committee corresponding to their content, the Speaker may interfere where important bills are concerned and may refer them to such committees as he knows will dispose of them according to majority desires. Every Speaker may rule on points of order, subject to an appeal over his head to the house. Frequently, on their own initiative, speakers refer questions to the house for decision; and there are certain kinds of questions which the rules sometimes require shall so be referred. Thus, in the Pennsylvania house of representatives the rules prescribe that "all questions of order involving the determination of constitutional law shall be submitted to the House on the request of five members."

Generally the rules do not require that the Speaker shall vote, unless in case of a tie; but in the absence of a constitutional provision it is understood that no Speaker can be denied the vote on any occasion, since this is the privilege of all members. In about two thirds of the States the Speaker's most important power is the appointment of the standing and special committees. Of course he never uses his unfettered judgment in the task but acts as the agent of the majority party. Nevertheless, it is his most important instrument for asserting a dominance in the choice and execution of a legislative program for the house.

THE PRESIDENT OF THE SENATE · The lieutenant governor's position and power as a presiding officer pretty closely correspond to those of the Vice-President in the United States Senate. He is not a member of the house but primarily an alternate for the governor who needs to be given employment. The senate consequently more often resents than welcomes his presence. An exception was Rhode Island, where from 1842 to 1909 the constitution provided that "the Senate shall consist of the Lieutenant-Governor and of one Senator from each city or town in the State."[24] He is more an impartial moderator than a party leader. In most States he votes only in case of a tie. He preserves order and rules on questions of order, although he is more apt than the Speaker to submit the questions first to the house. In sixteen States he appoints the standing committees.[25] The president pro tempore is chosen by the majority party from among its leaders. When the office of lieutenant governor is vacant and in those States where it

[24]R. Luce, *Legislative Procedure* (1922), p. 449.
[25]A. F Macdonald, op. cit. p. 209.

does not exist, the elected presiding officer wields a legislative power comparable to that of the Speaker of the lower house.

THE STANDING COMMITTEES · Every State legislature performs much of its work through a set of standing committees, or "little legislatures" as they have been aptly called. The number, size, and method of choice are usually specified in the rules of the legislative body. The desire to give all the majority leaders committee chairmanships, and as many others as possible committee places, has led usually to the creation of more committees than necessary.[26] The average number for all States for the upper house was over 30, running from 53 in Florida to 13 in Kansas and 11 in Rhode Island. For the lower house the average was in the neighborhood of 40, ranging from 66 in Kentucky to 14 in Rhode Island.

In most of the States the excess in the number of committees is matched by the excess in size. The average number on house committees in a few States in 1937 was as follows: 35.6 in Georgia, 30.4 in Pennsylvania, 25.4 in Illinois, and 20.5 in Tennessee; but in Nevada it was 4.7, in Oregon 6.2, and in Wisconsin and Wyoming 7.[27] The average for Senate committees was considerably smaller, the majority ranging from 4 to 8. In a majority of the States each member of the lower house serves on six to eight committees. Of course, no person can work effectively on so large a number. He must choose one or maybe two on which to expend his efforts. Committees have great difficulty in securing a quorum for their meetings, and their work generally is done superficially. Too often meetings of the committees are not held regularly, due notice is not given, regular minutes are not kept, and persons desiring to be heard on a bill may find great difficulty in finding the committee in session or a quorum present. Control of the legislative program by the majority-party organization often is obtained by placing its leading members on the key committees.

APPOINTMENT · In about one half the States the committees of the upper house are appointed by the lieutenant governor or by the elected presiding officer; in the others, by a committee on committees or by direct vote of the senate.[28] Choice in the lower house is left to the speaker, except in Nebraska and Oklahoma. As a matter of fact, the slate in all cases is determined by the party organizations. The rules of the lower house in Pennsylvania, for instance, frankly recognize the party's responsibility by setting up a committee on committees, to be composed of the Speaker, four members of the house selected by the majority steering committee, and two members selected by the minority steering committee. Their recommendations are then made to the house, which by resolution elects the slate.

[26]For a complete list of the standing committees of all the State legislatures, cf. *The Book of the States* (*1937*), Vol. II, pp. 225–240.

[27]A. F. Macdonald, op. cit. p. 217.

[28]W. B. Graves, *American State Government* (Rev. Ed., 1941), p. 256; chart prepared by C. I. Winslow, *State Government* (March, 1931), pp. 10–12.

THE COMMITTEES · The largely different fields of legislation occupied by State and nation are reflected in their respective lists of committees. In each may be found committees on "ways and means" (or finance), judiciary and rules committees, and so on; but in the States are found, for example, those on municipal affairs, Federal relations, game, highways, insurance, public utilities, counties and townships, public schools, and mines and mining.

THE JOINT COMMITTEE SYSTEM · The so-called "joint-committee system" is found in the two states of Maine and Massachusetts; while four others, New Hampshire, New Jersey, North Dakota, and Rhode Island, have a few such committees. In Massachusetts there are thirty identical committees which regularly hold their sessions together.[29] A bill introduced in the senate, for instance, to improve a certain highway, would be referred to the joint committee on highways and motor vehicles. After a report had been agreed upon, the bill would go to the senate, the house of its origin. Hearings must be held on every bill, public notice of which is posted, and all bills must be reported out within a specified time. Joint hearings, because they avoid a second giving of testimony and presentation of reports, make practicable one good committee examination of a bill. The joint committees serve also as a tie between the two houses and expedite the carrying through of a planned program.

INTERIM COMMITTEES AND COMMISSIONS · House committees (joint or sometimes single) are frequently set up to carry on throughout the biennium after the adjournment of the regular session of the legislature. The term *commission* is applied when both members of the legislature and administrative officers or other outsiders make up the membership. More than two thirds of the 1941 legislatures established such bodies. California led with thirty-three: twenty for the lower house, eight for the upper house, and five joint commissions. Each is set up to do a certain task, usually to investigate, gather facts, and bring in recommendations or drafted bills. Thus some of them perform the work which in a few States has been taken over by the legislative councils. The scope and nature of their activities can be seen from topics taken at random from the existing committees: interstate co-operation, juvenile delinquency, un-American activities, traffic safety and control, legislative reapportionment, conservation laws. Frequently the laborious task of recodifying the laws of the State on some intricate subject such as elections or corporations is turned over to such committees or commissions.[30]

OTHER OFFICERS · The State legislatures have the usual complement of paid officials and employees: the Sergeant at Arms, chaplain, clerk, bill clerks, office employees, doorkeeper, pages and messengers. These persons

[29] *Book of the States, 1937*, Vol. II, pp. 225–227; A. C. Hanford, "Our Legislative Mills," *National Municipal Review* (1924), Vol. XIII, pp. 40–48.

[30] *State Government*, Vol. XV, No. 10 (October, 1942), pp. 197–200.

are generally subject to the presiding officers, although most of them are directly responsible to the clerk of the house or to the Sergeant at Arms. With few exceptions they are appointed on the basis of political patronage.

## *THE PROCESS OF LAWMAKING*

The procedure and the practices in the making of laws closely follow that of Congress and need not be repeated in detail. Generally the adherence to forms is less meticulous and the work is more slipshod, owing to the imperfectly developed party organization, weaker leadership, and the larger percentage of inexperienced members. Naturally the legislatures differ very sharply from State to State in these respects. Only a generalized picture of the State legislative process can be attempted.

THE RULES · At the opening of a new session of a legislature usually a motion is made and carried to adopt temporarily the rules of the preceding session. Within a few days the committee on rules brings in a new set of rules for the session. These are usually the old rules with a few alterations. Cumbersome rules are carried over from session to session, partly because the older members skilled in their use do not desire a change and because the new members understand them too little to make effective suggestions. The rules follow the general plan of those of the United States Congress. They set up an order of business; provide a corps of officers, with definitions of their duties; lay down a scheme of procedure for legislation; name the standing committees and specify their size; and state various rules of order for the governance of the house. Much more detailed and more difficult for the beginner to master is the common law of the legislature, that is, the rulings and decisions of the presiding officers over a long period of time, which together constitute a consistent body of law.

THE DAY'S ORDER OF BUSINESS · The rules provide an order of business for the day, subject, of course, to modification from time to time by special orders. While this order differs in items from State to State, that of the lower house of the Pennsylvania legislature may be taken as typical.[31] Generally Senate procedure is somewhat simpler. The steps are (1) prayer by the chaplain; (2) reading and approval of the *Journal*; (3) reference of bills and other matters to standing committees by the Speaker; (4) requests for leave of absence by members; (5) reports of committees; (6) offering of resolutions; (7) motions to recommit; (8) unfinished business other than bills; (9) bills on first reading; (10) bills on second reading; (11) bills on final passage recalled from the governor; (12) bills on third reading and final passage.

As in Congress, the regular order of business may be set aside in several ways. One is to extend the legislative day beyond the calendar day by taking a recess. Another is to make a subject a special order, which usually

[31] *Pennsylvania State Manual* (1925–1926).

may be done by a majority vote upon a resolution to that effect brought in by the committee on rules. Another is by a suspension of the rules, which requires a two-thirds vote. This is usually done at the end of a session, to expedite business.

THE STEPS IN THE PASSAGE OF A BILL · The following are the steps in the passage of a bill as prescribed by the rules of the Pennsylvania house of representatives. The procedure in the various States differs from it at only a few points for each State.

1. *Introduction.* This is done by filing the bill in triplicate with the clerk of the house: one copy for the committee to which it will go, one for the press, and one for the printer. The Clerk gives the bill a serial number and hands it to the Speaker for reference. In practice the great bulk of the bills go to the committee normally having jurisdiction over the subject matter, without the intervention of the Speaker. If the latter neglects to send a bill to a committee within two days after presentation, it is in order for any member to move that it be sent to a named committee. All bills must be printed on pink paper, with the lines numbered from beginning to end to facilitate later discussion and amendment. If the bill proposes the amending of any existing law, it must refer to the sections and paragraphs of the general code and specify the parts to be stricken out, altered, or added to.

2. *In Committee.* The rules prescribe that "each committee shall have full power over the bill, resolution or other paper committed to it, except that the committee cannot change the subject, nor amendments adopted by the House." The committee, if it does its work well, examines the bill in detail, debates its general merits, holds hearings open to the public, and may even summon witnesses. It then reports the bill out without change, with amendments, or entirely rewritten. In all but a few States the bill may be pigeonholed without recommendations of any kind. It may simply be reported out with the recommendation that it shall not pass. Committee reports must be made in writing, and the minority may make a separate report.

3. *On the Calendar.* Bills are reported adversely by a committee by writing across the top "Negative recommendation," and such bills may not be placed on a calendar except by a majority vote of the members of the house. Those reported favorably are placed on a calendar in the order in which they were reported.

4. *First Reading.* At the proper stage in the day's business the Speaker calls the bills in their order on the calendar, and they are read at length.

5. *Second Reading.* Bills are taken from the calendar in their order, considered in committee of the whole, debated and amended, and read at length. The committee then reports back to the house; its work is accepted or rejected; and the bill again goes on a calendar. (After the first reading, the bill is placed on the calendar at a point agreed upon at this time.)

6. *Third Reading and Final Passage.* At this stage the Speaker calls the bill from the calendar in the order agreed upon; it is read through; and the question is put "Shall the bill pass finally?"

7. If the vote is in the affirmative, the bill is sent to the senate, where it goes through a similar procedure. If amendments are made, there is a conference committee, whose report must be adopted by the two houses. The bill is signed by the presiding officers; is sent to the governor for his signature; and finally is deposited with the Secretary of State and printed in the biennial volume of the session laws.

THE WORK OF COMMITTEES · With from five hundred to fifteen hundred bills and resolutions to be considered in one short session, with normally an ineffective party leadership, and with a general tendency to rush bills to judgment on the floor of the house without debate or scrutiny either in detail or on their general merits, the sifting and scrutiny of bills on both their merits and their technical aspects is left chiefly to the standing committees.[32] In many States these "little legislatures," as Woodrow Wilson called them, are not fitted by organization or procedure to do this work well. In a preceding paragraph their unnecessary number and size were pointed out. Influential leaders of the body serving on six to a dozen different committees find themselves unable to attend adequately to their duties on any one.

It is a familiar and accepted fact that committees have difficulty in procuring a quorum. The chairmen or lobbyists rush from one part of the building to another, bringing in members to make up a quorum, who, after the roll is called, are soon taken away by messengers from another committee attempting to find a quorum. Bills are often delayed and defeated not through the intention of any leader but through the failure of a committee for this reason to take action on them. Hearings before a skeleton committee are of small worth, the absent members having to rely solely on the judgment of the chairman or someone else who was present. Committees hold hearings on bills when there appears a demand for them, and these hearings normally are open to the public. While some legislatures prescribe rules for their conduct, their fairness and adequacy usually depend on the inclinations of the chairman. It is the custom to divide the time between the proponents and the opponents of the pending bill. In the quest for information, committees have the right, given either by constitutional provision or by statute, to subpoena witnesses and bring in papers.

In most States the legislative committees are lax in keeping records of their proceedings and of the attendance and votes of members. Some have rules attempting to enforce a better system of records. Those of Wisconsin require the committee to file with its report on a bill that portion of the proceedings which had to do with the bill. The Pennsylvania lower

[32] R. Luce, *Legislative Procedure*, chaps. vi–viii.

house requires minutes of all committee proceedings, which shall be open to any member of the legislature and shall be filed with the resident clerk at the final adjournment and kept for a period of two years. In nearly three fourths of the States the committees are required to file within a specified time a report on each bill referred to them, ten days being the most usual time. That this requirement is more honored in the breach than in the observance in all but a few States is the conclusion of most students.

With biennial sessions and a restriction as to the number of days in the session it is difficult to see how the more important bills may be given proper consideration unless the committees have authority to sidetrack the less important ones. In some legislatures a certain committee composed of picked men is set aside as a "graveyard" committee to bury undesirable measures referred to them. Pennsylvania has one of this kind, known as "the Pickling Vat," in each house.[33] With all the shortcomings of committees it is difficult to see how the American legislatures could accomplish their work without the committee system. The committees virtually take the place occupied in the parliamentary countries by the cabinet, which, after all, is a grand committee of the lower house entrusted with the powers of arranging its program, drawing and introducing the greater portion of the bills, and attesting to their desirability and technical soundness.

The American committees, when considering bills markedly affecting an administrative department, call in at the hearing the representatives of that department to give information as to their needs and an opinion as to the practicability and desirability of the pending legislation. This is the chief means by which the legislative and administrative departments, under our system of separation of powers, are enabled to join hands and take common counsel. The committee system tends to develop a few specialists on the various matters which come before the legislature year after year, such as finance, taxation, education, and agriculture; and while the majority of a committee's members may be only indifferently informed on the subject coming before it, one or two of them usually are qualified to give it sound counsel and direction.

THE DRAFTING OF LAWS · Members of a legislature, chosen as they are by popular vote, inevitably are not specialists but laymen representing all elements of society.[34] As with a jury, their competency is in understanding and evaluating facts which are presented to them or have come under their observation. They are supposedly aware of the current conditions of society and its pressing needs. Needs, grievances, and mischiefs call for the proper remedies; and to find these is their task by investigation, debate, and deliberation. Laymen of common sense and experience may well discover an adequate statutory remedy and may be able to phrase it in everyday English which will be understandable to the man on the street.

[33]R. Luce, *Legislative Procedure*, p. 167.

[34]Ibid. chap xxiv.

But this is not sufficient for the purposes of a statute. Words and phrases must be used in the technical and exact meanings which have been given them by the courts through long years of litigation. Since every law affects in some manner the citizen's personal and property rights, extreme care must be taken to see that its prohibitions express clearly and accurately its sponsors' intentions. Furthermore, a new statute will not stand by itself, like a solitary monument, but is only an addition to an already large mass of laws on the same question. It is to be enforced alongside many more. Its provisions may conflict in some respects with existing laws or may parallel them; and later the practical question will arise as to how much force is to be allowed to each. These are only a few of the factors to be considered in the drafting of a bill. It is a highly technical task which no layman is qualified to perform and indeed only a small percentage of lawyers with special qualifications and experience.

DEFECTIVE STATUTES · The statute books of the States are cluttered with ambiguous, vague, and contradictory statutes. Governor Hughes of New York, in explaining his veto message covering 118 bills passed by the session of 1910, wrote,

> The following bills are not approved because they are either duplicates or unnecessary, or are defectively drawn, or are embraced in or conflict with bills already signed, or are unconstitutional, or are for purposes which can be suitably accomplished under general laws, or should be provided for, if at all, by amendments to the general law, or are objectionable and inadvisable by reason of proposed changes.[35]

This amazing grist seems to have been matched a few years later in a Western State. Governor Hodges of Kansas thus characterized some of the work of a legislative session:

> Notwithstanding the fact my executive clerk and the attorney-general did their best to scrutinize all the bills, chapters 177 and 178, and chapters 174 and 175, respectively, are duplicates. Chapter 75 of the laws of 1911 was repealed three times. . . . Chapter 318 of the laws of 1913 was immediately amended by chapter 319 of the laws of 1913. Chapter 82 of the laws of 1911 was repealed by section 7 of chapter 89 of the laws of 1913, and after being repealed was then amended and repealed by chapter 108 of the laws of 1913.[36]

BILL-DRAFTING AIDS · The most efficient aid in the drafting of bills is the legislative reference library and its staff. The first and the model for all was that established in 1901 at Madison, Wisconsin, by Charles McCarthy.[37] The contributions of the library and staff are chiefly two. The

[35]Quoted in A. N. Holcombe, op. cit. p. 357.

[36]*Proceedings of the Sixth Meeting of the Governors of the States of the Union, Held at Colorado Springs, Colorado, August 26th to 29th*, p. 252.

[37]C. McCarthy, *The Wisconsin Idea* (1912); E. A. Fitzpatrick, *McCarthy of Wisconsin* (1944), chap. iv.

first is the collection and arrangement in usable form of information on a wide range of subjects of possible legislation. This includes the laws of all the States classified by subjects; social, economic, agricultural, labor, and business statistics; articles and treatises bearing on subjects of interest; judicial decisions; and the reports of administrative officials, bureaus, boards, and commissions of the various States. The second contribution is aid in the drafting of bills by the expert staff attached to the library. A member, if he makes full use of this equipment, thus may find laws in other States paralleling the one he proposes to introduce, ascertain how it has worked, discover the faults in its structure, see how it has been handled by the courts, and, with the aid of the staff, draft his bill accordingly.

The McCarthy idea of a combination of reference library and bill-drafting service has been adopted in only a minority of the States; but twenty-seven States maintain specialized libraries devoted only to reference work, and such divisions are maintained in a dozen or more State libraries.[38] Seventeen of the legislative reference libraries provide bill-drafting services for legislators, and in a few others "legislative counsels" or "revisors of statutes" perform this work. In the remaining seventeen States no such specialized service is available, but the office of the attorney-general may give a limited amount of aid.

LAST-MINUTE RUSH · In a large majority of the States the greater part of the session's product is passed in the last week or so. In Texas, in 1923 90 per cent of the bills reached the governor in the last ten days of the session, and this was not unusual.[39] In the nearly six months' session of the Illinois legislature of 1923 the number of bills passed for the months of February, March, April, May, and June were 3, 5, 21, 33, and 318 respectively; and of those in June, 39 were passed on the next to the last day of the session, and 133 on the last.[40] In the period of rush it is common to suspend the rules, the procedure being about what the Speaker and his aids desire. Bills are sometimes passed en bloc. There are all-night sessions; and the members, wearied from loss of sleep and anxious to leave for home, are in no state of mind to give proper attention to the bills which come rapidly before them for decision. It is in these last days that bills of special interests are usually brought to a final vote. Several factors explain the congestion of work at the end of the session. The chief of these is the lack of a strong, effective, and responsible party leadership which is necessary if a program is to be wrought out and put through. There is usually considerable delay in completing the organization of the standing committees. Legislatures are usually in session only four days a week, some of

[38]E. V. Laurent, "Legislative Reference Libraries," in *The Book of the States, 1943–1944*, pp. 151–155.

[39]Tom Finty, Jr., op. cit. p. 653.

[40]L. D. White, op. cit. p. 715.

them regularly only three, and the members go home over the week end. The first half of the session is pretty well taken up with the introduction and reference of bills and with bargaining among the various interests to create an alignment which will see the favorites through. Holding up the final passage of a bill is a bargaining device comparable to the withholding of patronage until a political debt has been paid.

THE "SPLIT" LEGISLATIVE SESSION · Several different devices have been brought forward to mitigate the end-of-session rush. One is the consent of an extraordinary majority, two thirds or three fourths, for bills introduced after a certain date. Another is the "split session," employed by California since 1911.[41] Here the first thirty days of the session are taken up with the work of organization and the introduction of bills, all bills thereafter requiring a three-fourths vote for presentation. A thirty-day recess is then taken, after which the legislature returns to take the bills through their later stages. The theory of the scheme was that the early introduction of bills would prevent the last-minute congestion; that the standing committees would use the recess for holding investigations of the administrative departments; and that the members would use it to explain the bills and ascertain the popular reaction to them in their respective home communities. Professor West, writing after six sessions had experimented with the scheme, concluded that the reasonable expectations of its proponents had "generally been realized."[42] The experience of West Virginia, which adopted the system by constitutional amendment in 1921, was not so favorable. The standing committees did not meet during the recess, nor did the legislators and citizens in any appreciable amount use the recess for the discussion of pending bills. The last-hour rush was not eliminated; in 1927, for instance, 84 of the 196 bills enacted were enacted in the last week of the session, and 29 of them on the last day.[43] The system was abandoned in 1928. The split session is used also in New York, Alabama, Ohio, and Massachusetts, but only in the last-named by constitutional mandate.

INFLUENCE BY THE JOINT-COMMITTEE SYSTEM · The Massachusetts legislature is one whose closing days are not characterized by rush and disorder.[44] The joint-committee system is a major factor in eliminating this condition. Most of the bills are introduced in the first month of the session, and the rules require that they be reported out by the second Wednesday of March. This period may be extended by one month; but all bills in the hands of committees must be reported out within three days of the end of that time, except appropriation bills. The bills then go to second reading;

[41]R. Luce, *Legislative Assemblies*, chap. viii.

[42]V. J. West, op. cit. pp. 369–376.

[43]M. L. Faust, "Results of the Split-Session System of the West Virginia Legislature," *American Political Science Review* (February, 1928), Vol. XXII, pp. 109–121.

[44]A. C. Hanford, "Our Legislative Mills: Massachusetts, Different from the Others," *National Municipal Review* (1924), Vol. XIII, pp. 40–48.

thereafter to a committee on third reading, which scrutinizes them for technical defects. The penalty which Massachusetts pays for the measured consideration of bills ensured by these rules is long-drawn-out sessions, but the quality of the legislative product seems to justify it.

The arbitrary methods by which much legislation is handled at the close of a session, and the amazing scenes of disorder which at times accompany it, are symptoms of a general weakness in the legislative set-up rather than an isolated evil which might be removed by a law. Abler leadership and a more exacting public opinion might remove this weakness from every legislature without a single new law; but constitutional changes in the direction of the executive control of the program or the concentration of a closer public scrutiny on the legislature's work, such as might come through the unicameral system, would seem to offer a way out.

SPECIAL INTERESTS AT THE LEGISLATURE: THE LOBBY · "Each individual," wrote Rousseau in his *Social Contract*, "as a man, may have a particular will contrary to or dissimilar to the general will which he has as a citizen. His particular interest may speak to him quite differently from the common interest." In this Rousseau stated in philosophical terms a principle whose validity generates one of the difficult problems of legislatures.[45] The State legislatures, because of the wide "reserved" powers which they possess, are besieged at every session by the representatives of a flock of special interests which wish either to forestall or to foster legislative action. These lobbyists find the State legislatures even more fruitful fields for their efforts than Congress. State legislators are less experienced than Congressmen in the problems of government; they come to the State capitol without a mandate on many questions and without the guidance of a well-knit party organization; moreover, the possible field of their legislative activities is much wider than that of Congress and may affect a much greater number of interests. Many business concerns of nation-wide activities which do not fall under Federal jurisdiction because not engaged in interstate commerce have legislative agents in the capitals of most of the States to watch for hostile legislation or to press desired legislation. Thus it was brought out in the 1905–1906 insurance investigation in New York that the three large companies incorporated in that State had pooled their efforts, each taking ten States to watch, leaving the rest of the country open to all.[46] Typical of the lobbyists found about a State capital are those of the utilities (gas, electric power, railroads, bus companies, telephone and telegraph companies), the farmers' grange, labor, chambers of commerce, insurance companies, banks, and various trade associations (according to the kind of industries in the State). Often the professional associations, such as those of physicians, lawyers, and teachers, and sometimes the cities, counties, and townships have persons regularly representing their interests.

[45] J. J. Rousseau, *The Social Contract* (G. D. H. Cole, Tr., 1916), Book II, chap. i.
[46] C. E. Merriam and H. F. Gosnell, *The American Party System* (Rev. Ed., 1929), pp. 113, 114.

STATE REGULATION OF LOBBYING · Thirty-five States now have statutes attempting to control the activities of the lobby.[47] Although Georgia first had legislation on the subject, most present-day statutes were inspired by the stringent Wisconsin law of 1901. Their regulations generally attack the problem from three different angles: (1) the registration of lobbyists, (2) the prohibition of certain activities, and (3) the filing of expense accounts.

In twenty-five States the lobbyist, designated as "counsel" or "agent," must register and file certain information, including the name of the interest or agency which he represents. Cities, counties, and other political subdivisions are usually exempted from the law, as are persons appearing in response to an invitation from the legislature or one of its committees. Usually those lobbyists are barred whose compensation is made dependent upon the success of their mission. The object of the registration is publicity so that the legislators and the public may distinguish between selfish interests and disinterested citizens working for the public good.

Restriction of the activities of lobbyists is a difficult matter; for legitimate expressions of opinion on pending legislation cannot well be forbidden in a democracy. Lobbyists are generally forbidden to appear on the floor of the legislative chamber; bribery of course is illegal. Some States forbid the personal solicitation of members and limit the activities of lobbyists to testimony before standing committees. Others require the filing of lobbyists' views in written statements to the standing committees.

About half of the States with antilobbying laws require the filing of accounts listing all expenditures incurred in connection with the promotion of legislation.[48]

The general testimony is that these laws have been of small effect in checking the undue and undercover pressure on legislation by selfish interests. No adequate machinery for enforcement exists, and in many States the law is quietly ignored. The reasons are not hard to find. Drawing a statute to give relief from importunate lobbyists and their use of improper methods is a difficult task. No one would argue for a minute that citizens in general should be prohibited from giving information to legislators or appealing to them for or against a pending statute.[49] Most would regard this as a logical part of the right of petition. The real aim of the legislation is to hamper the efforts of undesirable interests in their influencing of legislators and to leave others free. But what one might think an undesirable

[47]B. Zeller, "State Regulation of Legislative Lobbying," *Book of the States, 1943–1944*, pp. 161–166.

[48]The California statute prohibits the influencing of legislation by "menace, deceit, or the suppression of truth."

[49]Henry A. Bellows, in his "In Defense of Lobbying," *Harper's Magazine* (December, 1935), Vol. 172, pp. 96–107. "It is largely through the instrumentality of lobbyists that legislation is adequately studied before enactment, and it is chiefly by way of the lobbyist that detailed information regarding such legislation reaches those most deeply concerned with it."

interest another might believe highly desirable. Civic and voters' leagues and clubs usually represent no selfish interest and should be encouraged; but it is hardly possible to draw by statute a line which will permit one organization to lobby and will debar another. The rules of legislative bodies ought to forbid lobbyists the use of the floor, and statutes requiring publicity and identification of the lobbyists are sound in principle. But beyond that, legislation can do little to bolster the morality or improve the code of morals of men elected to the legislature. Men will continue to lead and be led according to their talents in legislative bodies as well as out in the wide world.

Maud Wood Park, for years an effective lobbyist representing the National League of Women Voters, replying to the charges of undue pressure by women's and other organizations on members of Congress, stated, "To such charges I have always replied that there is no legitimate ground for objection against any lobby which is courteous in its methods and frank in the avowal of its purposes and which makes no attempt to conceal the names of its workers or the methods that they employ."[50]

LAWMAKING IN THE UNICAMERAL LEGISLATURE · The problems of organizing the Nebraska legislature for work are different from those of any other State. Because it is a single house, no officials or rules for interchamber transactions are necessary; and no party organization of floor leaders, steering committees, and "whips" is called for, because all members are elected on a nonpartisan ballot.[51] The constitution provides that the lieutenant governor shall preside, and in his absence a speaker chosen by the house. The first legislature in 1937 elected 16 standing committees, in contrast to the 32 senate and 36 house committees of the preceding legislature; these 16 committees were nominated by a committee on committees of 11 members chosen by the house. The membership of the standing committees ranges from 5 to 11. A new feature of the rules adopted was the reference of bills to a committee on enrollment and review which scrutinized them for technical and constitutional defects.

[50]National League of Women Voters, *Record of Four Years, 1920–1924* (1924), p. 23. A committee of the House of Representatives appointed in 1913 to investigate the lobby, after condemning its methods, concluded: "Your committee is of the opinion that any individual or any association of individuals interested in legislation pending in Congress has the unquestionable right to appear in person or through agents or attorneys before committees and present his or its views upon and arguments in behalf of or against such legislation; that it is the right of the individual and the mass to appeal to the legislator personally, verbally, if he sees fit to grant an interview, or in writing, if he sees proper to read it, and by education and argument seek to convince his judgment and his conscience. This, we think, is the true spirit of the right of petition guaranteed by the Constitution to the citizens of the Republic. To place the Congressman in a cloister to legislate, rendering him immune to extraneous influences, would be impossible, and if possible, it would be exceedingly ridiculous." (63d Cong., 2d Sess., House Report No. 113, pp. 24, 25)

[51]L. E. Aylesworth, "Nebraska's Unicameral Legislature," *National Municipal Review* (February, 1937), Vol. XXVI, pp. 77–81; H. B. Summers, *Unicameralism in Practice: The Nebraska Legislative System* (1937); J. P. Senning, *The One-House Legislature* (1936).

Most observers agreed that the results of the first session were inconclusive but promised more for the future.[52] The subsequent sessions indicate that the unicameral legislature is fulfilling the chief claims of its supporters and that it is satisfactory to the people of Nebraska. Considerable sentiment has appeared in favor of a larger house, in order to relieve an overburdened membership, and the abolition of the nonpartisan ballot, in order to introduce party responsibility. The adaptability of the unicameral legislature to States of a large, urban, and nonhomogeneous population is yet uncertain. The relation of this centralized legislature to the office of governor with respect to leadership in legislation, appointments to office, and financial matters needs yet more study. States of the size and racial and occupational homogeneity of Nebraska afford the best proving grounds for this new type of legislature.

## *THE CITY COUNCILS AND OTHER BOARDS AND COMMISSIONS*

Other bodies which exercise some of the legislative powers of the State are city councils, county commissioners, and township trustees, and certain administrative boards and commissions. Only in the city councils is a considerable part of the work legislative. All are engaged chiefly in making rules and regulations which are more administrative in nature than legislative, which means that the rules and regulations are for the guidance of officers in the performance of their duties, or are to fill gaps in the general laws passed by the State legislature. All are essentially bodies subordinate to the State legislature and often to central administrative officers, and their so-called legislation is for the purpose of carrying out State policy. Only the city council possesses a degree of independence in legislative policy-making; the other bodies will be considered in connection with their part in State administration.

THE CITY COUNCIL OR COMMISSION · City councils are now almost universally unicameral, and the tendency is in the direction of a small body.[53] The five hundred or more cities having a commission type of government have a combined legislative and administrative body of five or seven members. Villages often have a council of three members, with the mayor as presiding officer. In these small councils an elaborate party organization naturally does not exist; but party lines are usually drawn. In those with a dozen or more members, majority and minority floor leaders appear, and party lines are drawn on issues lending themselves to that purpose.

[52]W. E. Johnson, "Unicameralism Works," *State Government* (November, 1934), Vol. XII, pp. 197, 198. William E. Johnson, who had opposed the adoption of the system, wrote, "Two sessions of its use, however, have convinced me that it is entirely workable and that it will show its superiority over the two-house plan more and more as time goes on."

[53]W. Anderson, *American City Government* (1925), chaps. xiv-xv; A. F. Macdonald, *American City Government and Administration* (1941), chaps. xii, xiii; H. Zink, *Government of Cities in the United States* (1939), chaps. xvi, xvii; T. H. Reed, *Municipal Government in the United States* (1934), chap. x.

The majority maintains control of the standing committees and elects the clerk, the Sergeant at Arms, and other employees. In the larger municipalities with larger councils there are standing committees corresponding to the major subjects of legislation.

PROCEDURE · Each council adopts a set of rules, portions of which are often prescribed in the city charter. The order of business, the regulations of debate, and the procedure on ordinances and resolutions are simpler than those of a State legislature, but they follow the same general lines. Three readings and reference to a committee are usually prescribed. In the cities with a mayor and council the mayor normally is given a veto. In those with a manager and council he is only one of the council members elected as presiding officer, and has a vote as a member or a casting vote as a presiding officer. The feature that most distinguishes municipal legislation from others is the emphasis on committee work. Although the council itself may meet weekly of an evening, the standing committees meet during the daytime. Most of the legislation is drafted in the legal department of the city at the behest of the mayor or his cabinet, is introduced in the name of a member of the council, and is then considered in the standing committees. Hearings are held normally whenever there is a demand. If the question is one considerably affecting property-owners, neighborhoods, or other interests, they are well attended, and the proposed ordinance is warmly debated. An official journal, got out by the clerk of the council, lists all ordinances and the stage of their passage through the council. The initiative and the referendum, as explained above, are widely used for city legislation, almost universally in home-rule cities.

## *DIRECT LEGISLATION BY THE PEOPLE*

NATURE OF DIRECT GOVERNMENT · So far all the legislative processes have been those performed by representatives selected by the people. Indeed, no other method would be possible in the Federal government; for there all legislative powers are vested in Congress. Direct legislation means the enactment of statutes by the people themselves without the use of any intermediate agency.[54] Historically two different methods of direct legislation have been used. The first is the coming together of the people in a mass meeting, to take action by the usual parliamentary devices. This, of course, is suited only to small units of government. It was used in the Greek and Roman city states. It has been the basis of the New England town government for nearly three centuries, except for those towns which have grown into populous centers; and it is used for the school districts in the rural portions of many States. The town meeting, with its democratic spirit, free debate, and plain speaking, was the acme of popular self-

[54]For an excellent account of the principles of the system of direct legislation cf. A. N. Holcombe, op. cit., chap. xvi.

government. But population changes and greater centralization of administration generally have combined to relegate it to a minor place in the scheme of American government.

By direct legislation one now usually thinks of the initiative and the referendum, two devices by which any number of people over a wide area may take action on a proposed statute. By initiative petition a statute may be placed on the ballot for decision by the people at an election; and by a referendum they vote Yes or No on the question or statute propounded to them for decision.

THE MOVEMENT FOR DIRECT LEGISLATION · This movement for the extension of popular government was well under way at the opening of the present century. While its immediate inspiration was derived from the forms of direct government used at that time in the Swiss cantons, there was a considerable background of American practice to give it impetus.

EARLY USE OF THE REFERENDUM · The use of the referendum on a State-wide scale began in 1778 with the submission by the Massachusetts General Court to the people in their town meetings of a new constitution which the Court had framed.[55] When this was rejected, the following year the question of whether a constitutional convention should be held was likewise submitted to the town meetings and was carried. The constitution thus drawn was then sent to the town meetings and there received a favorable vote. New Hampshire meanwhile had used the referendum for passing on the adoption of constitutions and was soon followed by Connecticut and Maine. With constitutional referenda in New York in 1822, Virginia in 1829, Georgia in 1833, and Tennessee in 1834, this had become the most widely accepted mode of deciding this question.

The use of the referendum for statutes of state-wide application began before the Civil War. In 1819 the people of the District of Maine were given the right to decide by ballot whether Maine should be detached from Massachusetts and become a State. Constitutions of the new States generally gave the people the right to decide the question of the location of the capital and of State institutions such as universities, prisons, and hospitals. The Rhode Island constitution of 1842 provided that the legislature might not incur a debt in excess of $50,000 without the consent of the people except in an emergency. Popular consent for a steadily increasing number of questions came to be required in many of the States, such as the sale or lease of State lands, the levying of tax rates above a certain level, or the creation of banking corporations. The submission to the Maine voters in 1858 of the choice between prohibition and high license marked the beginning of an era in which the referendum was much used for settling the liquor issue. Local-option laws, by which even the smallest of the units of local government were authorized to decide their own policy on the liquor traffic, were the logical outcome.

[55]E. P. Oberholzer, *The Referendum in America* (Rev. Ed., 1911), pp. 103–112.

But by far the most extensive use of the referendum before 1900 was in the smaller areas of the local governments; since then the field of its use has been steadily extended.[56] Among the problems settled by referenda are the levying of taxes or the authorization of bonds for special purposes, as for bridges, buildings, parks, and publicly owned utilities (such as water systems, gas plants, and electric railways); the giving of franchises to utilities; and the levying of taxes above the limit set by law. Some Western States authorized the people of the local governments to decide by referendum whether livestock must be confined on their owner's land or may wander at large, and what constitutes a legal fence, "horse-high, bull-strong, and pig-tight." The establishment of local-government boundaries, the annexation or detachment of territory, is usually decided by referendum in the parts concerned, as well as the location of county seats, questions which in some of the newer States once led to miniature civil wars. Home rule for cities and counties implies the adoption of charters by popular referenda.

EARLY USE OF THE INITIATIVE · For many years referenda took place chiefly on the initiative of the legislature or of certain administrative officers, as required by the State constitution or laws. The modern initiative petition, the companion piece of the referendum, however, did not come out of a clear sky.[57] During the last quarter of the nineteenth century the people were given the right by means of petitions to initiate elections on certain questions. In Connecticut twenty-five legal voters might by petition cause an election to be held on the question of licensing the sale of intoxicating liquors; in many other States petitions had to be signed by from one tenth to one fourth of the voters. In a number of States the dangerous question of county-seat location could be brought to referendum by petition signed usually by two fifths of the legal voters. In Kansas, the classic land of county-seat fights, there was a sliding scale. If the existing county buildings had cost the county less than one thousand dollars, the petition needed only a majority of all the electors; if they had cost as much as two thousand dollars, a three-fifths majority; if they had cost more than ten thousand dollars, and if they had been in one place continuously for at least eight years, the signatures of two thirds of the electors were required. Other questions on which the people might initiate an election were the establishment of a county high school, an orphans' home, or a free public library, and the payment of a bounty for the destruction of wolves, wild cats, coyotes, or mountain lions.

[56]A New York law of 1849, providing that the free-public-school law should become effective in each district only upon receiving a majority vote of the people, was declared unconstitutional by a State court on the ground that the State was a "representative democracy," the people having surrendered their power to legislate to the State legislature.

[57]Illinois Constitutional Convention Bulletin No. 2, *The Initiative, Referendum, and Recall* (Springfield, 1920); Massachusetts Constitutional Convention Bulletin No. 6, *The Initiative and Referendum* (Boston, 1917).

## *DIRECT LEGISLATION TODAY*

CONSTITUTIONAL BASIS · The sporadic and unsystematic use of the initiative and the referendum in many States and local governments had demonstrated their value. Whereas State constitutions had progressively thrown restrictions around the activities of the legislatures, particularly on financial matters (the amount of taxes that could be levied, the limits on debt, the authorization of projects which required borrowing), they now turned over to the people by direct legislation the decision on these questions, as well as such subjects as the prohibition of the sale of intoxicants and the location of county seats, where special interests were particularly aggressive and the losers hard to reconcile to a decision.

The constitutions of all the States had originally vested the power to make laws in a popularly elected representative body. To make way for direct legislation, these constitutions must be amended in some such way as that of Ohio: "But the people reserve to themselves the power to propose to the General Assembly laws [the Initiative] . . . and the power to adopt or reject any law [the referendum] . . . passed by the General Assembly."[58] In this way the general body of voters was established as a lawmaking body co-ordinate with or supplementary to the representative legislature. South Dakota led off with a constitutional amendment in 1898 authorizing both the initiative and the referendum for general legislation, followed by Utah in 1900, Oregon in 1902, Montana in 1906, and Oklahoma in 1907. By 1945 nineteen States had adopted both the initiative and the referendum, and two others the referendum only. (The Supreme Court of Mississippi soon declared the amendment invalid, and Idaho failed to pass legislation to make the amendment effective.)[59] Many States authorize the referendum for use in the local governments, and two (Maryland and New Mexico) have it for state-wide legislation without the initiative. It is interesting to note that only two of the States adopting it are in New England, that three are in the Old South, two in the Middle West, and fourteen in the West.

THE SCOPE OF DIRECT LEGISLATION · The initiative and the referendum are generally given a very broad application. South Dakota's amendment of 1898 is typical, with its application to "any law" except "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the State government and its existing public institutions." These "emergency laws" in most places require an extraordinary majority, say, of two thirds. Ohio adds to the above exceptions "laws providing for tax levies, appropriations for the current expenses of

[58]*Constitution of the State of Ohio*, Art. II, sect. 1.

[59]J. K. Pollock, *The Initiative and Referendum in Michigan*, Michigan Governmental Studies, No. 6 (1940), pp. 87–90. Cf. also the table of States in *Illinois Constitutional Convention Bulletins*, No. 2 (1920), pp. 81, 82.

the State government and State institutions." What constitutes an "emergency law," the courts generally have held, is not a judicial question but a political one which the legislature itself must decide. The result is that legislatures have gone to ridiculous lengths in declaring acts emergency measures. It is common in some cities to pass most ordinances as emergency measures, the extraordinary majority being the only check. This is a convenient way of setting aside the referendum without constitutional action.

Home-rule cities and villages are normally free to include the initiative and the referendum in their charters, even though these devices may not be specifically provided for in the State constitutions and statutes.[60] Most of the States which have direct legislation, however, do make such specific provision. South Dakota, for instance, gave the electors twenty days after the passage of any city ordinance, the usual emergency ones excluded, to prepare petitions for a referendum. In Ohio the initiative and referendum are reserved to the municipalities, whether operating under the general code or under home rule charter, "on all questions" which they "may now or hereafter be authorized by law to control by legislative action." Direct legislation by the people is much wider than the enumeration of twenty States with their formal devices of initiative and referendum would indicate; for in all forty-eight there has been an increase in referring decisions on questions of tax levies, public improvements, and so on singly by statute to the people of counties, municipalities, and districts of various kinds. The initiation of constitutional amendments by petition in thirteen of the States and their adoption almost universally by referendum, and the almost universal amending of the charters of home-rule municipalities by both the initiative and the referendum, are evidences of the breadth of its use.

THE MECHANISM OF DIRECT LEGISLATION · Naturally the mechanism of direct legislation differs considerably from State to State, but the general picture is much the same for all. Many of the differences in the laws are in the details dealing with safeguards to ensure honesty in the circulating of the petitions, the number of signatures necessary to initiate a bill or to force a referendum on a bill passed by the legislature, and the like.

1. The first step in the legislative process by means of the initiative is the drafting of the statute. The interests backing the proposition often appoint a committee to shape the bill. Its full text is then printed on official petition blanks and placed in the hands of those who are to circulate them.

2. In order that the bill may be placed on the ballot at the forthcoming election, it is required that the petitions be signed by a certain percentage of the qualified voters, ranging from 5 per cent in three States to 10 per cent in others. Usually the law specifies that the signatures must be spread over the State by requiring stated proportions from a majority of the counties. Ohio, for instance, requires that not less than one half the re-

[60] A. F. Macdonald, op. cit. chap. xix.

quired percentage of the qualified voters shall have been signed in at least one half of all the counties of the State.

3. Next, these petitions are filed with the Secretary of State or, in a smaller political unit, with the proper election official. It is his duty to check the number and validity of the signatures and see that the petition complies in other respects with the law, and then to certify as to the sufficiency of the petition.

4. The last step is the submission of the law to the voters, which usually is done at the next succeeding general election. The title of the bill, with a short summary, is placed on the ballot, with two squares by which a vote "For" or "Against" may be cast.

Some States require that the full text of the bill, together with a brief statement of the arguments for and against it, shall be printed and distributed to all the voters at public expense. When a considerable number of measures are up in one election, these "publicity pamphlets" assume formidable size, and the expense of sending them is large. In some states only a majority of all those voting on the proposition is necessary for its enactment. The requirement for a larger vote is usually applied to financial measures, such as bond issues or special tax levies.

THE INITIATIVE AND THE REFERENDUM AND THE LEGISLATURE · In some States the bill started on its way by initiative petition may go only to the legislature; in others it may go to the people if rejected or amended by the legislature. In Ohio an initiative petition requires only 3 per cent of the voters to present a bill to the legislature; but upon negative legislative action a supplementary petition with another 3 per cent is necessary to refer it to the people. In some places no supplementary signatures are necessary to cause a referendum after adverse legislative action. The governor may not veto a bill passed by the people; and whenever conflicting statutes are so passed at one election, the one receiving the highest number of votes becomes the law.

Referendum petitions may be used to send bills passed by the legislature to the voters for judgment even if the bills have not been originated by the initiative. The steps are simple. A petition is drawn and circulated requesting that a certain law just passed by the legislature, or a section or item of the law, be submitted to a referendum of the people. The title and the text of the laws to be submitted are printed on the petition, and publicity pamphlets with the text and arguments mailed out. A majority vote is needed to pass the law. States with the referendum normally provide that no statutes, except emergency ones, shall go into effect for ninety days after their passage by the legislature, in order to give time for the circulation of referendum petitions.

ARGUMENTS FOR DIRECT LEGISLATION · A great many arguments for and against direct legislation by the people have been advanced, some of them

dating from the outset of the movement, others based on experience and propounded after the movement had spent its force early in the Wilson administration. (1) It has been said with much reason that direct legislation is a logical extension of the principle of self-government: it is democracy carried to its natural fulfillment. One cannot deny the validity of direct legislation without denying the validity of democracy itself. (2) It is a needed check on legislatures. Campaign promises made in the heat of summer and cooled to forgetfulness in the frost of January are a commonplace. The initiative gives the outraged citizen the power to introduce those bills which his representative now refuses to introduce. The referendum gives him the power to call before the court of public opinion those laws which the corrupt interests have slipped through the legislature by bribery, logrolling, or subtle pressures. For more than half a century the States have been hedging their legislatures about by increasingly numerous and severe restrictions. In this way they have shown their distrust of the legislators' ability and judgment and to some degree of their morals. The initiative and the referendum, as a complementary legislature, will now be a more effective monitor than constitutional restrictions. (3) There is no implication that the mass of voters have the ability or the time to legislate on all subjects or enact a complete legislative program; but they are competent to pass on broad questions of policy as embodied in a piece of legislation, and these, it was argued, are the type that will be chiefly the subject of the initiative or the referendum. (4) Direct legislation affords an excellent drill in self-government. It will lead to mass meetings, like the New England town meeting, for the debate of the issues and to newspaper discussions pro and con.

ARGUMENTS AGAINST DIRECT LEGISLATION · (1) The first argument against direct legislation is the one for representative government: that the masses are not qualified to carry on the work of governing, which requires special knowledge and abilities, but should choose agents who have these capacities. Just as the doctrine of rotation in office for civil servants had to give way to the system of technically trained officials, so is the attempt to lodge actual legislation in the hands of the electorate an overreaching of their capacities. The argument of the authors of the *Federalist* against a large House of Representatives applies here: that "the larger the number, the greater will be the proportion of members of limited information and of weak capacities."[61] (2) Another argument refers to the mechanical difficulties in the accurate ascertainment of the popular will on a question. The proposition is drafted by a person or persons often unknown and always irresponsible; it cannot be amended or otherwise modified during the discussion in the campaign; and the people can vote only Yes or No, although there are many questions which cannot be answered by either. (3) It is an encouragement to minority and special-interest legislation.

[61] *The Federalist* (Lodge ed., 1895), No. LVIII.

Bills are framed by public employees for increases in their compensation, by real-estate interests, labor unions, chiropractors, antivivisectionists, farmers, chambers of commerce, and many other groups, and through the initiative, often with some group interest paramount. All the members of the group or association are regimented to vote for the measure, whereas the masses are uninterested and the opposition is unorganized. The number of people voting on a referred statute generally constitute only between 50 and 75 per cent of those voting for persons in the same election; occasionally a much smaller percentage. A small proportion of the population is thus enabled to add to the statute books with neither a central legislative body nor the citizens at large being aware of the action. (4) It unduly lengthens the ballot at a time when many students of political affairs believe it should be shortened. (5) It further weakens a legislature already low in popular esteem, and circumscribed in action by constitutional limitations, by relieving it of full responsibility for a proper legislative program. (6) By weakening the distinction between constitutional laws and statutes it opens the way to attacks on minority and individual rights, such as the Oregon parochial-school law of 1922.

USE OF THE INITIATIVE AND REFERENDUM · The use of the initiative and the referendum for state-wide lawmaking has been spotty.[62] In some States an excessive number of propositions have been placed before the people; in others, few if any. South Dakota's machinery for direct legislation had been installed nine years before it was used. In 1907 the people killed an initiated bill and passed three bills referred to them by the legislature. In five biennial elections from 1904 to 1912 the people of Oregon voted on 102 laws, 37 of which were on the ballot in 1912. Forty-one were constitutional amendments and 61 were statutes. Seventy-six were initiated by the people, 17 were voluntarily submitted by the legislature, and 9 were ordered by referendum petition. A total of 42 were approved. The publicity pamphlet for the 32 measures in 1910 contained 208 pages. Among the measures submitted were bills for the direct primary, woman

[62]For some special studies cf. J. D. Barnett, *Operation of the Initiative and Referendum in Oregon* (New York, 1915); E. L. Shoup, "The Initiative and Referendum in Thirty-six American Cities," *National Municipal Review* (October, 1923), Vol. XII, pp. 610 ff.; W. Schumacher, "Thirty Years of People's Rule in Oregon: An Analysis," *Political Science Quarterly* (June, 1932), Vol. XLVII, pp. 242–258; C. I. Winslow, "The Referendum in Maryland," *American Political Science Review* (February, 1933), Vol. XXVII, pp. 75–79; D. Y. Thomas, "The Initiative and Referendum in Arkansas Come of Age," ibid. (February, 1933), Vol. XXVII, pp. 66–75; H. F. Gosnell and M. J. Schmidt, *Popular Law-Making in the United States, 1924–1936*; New York Constitutional Convention Committee, *Problems Relating to Legislative Organization and Powers* (1938); V. O. Key and W. W. Crouch, *The Initiative and Referendum in California* (1939); Colorado Legislative Reference Office, *The Initiative and Referendum in Colorado* (1940); J. K. Pollock, op. cit.; N. D. Houghton, "The Initiative and Referendum in Missouri," *Missouri Historical Review* (January, 1925), Vol. XIX, pp. 268–299. For all phases of the system cf. *Massachusetts Constitutional Convention-Debates*, Vol. II (1923); *Illinois Constitutional Convention Proceedings, 1910–1922*, Vol. I (1923).

suffrage, and municipal home rule; a bill to increase the legislators' pay from $120 to $400, which was defeated more than three to one; a bill requiring State legislators to choose that person for United States Senator who had received the highest number of votes in a preference primary; and bills prohibiting the liquor traffic, providing for the single tax, and abolishing the poll tax.

In the year 1940, 189 state measures were placed before the voters, a number which is fairly representative for the even-numbered years in which the general elections are held.[63] Of these, 151 were constitutional amendments, of which 76 were adopted. There were 20 initiated measures, of which 5 were adopted, and 18 referred legislative acts, of which 10 were approved. The proposals dealt with many subjects, including taxes, bond issues, old-age pensions, elections, and civil service.

Direct legislation in the cities, where the small, compact territory would seem to make it particularly effective, was not excessive. In thirty-one cities with machinery for direct legislation, studied for the years 1921 and 1922, only 95 measures were voted on, of which 51 were carried and 44 rejected. Of these San Francisco voted on 23 measures at one election, and Denver on 11. Thirty-three of the questions related to political matters, such as charter amendments and elections; 24 to utilities; and 18 to finances, including initiated ordinances for policemen's and firemen's salaries. Of 410 cities with a population of 25,000 or more studied, 172 voted in 1940 on legislative proposals, and 321 of these proposals were passed. One hundred and sixty-five of the proposals dealt with bonds or taxes, and 114 with liquor licenses.

CONCLUSIONS · Experience has shown that there is some validity in all the claims for and against direct legislation. But the claims neither of those expecting the millennium nor of the alarmists have proved justified. For State measures the chief value of direct legislation is as an emergency mechanism to control the work of a legislature dominated by entrenched special interests. The referendum in the localities has proved itself an effective and practical use of the democratic principle. On the whole, instances of erratic or oppressive uses of the initiative and the referendum are much fewer than the critics had anticipated; and the decisions on measures proposed probably strike as high an average in wisdom as those made in the legislatures over the same period. Experience, however, does not warrant the conclusion that direct legislation by the people may ever produce a consistent and complete program of legislation or displace the elected legislature as the chief lawgiving body.

[63]Tabulation by the Bureau of the Census, quoted in *National Municipal Review* (March, 1941), Vol. XXX, p. 168.

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CHAPTER XXIII

# *Judicial Lawmaking and Review of Legislation*

The discovery that the courts make law is likely to come as a shock to the average layman. His attitude arises chiefly from unfamiliarity with the technical side of law and its administration, but not a little from the all-too-simple formula learned as a schoolboy: "Congress makes the laws, the President executes the laws, and the courts interpret the laws." An understanding of the courts' lawmaking function can be reached only after an appreciation of what the courts do in the administration of justice. This involves an examination of what is meant by *judicial interpretation*, *judicial review*, *law*, *statutes*, and *rights*.

THE ADMINISTRATION OF JUSTICE · Courts were created to administer justice. Their other functions, lawmaking and law-interpreting, are only incidental to the main purpose. A suit is brought before a court when some person believes himself injured by the acts of another. He lays claim to certain rights which the other has violated. With which one does justice lie? The court cannot make a decision based on considerations of sympathy for personalities, or even on its conception of what is ethically right and wrong. Rights are values rigidly established by laws, and the court's task is to discover the law which covers the dispute and apply it. Today the individual moves in a society where relationships are very involved and complex and conflicts often arise for which the existing law has no very clear answer. Nevertheless, the court must "do justice" as between the two suitors and in so doing must declare what the law is and what it means. It often must rephrase or restate the law for purposes of clarity before the relative rights of the two suitors can be ascertained. This whole process is what is meant by *interpretation* of the law. Sometimes the case is a novel one which no existing law seems to fit, but even then the court cannot decline to administer justice. In one way or another it must find a law which will define the respective rights of the two parties; and this it may do by restating existing ill-fitting laws or by deriving a new rule from a number of laws related to the subject. In this sense, then, the courts are said to be makers of law.

LAW AND STATUTE · Law was defined in an earlier section as a rule of conduct for human beings which the government through one of its agencies will enforce. When a court declares that the parties to the suit are bound by such and such a rule, not found in existing laws but only derived from them, it acts as a lawmaker. The court, however, is never a statute-maker. Statutes are acts of legislative bodies, laws drawn in formal

style and so labeled. A volume or more of these is issued for each session of a legislature; but the sole record of the laws which the courts make is the written opinions of cases that they have decided. Nearly all the statutes passed by legislative bodies come sooner or later before the courts and receive interpretation. In a very true sense, then, the legislatures and the courts are partners in the task of lawmaking.

WHY LAWS REQUIRE INTERPRETATION[1] · The interpretation, or construction, of laws is not a function peculiar to American courts but is a part of the everyday work of the courts of all nations. There are several reasons why statutes must be interpreted. One relates to the well-known deficiencies of human language. Even if all statutes were drawn by persons skilled in the use of words, there would be circumstances in which their meaning would be called into question. In the literary field, specialists start endless disputes as to what Shakespeare, Browning, or Wordsworth meant in certain passages, while the disagreements of theologians on the meaning of certain texts of Holy Writ have been so profound as to lead to the founding of new religious sects. What wonder, then, that disagreements arise with respect to the meaning of words in statutes upon which prized rights of human liberty and of property depend? Secondly, a statute is usually designed to regulate certain concrete things or situations which the legislators have in mind; but the general character of the rule which it lays down often makes it applicable to things never foreseen by the sponsors of the law. When such a case comes before a court, the court is obliged to state the meaning of the law in such a way as to ameliorate its effects. Thirdly, the passage of time inevitably reshuffles individuals and classes, assigning them new places in the social order: the high may be cast down and the lowly be raised up; old wrongs may be righted and new wrongs created. Statutes which, at the time of their passage, were well designed to give justice to individuals, groups, and classes, may become the bases of injustice. By slight changes in interpretation, year after year, the courts may succeed in keeping an old statute abreast of the times. The laws governing the rights of husband and wife and of employer and employee are two fields in which these law-interpreting and lawmaking functions of the courts have been distinctive.

THE PROCESS OF LAW INTERPRETATION · What is actually done by a court when it interprets the text of a statute or a constitution? This varies with the character of the text to be interpreted. Perhaps, as with the walls of a log cabin, there are gaps to be filled in, and the builder is left a pretty large discretion as to what materials he will use in chinking them. But as Justice Cardozo said, he must not go too far afield.[2] "He fills the open

[1]For a clear and succinct account of the problem of the interpretation of law see B. N. Cardozo's *The Nature of the Judicial Process* (1922), chaps. iii, iv, and *The Growth of the Law* (1924), chaps. iii–v.

[2]Ibid. *The Nature of the Judicial Process*, pp. 113, 114.

spaces in the law. How far he [the judge] may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art." With other statutes there may be no gaps to be filled, so that the task of interpretation consists chiefly in removing ambiguities and uncertainties in expression. The task of the courts, in short, is to declare the meaning of the statute; the raw product of the legislative mill must be refined or reshaped before it may be applied to the affairs of the citizens.

EXTENT OF JUDGE-MADE LAW · Before formal legislative bodies came into existence and during their earlier years the courts were the chief law-making agencies. The greater part of the common law of England was judge-made. Today, in democratic countries, the law of the land is the joint product of the legislature which frames and enacts the statute and the court which declares its meaning and applies it to individual cases. The people by legislative enactment may repeal or modify old rules of law, whether they originated in court or legislature. They may pioneer in entirely new fields of regulation, overturning ancient concepts of rights and privileges. Nevertheless, the courts have the last word: it is the judge who translates the words of the statute into applicable terms; who declares the specific intention of the makers of the statutes if they had one; and, if they had none, who guesses what would have been intended if the particular point had come to mind.[3]

## *JUDICIAL REVIEW*

THE NATURE OF JUDICIAL REVIEW · Judicial review, in its simplest terms, is the declaration by a court that a given piece of legislation is null and void and of no effect because contrary to a provision of the written constitution. The occasion for the exercise of this power is a suit the decision of which is dependent upon the meaning of the questioned statute. It is plain, therefore, that the function of declaring a statute void because of its unconstitutionality is only an incident to the broader one of interpreting the laws. All judicial review is judicial interpretation, but not all judicial interpretation involves judicial review.

In Great Britain, where there is no written constitution, if the courts construe one statute of Parliament to be contrary to another, the later one is regarded as overruling or repealing the earlier, even though it is not so stated in the text. The same rule holds in the United States as between two statutes; but should the contradiction exist between a statute and a phrase of the Constitution, the statute must give way no matter if it should antedate the Constitution. Both in Great Britain and in the United States the courts interpret the statutes, declaring their meaning, and indicating con-

[3] J. C. Gray, *The Nature and Sources of Law* (2d ed., 1921), pp. 124–125.

flicts if such exist; but in the United States there is a higher order of statute, the Constitution, to which all other laws must give way.

How Judicial Review Operates · A court is a passive agent in the matter of reviewing legislation. It cannot go out and seek business. It gives no interpretation unless the statute is brought before it. Statutes come before the courts for interpretation and review only by means of a suit at law. The task of review may be occasioned by almost any kind of legal case or action. It may occur in a civil suit, where one person is suing another, or in a criminal suit, where a State or the Federal government is a party. Should no suit ever arise under a given unconstitutional statute, that statute would remain the law of the land indefinitely. The most trivial of suits as well as those involving great issues and large sums of money may equally be the occasion for judicial interpretations of lasting importance. The plea for liberty of a poor slave, Dred Scott, called forth a ruling declaring the great Missouri Compromise unconstitutional;[4] the petition of one Marbury for the delivery of a commission as justice of the peace led to the declaration of the right of the Supreme Court to void statutes because of their unconstitutionality.[5] But the resistance of a large steel corporation to a new labor-relations act brought forth an epoch-making definition of the Federal power to regulate the economic life of the nation under the guise of interstate commerce.[6]

Occasions for Judicial Review · Almost any kind of lawsuit may offer opportunity for the test of the constitutionality of a law. A few of the more important ways in which this power of the courts is brought into action are described below.

The Writ of Injunction · "Writs" were the legal forms used in the English system of justice to start suits at law, and some of these are in use in America today. The writ of injunction is used to stop, or "enjoin," acts of the defendant party. It may be directed to an officer of the government who, it is said, is about to enforce an unconstitutional law to the injury of the plaintiff, or to a private citizen or corporation which is asserting rights to the detriment of the suitor. The person asking for the injunction may do so on the ground (1) that the statute under which the officer or person is about to act is unconstitutional, or (2) that the officer or person is basing his acts on a misinterpretation of the statute. At the hearing the two parties present arguments, and the court is bound to interpret the statute which defines their respective rights or duties. If the decision is against the constitutionality of the statute or the interpretation which the defendant has placed on it, an injunction is issued. A good example of the use of the injunction to obtain the judicial review of a piece of legislation is found in the case of *Hammer* v. *Dagenhart*, decided in 1918.[7] Congress two years

[4] *Dred Scott* v. *Sanford*, 19 Howard, 393 (1857). [5] *Marbury* v. *Madison*, 1 Cranch, 137 (1803).
[6] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937).
[7] 247 U. S. 251 (1918).

earlier had passed a statute regulating child labor under the pretense of regulating interstate commerce. One Dagenhart, the father of two minor children, petitioned the United States district court to enjoin the United States district attorney, Hammer, from enforcing the law, on the ground that it was an unconstitutional invasion of the State's jurisdiction over labor. The court agreed with him and granted the injunction, whereupon the district attorney appealed to the United States Supreme Court, where the decision again was against him. Thus the law had been twice reviewed and twice declared void.

THE WRIT OF MANDAMUS · This is another ancient instrument in the nature of an order from a court to a person or persons, private citizens or government officials, to perform certain acts. The statute which purports to create the duty is examined and interpreted, and if it is found to be constitutional and its wording to require the performance of the duty, the mandamus is issued. The most famous instance of judicial review in the history of the United States Supreme Court, that of *Marbury* v. *Madison* in 1803, was occasioned by a petition for a writ of mandamus to compel Madison, Secretary of State, to deliver to William Marbury a commission for the office of justice of the peace in the District of Columbia.[8] Here the Court decided that a part of the Judiciary Act of 1789, which gave the same court jurisdiction in such cases, was unconstitutional. Characteristic acts which courts are often asked to require performed by means of this writ, and which may involve the judicial review of legislation, are the issuance of licenses and certificates, the payment of sums of money, the registration of securities under "blue sky" laws, the making of appointments, the assessment of taxes, and the delivery of goods. In general any administrative official failing to perform a routine duty, one which he is not free to do or not to do in his discretion, may be compelled by this means to act. If he asserts as the reason for his failure to act the unconstitutionality of the statute or a contrary interpretation of its provisions, it becomes the duty of the court to rule on those questions.

THE WRIT OF HABEAS CORPUS · This was established by an act of Parliament of 1679, and its chief provision is that any person imprisoned or in the custody of an officer or other person may petition a court to issue a writ directed to the jailer or custodian or guardian ordering him to bring the prisoner into court and prove a legal justification for his detention. The jailer may show that the person has been indicted and is held for trial, or has been tried and convicted and sentenced for a crime, or may give some other lawful reason for keeping him in custody. At the court hearing the prisoner may attack the constitutionality of the criminal statute under which he is being held, or the interpretation which the officers have given it; and the court will necessarily be compelled to review it. The immediate object of the writ is to do justice to the prisoner, but a by-product

[8] 1 Cranch, 137 (1803).

may be a review by the courts of the statute under which he is held in custody and a declaration of its meaning.

MISCELLANEOUS METHODS OF JUDICIAL REVIEW · These are only a few of the means by which the constitutionality of a statute may be brought to a test in the courts. In any criminal or civil suit, Federal or State, the question of the constitutionality of the applicable statute may be raised. A decision in the trial court in favor of the statute may be appealed to a higher court and ultimately a ruling obtained from the court of last resort of the State or Federal government. Some famous prosecutions under criminal statutes which ultimately awaited the ruling of the United States Supreme Court on the question of constitutionality were that of Eugene V. Debs by the United States in 1918 for violation of the Espionage Act; of Anita Whitney in 1927 for violation of the California Criminal Syndicalism Act of 1919; of the Schechter Poultry Corporation of New York City in 1935 for a violation of the National Industrial Recovery Act.[9] State courts, of course, likewise rule on the validity of State statutes under the State constitution. Almost any type of legal action may be the means of obtaining a test on the question of a law's constitutionality. The case of *Luther* v. *Borden* was a suit for trespass, but it called forth a decision on the question of the relative rights of the President and Congress in the recognition of the legal government of a State.[10] The case of *Chisholm* v. *Georgia* was a mere suit for a debt, but it settled the constitutional question as to whether a citizen of another State could sue a State.[11]

## *JUDICIAL REVIEW AND THE AMERICAN FORM OF GOVERNMENT*

JUDICIAL REVIEW AS A FEATURE OF A CONSISTENT SCHEME · The institution of judicial review cannot be scientifically appraised as an isolated thing, but must be studied as it operates in the political system of which it is a part. Is it the inevitable companion of a written constitution? France, Italy, and Germany existed for many years with written constitutions and no judicial review. Evidently, then, it is not the mere presence of a written constitution but the character of its content which determines the need for the review of legislation by the courts. Although the American frame of government has undergone some important alterations in the course of a hundred and fifty years, its essentials have remained unchanged by formal amendment, by custom, or by statute. The broad features of the plan are (1) federalism, the division of powers between two separate agencies of considerable independence, the States and the Federal government; (2) the separation of powers among three largely independent departments,

[9] *Debs* v. *United States*, 249 U. S. 211 (1919); *Whitney* v. *California*, 274 U. S. 357 (1927); *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495 (1935).

[10] 7 Howard 1 (1849).

[11] 2 Dallas 419 (1793).

legislative, executive, and judicial, a feature which is substantially the same for all the forty-nine governments of the nation and the States; (3) and the universal principle of limited government, which in practice confines all officers to duties prescribed by constitutions and statutes, and makes all acts beyond such authorizations null and void. These three main landmarks in the contour of the American political panorama have fostered, if they did not create, the system of judicial review. Whether they would have been obliterated without it, and whether it should be modified or abolished in order that the landmarks may be shifted, are questions to be judged after viewing the American plan of government as a whole. The chief alternative is the so-called parliamentary form of government which, with few exceptions, has prevailed among the democracies of western Europe.

FUNDAMENTALS OF THE PARLIAMENTARY PLAN · At the head of the parliamentary state is a nominal chief executive, king or president, whose office is chiefly ceremonial.[12] The active head of the executive branch is a prime minister. Under his general charge is the execution of the laws in the same degree as, in the United States, it is under the President. He is a member of Parliament, is the leader of his party in that body, and is chosen by his party. He and his cabinet control the legislative output of the session. Whatever in the way of legislation is needed for the better carrying out of the administration's policy is immediately forthcoming, and, conversely, whatever changes or improvements in the administration Parliament desires are at once accomplished; for, as chief legislator and chief executive combined in one, the prime minister is able to bring about a complete co-ordination between legislation and administration. There is no call for judicial review to keep executive and legislature in their respective spheres; for the two are combined under the leadership of one man.

The system is democratic even if the nominal head of the government is a monarch; for the political party which wins a majority of the seats in the legislature is able to choose the prime minister, write its legislative program into law, and carry it into execution. The degree of governmental responsibility to the people is greater and the response to changes in popular sentiment are more rapid than in any other form of governmental organization yet devised. Should a prime minister become unable to retain the support of the majority in the legislature, that body may choose another or it may be dissolved and an election held on the issue of the day. The new majority sent to Parliament may then choose its leader for prime minister and proceed to carry out the mandate of the voters. It is seen that there are no checks and balances between the executive and the legislative branches, but on the contrary a personal union between the two. Nothing

[12]A. L. Lowell, *The Government of England* (1908), Vol. I, chaps. i–iii; W. Bagehot, *The English Constitution* (1903 ed.), chap. ix.

stands in the way of a rapid realization of what had been ordered by the majority of the voters in the late election.

Moreover, in Great Britain there is no written constitution to stand in the way of any statute which the legislature may see fit to pass. There is, however, an unwritten constitution of great prestige, and Parliament does not pass laws contrary to it without full consideration of the consequences or without a special election in which the constitutional change has been made the issue.[13] The immutability of the English constitution is directly dependent upon the beliefs and attitudes of the English people. They, and not the courts, are its bulwark.

Furthermore, all the parliamentary states are unitary, not federal, in organization. The national legislature is the judge of what powers should be delegated to the local governments. There is no need for a third party, such as the courts, to settle disputes over jurisdiction between national and local governments.

Finally, in the absence of written bills of rights, the legislature is the sole judge of how far the liberties of the individual should be invaded by government. The line separating governmental action from the area of individual freedom is determined from time to time by public opinion. The courts are without power to tell the government that it has overstepped its bounds.

CHARACTERISTICS OF THE AMERICAN SYSTEM OF POPULAR CONTROL · The mechanism of popular control of the government characteristic of the American system can now be laid alongside that of the parliamentary.

1. The American system does not afford a national majority the means of legislating upon and carrying into effect all the items of a program which may have won popular approval. The right of decision on our various domestic problems is split among forty-nine majorities and their respective legislatures. Internal social conditions, spontaneously or because of skillful political leadership, might create, for instance, a popular demand for national laws governing divorce, city-planning, insurance, the inheritance of property, the national administration of the public schools, or control of business, manufacturing, mining, and production in general, whether in interstate commerce or not. No matter what the necessity or public sentiment, however, the national majority could not have its way; for these are matters left to the decision of the people of the respective States. Concretely, a popular majority in Nevada has the sole power to decide what sort of divorce law shall exist in that State, and not a popular majority in the United States; a popular majority in California may decide the character of the law regulating the rights of landowners to running water, and not a popular majority of the people of the United States; and so in all States with respect to the matters reserved to them.

[13]A. L. Lowell, op. cit. Vol. I, pp. 440, 441.

2. Even as respects those matters which are left to the decision of a national popular majority, the machinery for making the decision effectual works indirectly rather than directly. The majority speaks through three legislative agencies in making known its wants. In each there may be a different interpretation of what the elections meant in the way of a legislative program. Each of the three is responsible directly to the electorate and not to either of the other two. Except in those rare instances, such as the four terms of Franklin D. Roosevelt, and the heavy Republican postwar majorities in 1865 and the following years, where there was overbalance of power in the hands of one or two of the three agencies, the legislative product is the result of trades and compromises among the three. There are three potential legislative leaderships in the comparatively narrow field of Federal affairs, whereas in the British government there is only one. This mechanical obstacle to the carrying out of a clear-cut mandate of the national public is a result of the separation-of-powers and checks-and-balances theories of government which are woven into the American fabric throughout. All the States likewise provide that the popular will shall flow through independent executive and legislative departments, and all except Nebraska divide the latter into two houses.

3. Neither a national nor a State majority may legislate unqualifiedly upon those subjects which are admittedly placed under its control. No piece of legislation may go beyond the prohibitions established against interference with the liberty of individuals or groups of citizens. Thus, national public opinion may bring legislation establishing a system of bankruptcy, but it may not deprive creditors of their property without due process of law; it may establish a powerful army and navy, but it may not take supplies for that purpose without fair compensation to the owners; it might in gratitude vote a life pension to a person or his family, but not confer upon him a title of nobility; and it might establish government-owned and government-run newspapers, but could not deprive those in private ownership of the freedom to publish their own opinions. Popular majorities in the individual States likewise are variously restrained when legislating upon subjects which are without doubt within their own fields.

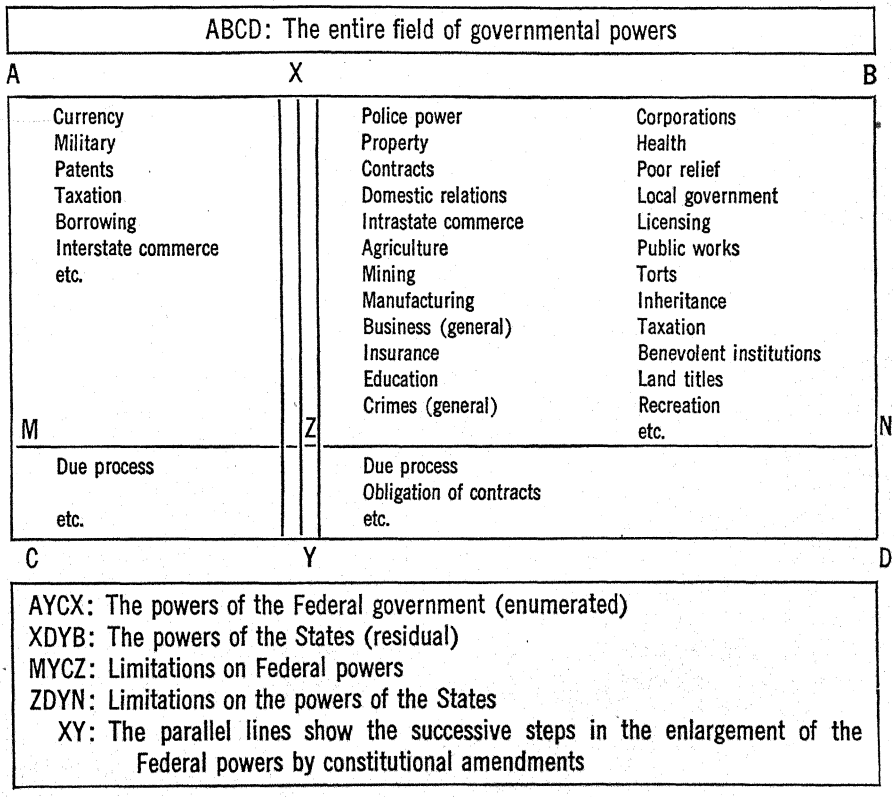
To summarize, the American governmental system, while based on the principle of majority rule, modifies that principle by providing (1) that some questions shall be settled by a majority in the entire nation, and others, for each State, by a popular majority there; (2) that in all forty-nine jurisdictions the majority speaks through two or three independent branches of the government; and (3) that each government, even within its own field, is restricted in its legislation by prohibitions against infringements on the liberty of the individual.

How Judicial Review Fits into the Scheme · It has been seen that the written Constitution of the United States sets up artificial barriers to

the political action of the people and marks out exclusive fields of action for each of the three great departments of government. What part does judicial review play in the working of the scheme? It must be said that Chief Justice John Marshall saw the opportunity offered by a constitution of rigid limitations and took it. The Supreme Court became the guardian of the constitutional blueprint and used the review of legislation as its weapon of enforcement. If both Congress and a State legislature lay claim to a bit of territory, can either be trusted to act as an unbiased judge of its own case? Or if Congress and the President disagree as to their respective fields? To permit one of the parties regularly to have its way, except as checked by public opinion, would result in the obliteration of the lines drawn by the Constitution. The Supreme Court's part may be variously named as that of an arbiter, a referee, or a policeman, depending upon the point of view. The Court indicates when one of the parties has stepped outside its territory, and it restores the old order by declaring the act unconstitutional.

MARKING THE BOUNDARY LINES · The function of the courts as guardians of the constitutional scheme of government requires a continuing re-

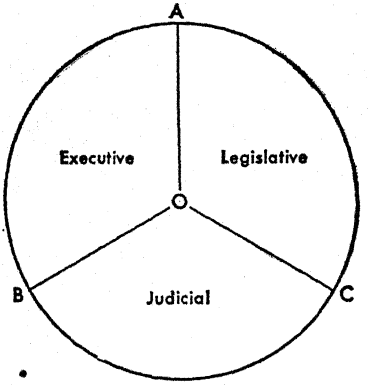
FIGURE 1



examination and definition of lines of demarcation. The chief of these lines, as already indicated, are those (1) dividing the Federal and State fields of government; (2) dividing the field of individual freedom from that in which government may act; and (3) marking out the respective areas of the Federal executive, legislative, and judicial departments. Figure 1, p. 539, shows graphically the location of the first two classes; Figure 2, the third.

The rectangle ABCD represents the whole field of human affairs, the potential maximum of governmental action; XDYB, the reserved powers of the States; AYCX, the field of the Federal government, including the total of its enumerated and its implied powers. The long, narrow rectangle at the bottom cut off from the original, MDCN, represents the field of the freedom of the individual. It is compounded of those things which one or both of the governments are forbidden to do, such as abridge the freedom of speech and of the press, impair the obligation of contracts, or take property, life, or liberty without due process of law. The two lines with which the courts are much concerned in the task of definition are XY, separating the Federal and State fields, and MN, dividing the sphere of individual freedom from that of governmental action.

FIGURE 2




The circle ABC represents the totality of all Federal powers; the segment AOC, the legislative field; the segment AOB, the executive field; and the segment BOC, the judicial. Judicial review is concerned with the locations of the boundary lines, AO, BO, and CO.

## *THE LINE BETWEEN THE NATIONAL AND STATE GOVERNMENTS*

From the beginning it seemed inevitable that there should be a continuing pressure of Federal against State governments for power. It has been related that a cleavage existed in the Philadelphia convention of 1787 between the large and the small States, the former favoring a moderately strong national government, the latter a very weak one, and that both sides agreed that the States should be left strong and independent. Every student of the general course of American history knows the dominant part taken by the Federal-State struggle in the first seventy-five years: the Virginia and Kentucky Resolutions, adopted by the legislatures of those States in 1796, which asserted the right of a single State to declare inoperative any

act of Congress passed in excess of its constitutional powers; the South Carolina nullification contest of the 1830's, based on the same theory; and, finally, the secession movement, which was the immediate occasion for the Civil War. There is little wonder, then, that the rival claims of the Federal and State governments for power should have been the occasion for a great volume of judicial interpretations. Contrary to superficial appearances, the Federal-State contest did not end with the Civil War. While its volume and vigor underwent sharp diminution in the halls of Congress and the State legislatures, it has gone on apace in the much more subdued atmosphere of the courtrooms. How judicial review has operated to mark the lines between Federal and State areas and to push the intruder back to his own home grounds will be briefly described in the following sections.

GENERAL LOCATION OF THE LINE · In settling cases where the boundary between Federal and State powers is in question, the courts have a few broad specifications laid down in the United States Constitution as a guide. (1) There is enumerated a list of matters upon which Congress may legislate, which is given a broad and indefinite expansion by the so-called "coefficient clause": "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[14] To ensure that the Federal territory thus defined shall not be invaded by the States, a further section provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[15]

With this enumeration of Federal powers, and assertion of their supremacy over all those conflicting with them, the Constitution then turns to the field of the States in these words: (2) "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[16] In short, powers are enumerated on which the Federal government may act and which have the right of way over all conflicting State powers, but the great field of human affairs over and above these is left to the States. This is the master outline; but the Constitution provides further rules for the guidance of the courts in separating the Federal from the State field. A number of these are in the ninth and tenth sections of Article I, concerning such things as ex post facto laws, the emission of bills of credit by the States,

[14]Art. I, sect. 8. [15]*United States Constitution*, Art. VI. [16]Ibid. Amendment X.

and the taxation of imports and the like; while various of the amendments circumscribe one or other of the two governments in some respects. A few examples of judicial review which serve to mark the line between the Federal and State fields follow.

ECONOMIC LIFE · The field requiring the maximum of government regulation today in all modern states is that of commerce, business, industry, labor, and production in general. The power of Congress to act in that field rests chiefly on the so-called "commerce clause," "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and what may be implied from it.[17] To the States are reserved jurisdiction over all other economic matters. The Supreme Court in 1824 declared unconstitutional an act of the State of New York giving certain persons a monopoly in steamboat traffic on the Hudson River. Such transportation was "commerce," and the monopoly was an interference by the State with interstate commerce. Local taxation of logs floating down a river to a destination outside the State likewise was declared unconstitutional for the same reason.[18] A law of the State of Florida, refusing a telegraph company permission to string its wires in the State, was ruled an interference with interstate commerce. The Supreme Court in 1905 held that the meat-packing business, although not engaged in interstate transportation, had so direct a relation to interstate commerce that it was subject to Federal regulation.[19] Similarly, other businesses directly "affecting interstate commerce" have been held to be under Federal control. In the case of *Kidd* v. *Pearson* a brewer had asked that a law of Iowa forbidding the manufacturing of intoxicating liquors be declared unconstitutional on the ground that the liquors were to be shipped outside the State.[20] The Supreme Court of the United States, in refusing, drew the line between interstate commerce, a Federal matter, and the State's police power over manufacture and production. State authority over "Agriculture, horticulture, stock raising, domestic fisheries, mining" might not be declared unconstitutional simply because such products might later flow into interstate commerce. Forty years later, however, the Supreme Court upheld Federal regulation of labor in the iron-smelting business. "When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing effects of industrial war?"[21]

[17] *United States Constitution*, Art. I, sect. 8.
[18] *Coe* v. *Errol*, 116 U. S. 517 (1886).
[19] *Swift and Company* v. *United States*, 196 U. S. 375 (1905).
[20] 128 U. S. 1 (1888).
[21] *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1 (1937).

TAXATION · Taxation is normally the chief source of government revenue. The Federal government was given an enumerated power "to lay and collect taxes, duties, imposts, and excises," and the States possess a similar reserved power.[22] All residents of the United States, therefore, are generally subject to taxation by two different governments. The same piece of property may be taxed twice, the tax being tempered only by the prudence of the legislators. However, when the State of Maryland attempted to tax the operations of a branch of the United States Bank located at Baltimore, the Supreme Court declared the law unconstitutional, since such a State power might be used to destroy a Federal instrumentality.[23] The rule was later declared to work both ways: the Federal government might not tax State instrumentalities. Neither might tax the salaries of the others' officials, including judges, or the income from government bonds or public lands.[24] Other things classed as "instrumentalities" of government are water-supply plants, mints, forts, arsenals, and fire equipment. The search for new government revenue in later years was perhaps one reason for a relaxation of the rule. State government instrumentalities of a commercial nature, such as liquor stores, may be taxed by the Federal government and vice versa, as may the salaries of public officials if the taxes are not discriminatory.[25] States may not tax interstate commerce as such; for instance, they may not tax the passengers carried, but they may tax the property employed in such commerce.

THE CRIMINAL LAW · The detection and punishment of the range of crimes known to the old common law remain securely within the domain of the States. The Federal criminal jurisdiction, however, has undergone a considerable increase, chiefly at the expense of the States, but sometimes by occupying a no-man's land between the two. The definition and punishment of piracies and felonies committed on the high seas were made exclusively Federal, but the courts have ruled that the States may overlap in the field of offenses against the law of nations. Two minor fields of Federal law result from the powers to govern the land and naval forces and to protect Federal property; but its greater portion comes from the power to punish the infraction of acts of Congress, such as those concerning the transmission of the mails, the circulation of the currency, and the free passage of interstate commerce. The most significant late extension of Federal criminal law consisted in the tacking of a new Federal crime to an existing State crime like a tail to a kite. Thus, while the adulteration of foods and drugs falls under State jurisdiction, their shipment in interstate commerce may be punished by the Federal government; and so with kidnaping and the carrying of kidnaped per-

[22] *United States Constitution*, Art. I, sect. 8.
[23] *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819).
[24] *Collector* v. *Day*, 11 Wall. 113 (1871).
[25] *Ohio* v. *Helvering*, 292 U. S. 360 (1934); *Graves* v. *State of New York*, 306 U. S. 466 (1939).

sons across State lines, the stealing of vehicles, and their shipment in interstate commerce.[26] The two authorities may work out methods of cooperation in the suppression of crime, such as the production of a prisoner, serving a term for a Federal crime, for trial in a State court for another offense.

PRIVATE PROPERTY · General property laws lie within the field of the States, but the Constitution has made exception in the matters of patents, copyrights, and bankruptcies. Congress is empowered to secure to authors and inventors "the exclusive rights to their respective writings and discoveries," and no State may by law modify such rights.[27] The holding of a Federal patent or copyright, however, does not debar a State from regulating or prohibiting the use of the things patented or copyrighted in common with other things of like character. Securing a patent for a new type of brewing machine, for instance, would not serve as a permit to operate the machine in a prohibition State, just as a patent for a new kind of kerosene lamp would not confer the right to use it where lamps burning kerosene are forbidden by law.[28] General State statutes regulating the sale, transfer, or inheritance of property apply to patents and copyrights as well as to other kinds of property held in the State, and property dependent upon patents and copyrights may be taxed by the States.

## *THE LINES SEPARATING THE THREE DEPARTMENTS OF GOVERNMENT*

BETWEEN THE LEGISLATIVE AND THE JUDICIAL DEPARTMENTS · That the courts are not entitled to legislate in the sense of making statutes goes without saying, for only "the judicial power of the United States" is vested in them. The executive and the legislative are the political departments, the Supreme Court takes pains to say, and the courts will not pass on political questions. Thus at various times the courts have refused to decide which is the legal government of a State, which the de jure government of a foreign state, whether or not a treaty is in force, what is the legal boundary of the United States, and whether or not a state of war exists in a given territory, stating in all such instances its duty to follow the lead of the President or Congress.[29]

The opportunities which legislative bodies have for invading the judicial field are not numerous. The problem arose on several occasions with respect to the power of Congress to compel the attendance of witnesses

[26]E. S. Corwin, *The Commerce Power* v. *State Rights* (1936), chap. ii; *Hippolite Egg Company* v. *United States*, 220 U. S. 45 (1911); *Brooks* v. *United States*, 267 U. S. 432 (1925).

[27]*United States Constitution*, Art. I, sect. 8.

[28]*Patterson* v. *Kentucky*, 97 U. S. 501 (1879).

[29]*Luther* v. *Borden*, 7 How. 42 (1849); *Jones* v. *United States*, 137 U. S. 202 (1890); *Terlinden* v. *Ames*, 184 U. S. 270 (1902); *Benson* v. *United States*, 146 U. S. 325 (1892); *United States* v. *Yorba*, 1 Wall. 412 (1864).

before its investigating committees. Several Supreme Court decisions have upheld the right of Congress to punish the refusal of such witnesses for "contempt of Congress."[30] The Constitution, of course, specifically confers on Congress one notable judicial power, that of the impeachment and trial of United States officers for high crimes and misdemeanors. Two judicial powers anciently exercised by the English Parliament, those of passing bills of attainder and ex post facto laws, were expressly forbidden to Congress.

THE LINE BETWEEN THE EXECUTIVE AND THE JUDICIAL FIELDS · The authors of the *Federalist* pointed out that the judiciary is inherently the weakest of the three departments.[31] It appoints no officers, levies no taxes, commands no army. It depends for its organization, procedure, personnel, and financial support on the political departments. The temptation to encroach on the executive departments comes from the use of court injunctions restraining administrative officers from performing duties prescribed by law on the ground of their illegality or unconstitutionality. For instance, a chief of police may discharge a member of his force, only to find a reinstatement ordered by a court. This power arises from a general principle of our policy which gives any aggrieved citizen the right to apply to a court for relief against an official who acts or refuses to act as the law requires. The courts have been quick to decline offers of executive power. When Congress in 1792 authorized the circuit courts to pass on Revolutionary pension claims, which later might be appealed to the Secretary of War, the judges of one of the courts protested that "neither the Legislature nor the Executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."[32] A year later, when President Washington sent a memorandum to the Supreme Court asking its opinion on several legal questions, the request was declined on the grounds that this was an administrative and not a judicial function.[33]

Executive invasion of the judicial field has been more pronounced. The great Federal commissions and boards, such as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board, hold hearings of a judicial nature, order the transfer of property, assess fines and penalties, and make money awards. Court review of their decisions has been greatly decreased in recent years. President Roosevelt's proposal for a law which would have enabled him immediately to appoint six new Supreme Court justices was labeled "an invasion of judicial power such as has never before been attempted in this country" by the Senate committee on the judiciary, which recommended that

[30] *In Re Chapman*, 166 U. S. 661 (1897).
[31] *The Federalist* (Lodge ed., 1895), No. LXXVIII.
[32] *Hayburn's Case*, 2 Dall. 409 (1792).
[33] C. Warren, *The Supreme Court in United States History* (1922), Vol. I, pp. 110, 111.

it be so "emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[34]

THE LINE BETWEEN THE EXECUTIVE AND LEGISLATIVE FIELDS · The Constitution "vests" the *legislative* power in Congress and the *executive* power in the President, but makes them so overlap that the line between the two is indistinct. It was seen that in the parliamentary governments the two departments are united under one leader. The party system has brought about a similar result in the United States, the degree depending on the relative strength of leadership in the respective departments. The authors of the *Federalist* believed that, of the three departments set up by the Constitution, the legislative would be the most aggressive and dangerous.[35] The legislators would be inspired "with an intrepid confidence in their own strength," being the people's representatives, sufficiently numerous "to feel all the emotions which actuate the multitude," and yet not so numerous that they would be "incapable of pursuing the objects of its passions, by means which reason prescribes."

With so great a commingling of powers the defense of each department against the other is chiefly in its own hands. There is a relatively small need for the interposition of the courts; yet judicial review stands as a musket behind the door, to be used in case of flagrant infringements of the Constitution. Congress has frequently attempted to control the appointment or dismissal of administrative officers by the President. The Tenure of Office Act of 1867, for the violation of which President Andrew Johnson was impeached and tried, forbade the removal of certain higher officers, including the cabinet, without the consent of the Senate.[36] The act never came up for judicial review; but a similar provision of the act of 1876, applying to postmasters, was declared unconstitutional in the case of *Myers* v. *United States*, when President Wilson removed Frank S. Myers, the postmaster of Portland, Oregon.[37] Attempts to control appointments have not come before the courts, but in some cases have met their fate at the hands of the President. An act of Congress of 1884 which authorized the President "to nominate and, by and with the consent of the Senate, to appoint Fitz John Porter . . . to the position of colonel in the Army of the United States" was vetoed by President Arthur as a "manifest violation of the Constitution."[38] Congress, in October, 1943, attached to a special appropriation bill the provision that none of its funds or of any other appropriation should be used to pay the salaries of three named persons. President Roosevelt denounced the provision as "an unwarranted encroachment upon the authority of both the executive and judicial branches

[34]Senate Report No. 711, June 14, 1937, 75th Cong., 1st Sess., *Reorganization of the Federal Judiciary.*

[35]*The Federalist* (Lodge ed., 1895), No. XLVIII.

[36]W. A. Dunning, *Reconstruction, Political and Economic, 1865–1877* (1907), chap. vi.

[37]272 U. S. 52 (1926).

[38]J. D. Richardson, *Messages and Papers of the Presidents*, Vol. VIII, p. 221 (July 2, 1884).

under our Constitution. It is not, in my judgment, binding upon them."[39] Secretary of the Interior Harold Ickes, following the cue of his chief, immediately appointed one of the three banned men to the position for which he had all the time been slated, that of executive assistant to the governor of the Virgin Islands. No court review of the case has yet been attempted.

The President is free to lead Congress in the task of lawmaking so far as he can persuade it to follow him, but he cannot participate directly in the work of the two houses. Lawmaking on his own account is confined to his so-called "ordinance," or order-making, power. This he and his chief subordinates possess as a means for executing the powers given directly by the Constitution or by acts of Congress. The courts steadily maintain that legislative power cannot be delegated to executive officers, but they have become steadily more liberal-minded as to what constitutes such delegation. Only Congress can pass acts authorizing new policies or establishing standards of what is legal and what is not, but it can authorize executive officers by issuing orders or ordinances to "fill in the details" of the general plan which it has laid down. Thus Congress, for instance, may not vote the President power to make tariffs for the next twelve months; but it may pass a tariff bill laying down principles and maximum and minimum rates, leaving to the President the task of raising or lowering the actual rates according to certain standards. It may authorize the devaluation of the gold content of the dollar, leaving to the President the determination of the exact amount. In the National Industrial Recovery Act, Congress authorized the President to prohibit the shipment in interstate commerce of oil produced in excess of quotas set by the States. The Supreme Court, in the *Panama Refining Company* v. *Ryan* case,[40] found this was a delegation of legislative power, since the President had been given a free hand to prohibit all such shipments or some of them or to let all go free. It goes without saying that there is an extensive overlapping of Congressional and Presidential lawmaking. All depends on how much detail Congress wishes to put into its statutes. If Congress passes the rule, it is a "law"; if the President issues it, it is an "ordinance," or Presidential order. Judicial review has steadily widened the area of executive rule-making, but draws the line at the transfer of policy-making power.

## *THE LINE SEPARATING THE FIELD OF GOVERNMENTAL ACTION FROM THE FIELD OF INDIVIDUAL FREEDOM*

The United States is the only state in the modern world which has designated in writing an area in which the individual is free from the interference of government, setting up at the same time, as its guardians, tribunals relatively independent of coercion from the political depart-

[39] *Congressional Record*, 78th Cong., 1st Sess., p. 8934. Public Law No. 132, chap. 218.
[40] 293 U. S. 388 (1935).

ments. This area, usually referred to as the domain of "civil liberty," has been considered separately in another connection.[41] Government throughout the world has steadily occupied more ground, and to this rule the United States is no exception. The courts increasingly are called upon to say whether the bounds of the field of freedom have been passed.

Landownership is one of our freedoms, but government may forbid such uses of land as might be a nuisance, and may further limit its use by zoning laws. Individuals are free to raise cattle and horses and to operate machinery, but government may restrict that right to the point where their fellow citizens do not suffer injury. Persons in general are free to follow such vocations as they choose, whether that of artist, laborer, salesman, or banker; but government may require reasonable standards of education before the work may be entered upon. The capitalist may hire and the laborer contract to work; but each may be limited with respect to hours, wages, conditions of labor, and bargaining. The liberty to communicate with his fellow beings by speech or written or printed word is given the citizen in emphatic language; but if he injures others, he is just as liable as though he had used force and brawn. And so the freedom to invent, produce, advertise, barter, and sell ends where fraud, deception, and unfair methods of competition begin.

All in all, the individual's island of freedom in the sea of governmental powers is not so large as the various constitutional guarantees seem on a casual reading to indicate; nevertheless, it is more substantial than that offered by any other contemporary state. Drawing the line which fairly divides the terrain between government control of the nation's social and economic life and the individual's self-government is one of the most delicate tasks of judicial review.

## *JUDICIAL REVIEW IN THE STATES*

ORIGIN · Judicial review by the State courts springs from the same fundamental situation as that by the Federal courts. All State constitutions organize government on the plan of three great departments, legislative, executive, and judicial; all purport to be a body of law superior and paramount to the enactments of the legislature; all embrace a list of liberties of the citizen; and in all, except Louisiana, the prevalence of the common law implies the growth of the body of the law by judicial interpretation. Eight States, by establishing the recall of judges by popular vote, and one, by requiring a vote of six out of its seven supreme-court judges to declare a law unconstitutional, imply or acknowledge the right of judicial review.[42]

[41]Chap. VII.

[42]The eight states having the constitutional recall of judges, in the order of its adoption, are: Oregon, California, Arizona, Colorado, Nevada, Kansas, North Dakota, and Wisconsin. Illinois Constitutional Convention, Bulletin No. 2 (1919), p. 120; W. B. Graves, *American State Government* (Rev. Ed., 1941), p. 169.

The basis of State judicial review of legislation is dual, since the courts are under obligation to test its validity by both the Federal and the State constitution; for the State courts are bound by the former, "anything in the Constitution or laws of any State to the contrary notwithstanding."[43]

EXTENT · In the early years of the last century the State courts used the power of judicial review sparingly. Haines found only eighteen instances down to 1819.[44] O. P. Field's study of ten selected States, however, showed 106 statutes declared unconstitutional by their courts in the decade preceding the Civil War, and a total of 1406 into the 1931-1940 decade.[45] Two causes for the later increase are apparent: the new programs of social and economic legislation, and the detailed character of many of the constitutions which makes some of them more like legal codes than fundamental law. The later constitutions commonly have this vice, and the older constitutions are overlaid with amendments which in many instances should have been adopted, if at all, as statutes.

SUBJECTS OF JUDICIAL REVIEW · The character and the content of the constitution naturally determine largely the range of the statutes which come up for review. In all States the proper bounds of the three departments furnish one important category, and in most of them the proper line between the delegated powers of the political subdivisions and the reserved powers of the State provides another. Particularly are city and county home-rule clauses responsible for much litigation. The bills of rights, defining the citizen's immunities from the action of government, call in question many regulatory statutes. State courts are much inclined to follow the decisions of the Federal courts in interpreting similar items of freedom. For instance, every State constitution has its "due process" and "equal protection" clauses, which give its courts the same wide latitude in interpreting the productions of the legislature. For all States in the 1903–1908 period, these two stood near the top as the grounds for unconstitutionality.[46] Rigid specifications of legislative procedure are found in many constitutions, showing the disposition of the framers not to trust the legislators too far in the making of their own parliamentary law. Fifty-five statutes in the same five-year period were declared invalid because their titles were not clear, did not properly represent the content of the bill, or otherwise failed to conform to constitutional procedural requirements. Next to these groups came statutes declared invalid because of their violation of liberties guaranteed in the bills of rights. These, in the ten States studied by Field, amounted to about thirty percent of all statutes declared unconstitutional.[47]

[43] *United States Constitution*, Article VI.

[44] C. G. Haines, *The American Doctrine of Judicial Supremacy* (1914), pp. 74–77, 307.

[45] The States covered by the study were Colorado, Illinois, Indiana, Massachusetts, Minnesota, New Hampshire, New York, North Dakota, South Dakota, and Wisconsin. O. P. Field, *Judicial Review in Ten Selected States* (1943). Cf. also "Unconstitutional Legislation in Minnesota," *American Political Science Review* (October, 1941), Vol. XXXV, pp. 898–915.

[46] C. G. Haines, op. cit. p. 307. [47] O. P. Field, op. cit. pp. 52–54.

WEAKNESS OF THE STATE COURTS · The task of judicial interpretation calls for courts of superior ability; and the weaknesses apparent in their main function, the administration of justice, are still more noticeable in this one. The correct functioning of judicial review presupposes a judiciary that is both able and independent. Popular election tends to bring legislators and judges closer together in character, methods, and learning. It is extremely doubtful whether the elective judiciary should possess, as a collateral power, the broad one of passing on legislation and the everyday acts of administrators. Professor Mathews concludes that judicial review of administration sometimes operates to "enfeeble the instrumentalities provided for the enforcement of the law" or to "paralyze the executive arm of the government," as when "administrative boards are enjoined from slaughtering infected cattle," or "police officers are enjoined from raiding notorious establishments or from preventing palpable violations of the law."[48]

## *THE INTENTION OF THE FRAMERS*

CONTROVERSIES OVER THE RIGHT OF JUDICIAL REVIEW · It is to be remembered that the Constitution nowhere specifically confers on the Federal courts the right to declare legislative acts unconstitutional. It was inevitable that the champions of acts passed in response to majority sentiment and later declared invalid by the courts should question not only the decision but the whole institution of judicial review. Such outspoken opposition was occasioned, for instance, by the *Marbury* v. *Madison* decision in 1803, the Dred Scott case of 1857, which set aside the historic working agreement between North and South, the Missouri Compromise; the Civil Rights Cases of 1883, which applied the death penalty to Charles Sumner's race-equality act;[49] the invalidation of the Federal income-tax law in 1895;[50] and, in the period following 1933, the setting aside of the National Industrial Recovery Act and other related New Deal acts.[51] These controversies led to a methodical ransacking of historical records to ascertain, if possible, the intention of the framers with respect to judicial review. Three able historians of this field, Professors Andrew C. McLaughlin, Edward S. Corwin, and Charles A. Beard, independently had made studies of the question and agreed that the evidence favored the intent of the framers to confer this power. "A careful examination of the debates of the Philadelphia convention will, however, convince the skeptic that men of the Convention made that assumption," concluded McLaughlin; and

[48] J. M. Mathews, *American State Government* (Rev. Ed., 1934), pp. 439, 440.

[49] 109 U. S. 3 (1883).

[50] *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S. 601 (1895).

[51] *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495 (1935); *Carter* v. *Carter Coal Company*, 298 U. S. 238 (1936), control of coal production; *United States* v. *Butler*, 297 U. S. 1 (1936), control of agriculture.

Corwin stated that "the power rests upon certain general principles thought by its framers to have been embodied in the Constitution."[52]

THE BASES OF THIS CONCLUSION · The grounds on which these and other scholars have chiefly based their judgment are these:

1. The power is a consistent, perhaps necessary, part of the plan set forth in the Constitution: a division of powers between the Federal and State governments, a separation of powers within each among three major departments, and a pledge of noninterference on the part of government with enumerated liberties of the citizen.

2. Seventeen out of the fifty-five members of the convention declared, directly or indirectly, that the Constitution as drafted was intended to embrace judicial review. These included at least three fourths of the men who had made substantial contributions to the construction of the Constitution; four of the five members of the Committee of Detail, which drafted the Constitution; and four of the five members of the Committee of Style, which was responsible for its textual form. Among the seventeen were such powerful leaders as Oliver Ellsworth, Gouverneur Morris, James Wilson, William Paterson, George Washington, and James Madison.[53]

The character of the debates in the convention suggests that judicial review of legislation was taken for granted. For instance, on September 12, when the question was propounded as to what would be the remedy if a

[52]A. C. McLaughlin, in his *Constitutional History of the United States*, reviews the history of the theory and practice of judicial review (pp. 308–319) and concludes: "Some delegates, at one stage of the Convention's work, disapproved of the exercise of such power [judicial review]; but the general trend of the discussion appears to indicate the general assumption that the power would be exercised in cases over which the courts had jurisdiction" (p. 313). C. A. Beard, in *The Supreme Court and the Constitution* (1912), states, "In view of the principles entertained by the leading members of the convention with whom Marshall was acquainted, . . . it is difficult to understand the temerity of those who speak of the power asserted by Marshall in *Marbury* v. *Madison* as "usurpation" (p. 118). E. S. Corwin, in *The Doctrine of Judicial Review* (1914), concludes, "In short, we are driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary, in the same way, for example, that certain other general principles made unnecessary specific provision for the President's power of removal" (p. 17). Twenty-four years later, in the midst of the contest between President F. D. Roosevelt and the Court, he had revised his judgment, stating that the intent of the framers had not been answered "with entire conclusiveness" (*Court over Constitution* (1938), p. 1).

[53]C. A. Beard, op. cit. pp. 90, 110, 111. That *The Federalist* (Lodge ed., 1895), No. LXXVIII, assumed the establishment of and argued for judicial review is strong evidence of the intention of the framers. Hamilton, the author, propagandizing in favor of the adoption of the Constitution, would hardly have dared advance a controversial proposition, which could easily have been refuted by other ex-members of the convention. "[Constitutional] limitations," he wrote, "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body." If a conflict should exist, "the Constitution ought to be preferred to the statute."

State taxed imports beyond the amount necessary to pay the expenses of customs inspection, Madison replied, and apparently was not contradicted:[54] "There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled." Madison was referring to the proposition for a council of revision, with power to pass on and negative laws.

3. As Professor Beard has indisputably shown, the elements in control of the convention were conservative in their beliefs and generally represented substantial property interests. They, and those who took the lead for ratification, naturally favored an independent judiciary able to "guard the personal and property rights of minorities against all legislatures, state and national." The records of the convention show conclusively, he believes, that the members "were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities."[55]

4. That part of Article VI of the Constitution which declares that the Constitution and acts of Congress made in pursuance of it shall be "the supreme law of the land" has little practical meaning unless associated with judicial review. Luther Martin, who introduced the clause in its original form, later explained that he did so as a substitute for a pending proposition to give a Federal council of revision the power to negative the laws passed by State legislatures.[56] To declare that State judges should be bound by the Constitution and acts of Congress in preference to the constitutions and laws of their own State, and then leave compliance to their own individual wills, would be a futile gesture. But when, in language practically identical with that in Article VI, the Federal judicial power is extended to all cases arising under the Constitution, Federal statutes, and treaties, the conclusion seems inescapable that the Supreme Court was empowered to invalidate anything which conflicts with them.

5. The Judiciary Act passed by the First Congress, September 24, 1789, authorized the Supreme Court to review decisions of State courts in which a Federal statute or treaty had been declared invalid, or in which the validity of a State statute had been questioned on the basis of its repugnance to the United States Constitution and the decision had been in favor of the statute.[57] That is to say, the act assumed that State courts might

[54]M. Farrand, *Records of the Federal Convention* (1911), Vol. II, p. 589.

[55]C. A. Beard, op. cit. pp. 90, 110, 111.

[56]M. Farrand, op. cit. pp. 27, 28, 76; "Letter to Landholder" (March 19, 1788), ibid. pp. 286–288. Martin had remarked in the convention, July 21, 1787, "And as to the Constitutionality of laws, that point will come before the Judges in their proper official character" (ibid. p. 76).

[57]*Statutes at Large*, Vol. I, chap. xx; C. A. Beard, op. cit. chap ii; E. S. Corwin, op. cit. p. 49.

declare Federal and State statutes invalid, as contrary to the United States Constitution, from which it was reasonable to suppose that the same right rested in the Federal courts. In the Senate, which passed this act, were three members of the convention: Oliver Ellsworth, chairman of the committee which drafted it, and Robert Morris and William Johnson, all of whom voted for it. George Washington, another member, as President of the United States, signed it. Opposition in the lower house was based not on repugnance to the principle of judicial review, which seems to have been taken for granted by both sides, but on the fear that it might be applied to all State cases, whether the Constitution was concerned or not.

## *SUGGESTED LIMITATIONS ON THE COURTS' POWER OF JUDICIAL REVIEW*

At the time of the various clashes between the political and judicial departments of the government various proposals were made to limit or to control the Supreme Court's power over legislation. The chief of these are stated below.

REQUIREMENT OF AN EXTRAORDINARY MAJORITY · Proposals for requiring more than a bare majority for declaring an act of Congress unconstitutional ran from 6–3 to 8–1. The idea of majority rule, as used in plural governmental bodies, is that the preponderance in judgment should prevail. The idea in these proposals is that the inferior, whether 4, 3, or 2, should outweigh the 5, 6, or 7, in view of the fact that the law in question has been passed by majorities in Congress. The proposal has not met with widespread favor, partly perhaps because it permits a minority to prevail over a court majority and because it would permit a Supreme Court minority to reverse a judgment of a lower court. The provision of the Ohio constitution requiring at least a 5-to-2 vote of its supreme court to declare a State law unconstitutional had the unforeseen result of a law's being constitutional in one county and not in another.

SUPERANNUATION OF THE JUSTICES · Another proposal was to require the retirement of all judges at an age in the neighborhood of seventy years.[58] The idea behind this is that the aged judge is too prone to decide the issues of today according to the standards of the past; that, anyway, the powers of mind and of body have so declined by the age of seventy that the individual is incapable of performing his work well. Such a change would touch only a detail of the present system, but might considerably improve the character of the Federal courts. The student may reflect, however, that such a rule would have denied the people the notable services of Justices Brandeis, Holmes, and Hughes during fruitful years of their careers.

[58]This would require a constitutional amendment, since the Constitution gives the Federal judges a life tenure for good behavior (Art. III, sect. 1). Message to Congress, February 5, 1937. *Congressional Record*, 75th Cong., 1st Sess., pp. 877–879.

PACKING THE COURT · A third proposal was to establish by law a plan by which the President and the Senate, under specified circumstances, may appoint a number of new judges sufficient to reverse objectionable decisions or secure new ones. The Court would then take on the character of a third house of the legislature. No responsible party leader has yet advocated such a scheme. The law requested by President F. D. Roosevelt in his message of February 6, 1937, would have permitted the immediate appointment of six new justices, but all intent to "pack the Court" was disavowed. Rather, it was said, the law was needed to relieve a court overburdened with work and handicapped by a membership of lowered mental and physical vigor due to old age.[59] The President already had expressed the belief that the proposed change was not an alteration of the Constitution "but an increasingly enlightened view with reference to it." The Democratic platform of 1936 had taken substantially the same stand, but included a cautious expression in favor of "clarifying" amendments if necessary.[60] By the summer of 1941, deaths and resignations had cleared the way for a total of seven appointments to the Court by President Roosevelt.[61] Since 1937 the Court has declared no acts of Congress unconstitutional; but, lest the hand forget its cunning, it has cast some State laws into outer darkness.

MAKE THE CONSTITUTION EASIER TO AMEND · The power which amends the Constitution has the last word as to content. It may strike any part of the Constitution and its judicial interpretation. In so doing it may redistribute the powers of government between the national and State governments and among the departments, and increase or decrease the items of personal liberty. By this means the powers of the States over slavery, the suffrage, and intoxicating liquors were decreased or turned over to the Federal government, and all their legislative powers made subject to the test of "due process." The present requirements for amendment are based on the proposition that the law of the Constitution is of a superior and fundamental nature and should be alterable only by a majority considerably greater than one half of the voters. A less rigid requirement, it is said, would permit changes in the distribution of powers to meet the demands of the times, and the Supreme Court would be relieved of pressure to sanction strained interpretations of the existing text of the Constitution.

[59] "During the past year, there has been a growing belief that there is little fault to be found with the Constitution of the United States as it stands today. The vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it."—Annual Message to Congress, January 6, 1937, *Congressional Record*, 75th Cong., 1st Sess., p. 86.

[60] "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security."—Democratic platform of 1936

[61] The sharp cleavage in the Supreme Court was not ended by Roosevelt's new appointments. Cf. C. H. Pritchett, "Division of Opinion among Justices of the United States Supreme Court, 1939–1941," *American Political Science Review* (October, 1941), Vol. XXXV, pp. 890–898.

APPEAL TO CONGRESS · It has been proposed that Congress be empowered to validate a statute ruled out by the Supreme Court by repassing it with an extraordinary majority, such as a three-fifths or a two-thirds vote. The policy-making branch of the government would thus share with the courts the guardianship of the Constitution. Congressional debates on the motion to repass the invalidated statute would logically be concerned with its constitutionality rather than its merits. A body of quasi-judicial precedents would be built up to guide the Congress in the consideration of cases later to come before it. The Court would be relieved of the sole responsibility for a duty which periodically calls down upon it the disfavor of powerful political forces.

ABOLITION OF JUDICIAL REVIEW · The proposal to abolish judicial review altogether carries forward the plan above to its logical conclusion. This would make the national legislature and public opinion the guardians of the Constitution, as in Great Britain they are the guardians of its unwritten constitution. The majority of the day, instead of the courts, would be the judge of the extent of Federal powers as against those of the States, of contests for power between Congress and the President, and of the extent to which government might trench on the liberty of the individual. Justice Holmes has been quoted as saying that the disappearance of judicial review would not necessarily signify the end of the nation. All courts, Federal and State, of course, would be under obligation to follow the rulings of Congress in its interpretation of the Constitution. Arguments on the other side center round the value of the State and local governments in a country so extensive and varied in economic resources, the dangers to the liberty of the minorities in a country of mixed nationalities and races, and the confusion in national law if Congress should fail to follow a consistent course in its constitutional rulings.

THE CONSTITUTION AS A "POINT OF REFERENCE" · A change only a little less drastic than the total abolition of judicial review consists more in a new attitude in the Supreme Court toward the Constitution than in any formal change in its powers or procedure. According to this view, the Constitution should be regarded as only a general guide for Congress and the President instead of, as formerly, a collection of laws binding on them. E. S. Corwin, in expounding this view, refers to the Constitution as already "little more than a point of reference—or, to adopt a twentieth-century streamline metaphor, . . . little more than a taking-off ground."[62] Inherent in this scheme are the propositions of a supremacy of Congress comparable to that of the British Parliament; the lack of necessity for future constitutional amendments, particularly as respects the powers of Congress and public officers; and the functioning of the Supreme Court, as respects constitutional questions, more as an arbitral socioeconomic tribunal than as a court of law.

[62] E. S. Corwin, *Court over Constitution* (1938), p. 126.

In the opening sections of this chapter the process of law interpretation and lawmaking characteristic of the Anglo-American common-law system was described. Judicial lawmaking, it was pointed out, is a by-product of the administration of justice. Rules of law, formulated by the courts in the decision of cases, become precedents to be followed in similar future cases. The accumulation of these judge-made rules and interpretations of written constitutions constitute the law upon which suitors in the courts depend for their rights. Should Congress become the sole judge of its powers and those of the States, its domination first by one political party or pressure group and then by another would leave little chance for the development of a consistent body of constitutional law. The Supreme Court, if it attempted the review of legislation, could act chiefly as a quasi-legislative body, to pass on the desirability or the expediency of the statute before it. Probably no valid justification for such a third legislative house would be possible. National public opinion, as in Great Britain, would not only constitute the real check on Congress but be more in accordance with democratic principles.

Whether from design or the mere pressure of events, considerable progress has been made toward this new conception of judicial review. Although President F. D. Roosevelt, in his first administration, asked for many laws regulating matters which by judicial precedents lay within the domain of the States, he submitted no proposals for amendments to the Constitution for their inclusion within the Federal sphere. The Democratic platform of 1936 asserted the sufficiency of the existing Constitution as the basis for the new legislation with perhaps some "clarifying amendments"; and this the President substantially repeated in a radio "fireside chat." A soldiers' ballot and various bills to abolish State poll taxes were introduced to supersede State laws, in spite of the constitutional provisions. It is too early to judge whether the frequent reversals of precedents by the newly constituted Supreme Court indicate merely a new constitutional point of view, later to be developed as a consistent new body of law, as in the years following 1835, or an adherence to the view of the Constitution as a mere "point of reference."

## *THE RESULTS OF JUDICIAL REVIEW*

The review of legislation by the courts for a century and a half has been an integral part of the American system of government. Its operation has been subjected to a more intensive study than perhaps any other feature. The following conclusions may safely be drawn.

The Federal courts on the whole have shown an excellent craftsmanship in their interpretation of the Constitution, owing primarily to the relatively high ability of the judges and their independent position. The names of such men as Chief Justices Marshall, Waite, Taft, and Hughes, and of

Justices Story, Holmes, and Brandeis, are inseparably connected with legal ideas making the Constitution adequate to the needs of their respective generations. The Supreme Court on occasions has invalidated new legislation, but the over-all effect has been a consistent development of the unwritten Constitution from its beginning in 1789. Federal power has grown steadily under the pressure of new social forces, but the States have been safeguarded in those respects most essential to the cause of local self-government. The liberty of the individual has been protected in the face of a world-wide tendency toward the accentuation of governmental authority.

The blanket prohibition of the Fourteenth Amendment on the States, not to make or enforce any law which shall deprive persons of "due process of law," which was adopted at the behest of a strong nationalist party, has proved the weakest point in the system of judicial review. While it throws almost the entire range of State legislation under the reviewing power of the Supreme Court, it offers no concrete standard for judicial guidance. The Supreme Court, unless it uses care, may easily act as a third house of a legislature, seeing "due process" in laws which its members approve, and lack of "due process" in those which they dislike. Actually, the Court has wavered between giving the benefit of all doubts to the State legislation and applying strictly its own view of a law's reasonableness.

Judicial review in the State courts has served a less useful purpose and has been conducted with considerably less skill than in the Federal courts. Chief among the causes are the detailed and less clearly drawn State constitutions, the lower average ability of the State judges, and the greater insecurity of their tenure.

Twice before, at the beginning of the last century and immediately before the Civil War, the institution of judicial review underwent severe attacks. The contest of President and Court in the 1930's was occasioned by the assumption by Congress of legislative powers not countenanced in the written Constitution. Although this was resolved by the retirement of the old Court majority and the appointment of justices favorable to the President's point of view, it is not yet clear whether this is an interlude or a settlement. It would seem that the demands for social and economic legislation by pressure groups nation-wide in scope bid fair to increase in frequency and to be met by Congress irrespective of constitutional limitations. The popular tendency toward national centralization at the expense of the States is at the same time a move toward the passing of judicial review. Nevertheless, the President's legislative proposal, which threatened the independence of the Supreme Court, received strong bipartisan popular disapproval, and was defeated in Congress. Minority races, nationalities, and religions, as well as the great economic interests, are reluctant to forgo the aid of an institution to which they may appeal for the vindication of their rights against a possible hostile majority.

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# PART II

# THE ADMINISTRATION OF PUBLIC AFFAIRS

The reader's introduction to the subject of American government in Chapter I was a picture of one hundred and thirty million people, living in peaceful co-operation, respecting each other in person and property, and sharing with relative equality in the products of nature and of labor. It was pointed out that this vast system of quiet regularity and order was a joint product: of government, the agent of the people in their collective capacity, which if necessary may use force to bring compliance with its commands; and of private individuals and associations of many sorts, including the family, religious sects, industrial corporations, labor unions, and cultural groups, which must depend chiefly upon the voluntary co-operation of their constituent members.

The steps in the governmental process so far accounted for stop just short of the goal, that of governing the people. The foundations of the state were described: the land, the people, and the constitutions. The constitutions were found to furnish a more or less permanent set of rules under which the game of politics is played. They establish the two chief governments, the Federal and the State; lay down the boundaries within which each must operate; define a realm within which the individual is free from the intrusion of government; and locate the supreme power in the people themselves. It was seen that the people exert their control of the government by means of political associations (especially political parties), the expression of public opinion, the conduct of political campaigns, and the election of public officials. Out of the competition, heat, and occasional fury of partisan contests is crystallized the product which guides the course of the government, namely, law.

Relation of Lawmaking to Administration · The people's control of the legislature ensures their general control of the operation of the government. First, it is the legislature which resolves policies into law, setting objectives and defining the breadth of the government services. These may include, for instance, the encouragement of agriculture, fisheries, and commerce, raising the living standard of the poor, or the attainment of universal literacy. Second, it provides the instruments by which these ends may be reached: offices, boards, commissions, inspectors, employees, and, to a certain extent, the rules to guide them in their work. The President of the United States is the only administrative officer provided by the Constitution; without legislation he would not have a single subordinate. The ten

cabinet members, and the boards and commissions and authorities, with their more than one million peacetime employees, are all the creation of or authorized by acts of Congress. In the State constitution, usually, and in the older type of municipal charter a few other principal officers besides the chief executive are provided for. Third, the "sinews of war," the funds to carry on the administration, are provided by the legislative body. This may be by taxation or by borrowing. By an appropriation act the legislature gives authorization for the drawing of money from the public treasury for purposes named in the act. Fourth, it provides the code of rules for the everyday lives of the citizens, defining their privileges and immunities and property rights. Fifth, the legislatures, in varying degrees, have the function of standing guard over the conduct of the administration. They may do this by impeaching and bringing to trial those in high posts, by calling representatives of the bureaus before standing committees to give an account of their work, by requiring periodic reports of their work, or by holding investigations of administrative services.

PUBLIC ADMINISTRATION · Constitutions, partisan politics, and legislation do no more than prepare the way for that for which the state exists, namely, the business of governing. This has been variously referred to as "the execution of the laws," "the administration of the laws," "the administration of public affairs," and "public administration." Public administration until recent years was not a subject of widespread interest in the United States, for the very good reason that it did not sufficiently affect the life of the average citizen. Now that he shares with government a considerable portion of his income and the management of his affairs, the traditional pose of indifference toward public administration is passé.

CHIEF ASPECTS OF PUBLIC ADMINISTRATION · The succeeding chapters of this volume are concerned chiefly with the administration of the government, the Federal, State, and local units being viewed as parts of a whole. For purposes of clarity the field is divided into three sections. The first deals with the general organization and problems of administration, including the chief executives; the areas of government, such as the States, counties, and municipalities; taxation and expenditures; and the management of personnel. The next two sections deal with the administration of the specific functions and services. One treats of those which may be called basic: national defense, foreign relations, banking and currency, police, and general welfare, including education, public health, public assistance, housing, and social insurance. The other covers the newer and consequently more controversial functions, chiefly of an economic character, whose principal subjects are agriculture, business, manufacturing, mining, transportation, labor, and the natural resources. Here administration is particularly complex and is beset with many unforeseen difficulties, while government policy runs all the way from laissez faire to public ownership and operation.

# IV

## THE ORGANIZATION OF THE ADMINISTRATION

*Government has a major problem common to all large employers of labor, that of organization to obtain a maximum of efficiency. Persons of various skills, technical and managerial, must be properly placed; workers must be grouped in units and given specific tasks to perform; lines of authority and responsibility must be laid down; and an over-all co-ordination and control established.*

*The Chief Executives.* Administration cannot be well conducted unless the officers and employees composing it are subject to a supreme direction. In the United States there are three kinds of such chief executives: the President of the United States, the governor of the State, and the mayor or manager of the municipality. Among their duties as administrators are the appointment and the discharge of officials, the issuing of orders to inferior officers and of ordinances for the execution of the laws, the determination of policy in administration, the preparation of budgets, and in general the co-ordination of the work of all their subordinates.

*Administrative Areas.* It was inevitable that the vast expanse of the United States should be divided into many areas for purposes of administration. The Federal laws are all administered by officials responsible ultimately to Washington; but in no State does all the administration lead up to a single official. Of the State subdivisions, only the cities and villages are given appreciable legislative powers; the others are purely administrative units. Some, like the county, have elaborate organizations; others, often only a board or a single officer. The multiplicity of such units makes co-ordination difficult and is at the base of the numerous conflicts in authority.

*Administrative Organization.* The principle used in the grouping of employees is usually that of the function to be performed, as in the collection of taxes, the disbursement of funds, and the minting and printing of currency in the Treasury Department. Adminis-

trative systems may be highly centralized, like that of the Federal government, or decentralized, like those of the States. The building of a smooth-working organization to administer a large new service is not an easy task, as has amply been shown with the present war agencies.

*Personnel Management.* Government in the United States is now the largest employer of labor. As such it falls heir to the manifold problems common to large industrial concerns. How are the thousands of employees to be recruited? What requirements should be set for the filling of particular positions? What scales of salary should be set for the various kinds of work? On what basis should promotions be made? How many hours of work a day and a week should be required? How about pensions for disability and old age? These are only a few of the questions which must be faced. Public personnel administration, as the handling of employees is often called, is a leading problem of modern government.

*Finance.* Government, no more than private business, can exist without funds. For these it depends chiefly on contributions from the earnings and capital of private individuals and corporations. Expenditures must be so ordered that the more necessary services have priority over the less important. Tax and budgetary management demands a maximum of administrative skill and wisdom, and is all the more difficult in the United States because it is the joint concern of two independent departments, the executive and the legislative.

*The Administrative Services.* The work of public administration from one point of view falls largely into two classes: The first is that concerned with the overhead operations of the government: the managerial functions of the chief executive, finance, personnel management, the work of planning boards, and other functions which concern the administrative system in general. The second class has to do with the operation of the particular functions as they apply directly to numerous parts of the population. The original, or basic, functions are principally those concerned with war, diplomacy, the maintenance of peace and order, welfare, and the administration of justice. The newer and more controversial functions are chiefly in the fields of economics and social amelioration: agriculture, business, labor, commerce, transportation, public health, and housing.

CHAPTER XXIV

# *The President of the United States*

THE OFFICE OF CHIEF EXECUTIVE · No matter what the form of government, the office of chief executive is much the same wherever found. There is a necessity for one-man rule in all active human associations, including government, the principal differences among them consisting in the amount of authority conferred, the checks provided, and the degree of responsibility enforced for his acts. The chief executive is the titular and ceremonial head of the state and its official spokesman. Although the three great departments of government in the United States are often referred to as equal and co-ordinate, only the executive is qualified to give effective leadership. The chief executive is the head of the national administration, civil and military; its manager with the power of general direction. He is also associated with Congress in the function of legislation. No government in the modern world could work effectively or even long endure if its chief executive were cut off from all participation in legislation. Usually, too, he is endowed with slight judicial powers, such as pardons, the appointment of prosecutors and judges, and the making of recommendations for the organization of the judiciary. In the democracies his office is vitalized by the backing of the great party organization of which he is the recognized head.

THE PLAN OF THE FATHERS · That the office of President was most severely criticized when the text of the Constitution was first made public is to be inferred from Hamilton's sharp reply in the *Federalist*.[1] "He has been decorated with attributes superior in dignity and splendor to those of a king of England. He has been shown to us with a diadem sparkling on his brow and the imperial purple flowing in his train," whereas, wrote Hamilton, his powers were "in few instances greater, in some instances less, than those of a governor of New York."

The evident intention of the framers was to create an office of only moderate power.[2] Legislative supremacy, doubtless owing to the late experience with the king of England and his colonial governors, was the vogue of the day. Antimonarchism, so well expressed by the pamphleteer Tom Paine, was not always distinguished from antiexecutive feeling. The political philosophy of John Locke, with whose precepts the framers were familiar, promised a supreme legislative body. Roger Sherman's remark in the constitutional convention that he considered "the executive magis-

[1] *The Federalist* (Lodge ed., 1895), No. LXVII.

[2] Max Farrand, *Records of the Federal Convention* (1911), Vol. I, p. 65.

tracy as nothing more than an institution for carrying the will of the legislature into effect" seems to have described accurately the kind of office which the convention thought it had established. A proposition before the convention to create a plural executive was occasioned by the fear of one-man power; but the experience with that form of administrative device during the Revolution and under the Confederation demonstrated its ineffectiveness. Hamilton, in the *Federalist* papers, explained how the concentration of properly checked powers in one man's hands was not dangerous but advantageous to free government.[3] "Energy in the executive is a leading character in the definition of good government." It was necessary in order to protect the community against foreign attacks; essential to the "steady administration of the laws," to the protection of property, and "to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." Furthermore, an executive without unity was able "to conceal faults, and destroy responsibility." The Presidency by 1945 had attained a degree of political power greater than ever before in its history; yet James Bryce, writing in the late 1880's, observed, "Congress . . . has succeeded in occupying nearly all the ground which the Constitution left debatable between the President and itself, and would, did it possess a better internal organization, be even more plainly than it now is, the supreme power in the government."[4] Lincoln's strong leadership had been succeeded by four years in which Congress ruled with little regard to the President; Woodrow Wilson's domination of the government was in sharp contrast to the two succeeding administrations of Harding and Coolidge. F. D. Roosevelt in 1933 again reversed the trend. It is evident that the Presidency at one time is one thing, and at another time something else. This is due not to any change in its constitutional powers but to the character of the men who have occupied the office.

SOURCES OF THE PRESIDENT'S POWERS · The vast powers of the President today are derived from three sources: the enumerations in the Constitution, the acts of Congress, and custom and practice. Those of the first group have never been increased by constitutional amendment since the time of Washington. The sharp differences between the Presidency of the early years and that of today arise from the powers derived from the second and third sources.[5]

## *THE PRESIDENT'S ENUMERATED CONSTITUTIONAL POWERS*

THE EXECUTIVE POWER · "The executive power shall be vested in a President of the United States."[6] This is the first sentence of the article of

[3] No. LXII.

[4] James Bryce, *American Commonwealth* (1895), Vol. I, p. 227.

[5] For a brief and excellent account of the President's general powers cf. W. H. Taft, *The Presidency* (1916).

[6] *United States Constitution*, Art. II, sect. 1.

the Constitution dealing with the executive department. Its language is sweeping and without exception or qualification. How much is included in the term "executive power"? A few items are specified in later clauses of the Constitution, but evidently these tell only a small part of the story. A better measure of the office is to be gathered from the customs and practices of the heads of other states. "Chief of the administration" is a narrower conception, referring primarily to the carrying out of specific governmental functions. When in 1793, during the war between France and England, President Washington was sharply criticized for proceeding to issue a proclamation of neutrality, Alexander Hamilton promptly came to his defense. He urged that the enumeration of the few powers in the Constitution should not be taken to indicate that these were all the office possessed.

> The enumeration therefore [ought] to be considered as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution and with the principles of free government. The general doctrine of our Constitution, then, is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications which are expressed in the instrument.[7]

It follows that whenever an executive power comes into being by custom or is created by act of Congress, its execution and direction must be placed in the hands of the President. Congress may not administer the law itself or create any agency outside the scope of the President's office. Such new functions as crop control, electric-power manufacture, and labor regulation, when assumed, must be placed under the office of the President.

THE FAITHFUL EXECUTION OF THE LAWS · Near the end of the article on the executive is another blanket vesting of powers: "He shall take care that the laws are faithfully executed, and shall commission all officers of the United States." What are the means at the disposal of the President for the execution of the laws? The routine one is the issuance of orders, oral or written, to his subordinates to perform specific acts. For instance, he may order the Attorney-General to start a certain prosecution under the antitrust laws, or the Secretary of Labor to intervene in a labor dispute. More drastic is the threat of dismissal of officers who refuse to carry out his orders, and still more drastic and infrequent the use of the army to quell disorder and keep the government services moving. While all laws on the books are supposed to be enforced, as a matter of practice the administration exercises a wide latitude as to which it will back vigorously and which quietly ignore.

Only in comparatively recent years have the President's power and responsibility for law enforcement been fully accepted. A test and a prece-

[7] A. Hamilton, *Works* (Lodge ed.), Vol. IV, pp. 142–144.

dent were set during the administration of Chester A. Arthur.[8] Justice Stephen J. Field of the Supreme Court had participated in a decision in the circuit court for California which had greatly angered Terry, an attorney in the case, and brought forth threats of personal violence. When the time came for the next session of the circuit court, the Attorney-General, acting for the President, ordered a deputy United States marshal to meet Justice Field at the State border and accompany him on his trips. In the course of an affray Neagle, the deputy, shot and killed Terry and, in turn, was arrested by the California authorities for murder. Neagle's fate depended on the validity of his appointment. There was no act of Congress empowering a marshal to accompany a court of justice; but was the President's order law? The Supreme Court answered Yes: the President was bound to enforce not only specific acts of Congress and treaties but also "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." He could take measures to protect the life of a judge or of any other Federal officer in the pursuit of his duties, such as a collector of customs, a postmaster, or a meat inspector.

The Pullman strike during Grover Cleveland's second administration threw further light on the President's law-enforcing power.[9] The Constitution requires that the United States protect each State against "domestic violence," but only upon the application of the legislature or of the governor (if the legislature is not in session). Railroad traffic was paralyzed at Chicago and considerable violence had been used; but Governor Altgeld, in sympathy with the labor strike, refused to call upon President Cleveland for troops, assuming that none could be sent without such application. President Cleveland thereupon, over the governor's protest, sent troops, not to suppress "domestic violence" as such but to keep the mails running, a Federal service. At about the same time his Attorney-General directed the local Federal district attorney to apply to the courts for an injunction against Eugene V. Debs and other leaders of the strikers, to restrain them from unlawful acts. The right of the President to use the injunction was upheld in the United States Supreme Court, which ruled that peaceful means as well as warlike might be used to suppress mass violations of the law.

APPOINTMENTS AND REMOVALS · A chief executive without the power to appoint or dismiss the key officers of his administration very soon finds himself chief only in name. This power he uses to build an organization loyal to himself and his policies and capable of working together with a minimum of friction. The Constitution provides that "he [the President]

[8] *In Re Neagle*, 135 U. S. 1 (1890). For an account of the affair cf. W. H. Taft, *Our Chief Magistrate and His Powers* (1916), pp. 88–92, and A. Nevins, *Grover Cleveland: A Study in Courage* (1932), chap. xxxiii.

[9] President Grover Cleveland gave an account of the affair in his *Presidential Problems* (1904), pp. 79–117.

shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law"; and proceeds to specify other methods of appointment for "inferior officers."[10] Hamilton interpreted this clause as primarily not to make the President the head of the administration but to provide a "judicious choice of men for filling the offices of the Union." He argued that one man's power of discernment was "better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps superior discernment."[11] The Senate's influence, he thought, would be so little that the act of nomination by the President would be tantamount to appointment.

COURTESY OF THE SENATE · For several decades the President and the Senate had the appointment of about twelve thousand civil employees, which by 1933 had risen to approximately fifteen thousand. If the army and navy officers are added, the total is much larger. The latter, however, are appointed and promoted principally according to the regulations of the respective army and navy services, and the President's and Senate's parts are chiefly formal. Hamilton's prophecy as to the President's ability to give careful scrutiny to each appointment and to the Senate's small part in the process has grievously gone awry, but not for reasons then apparent. Fifteen thousand appointments is far beyond the power of any one man to make intelligently in four years and in a country so large as this. All except perhaps two hundred of these could constitutionally be placed in the hands of the heads of the respective departments, subject to the civil-service rules. President Taft would have restricted Presidential appointments to the cabinet heads and one assistant secretary in each department, which, together with the judges and the members of the foreign service, numbering in all about two hundred, could have been handled "judiciously" by the President himself.[12] Congress, however, never could be persuaded to throw this vast patronage into the classified civil service, even if so urged by a President, because it is primarily the property of the Senators and, to some extent, of the members of the House. By what is called "courtesy of the Senate" no Senator will vote for the confirmation of a nomination to a Federal office unless the Senator in whose State the office is located has previously been consulted by the President. A single objection, therefore, is sufficient to bar the appointment. The privilege applies, however, only to the members of the majority party. If there are two Senators of this party from the State, the President normally consults the senior Senator; if there is no Senator of his party from that State, the President has a freer

[10] *United States Constitution*, Art. II, sect. 2.
[11] *The Federalist* (Lodge, Ed., 1888), No. LXXVI.
[12] W. H. Taft, *The Presidency*, pp. 52–63.

hand and may consult national party leaders, members of the lower house, or the governor (if of his party). When the President sends a list of nominations to the Senate for its "advice and consent," each of these names is referred to a committee, which in time brings back a recommendation. This committee checks to see that the proposed name has received the courtesy of the Senate. Presidential nominations are usually considered behind closed doors. Except in rare cases the President is free, without the intervention of Senatorial courtesy, to make nominations for members of his cabinet, high military and naval officers, and members of the diplomatic service.

THE NATIONAL PARTY MACHINE · There is a greater significance to the political appointment of this army of fifteen thousand officers than the desire to satisfy the Senators' appetite for patronage. These administrators occupy key political positions in the various States; nominations are normally not the arbitrary or personal choice of the Senator alone but are made after consultation with local party leaders and bosses. The collector of the port may well be the boss himself or his right-hand man; the United States marshal, a cog in the State machine. These officers not only are vital to the Senator's personal backing but are captains in the party's national standing army. On their political sagacity and party fidelity may depend the President's ability to command a nation-wide following which will back him in his legislative and administrative policies.

PRESIDENT GARFIELD AND SENATORIAL COURTESY · Rarely, indeed, has a President chosen to defy this solidly established custom; for he himself would be unable to perform the task of appointment unassisted. President Garfield, soon after his inauguration, nominated a person as collector of the port of New York without consulting either of New York's two Senators, Roscoe Conkling and Thomas C. Platt.[13] To these two experienced politicians this seemed a move on the President's part to undermine the party organization in New York. The bitter controversy led to the assassination of the President by a demented person, after which the two Senators resigned their seats and asked for re-election as a "vindication." The legislature, deadlocked for weeks during the summer, as the President lay near death, gave the public an unlovely spectacle of the evils of the patronage system, and finally refused to re-elect either of the men. The incident exposed the "courtesy" system to the bright light of day and hastened the adoption of a merit system for the lower Federal offices.

THE PRESIDENT'S REMOVAL POWER · The Constitution is silent about the question of the removal of Presidential appointees. Good administration would require that power be lodged somewhere for their removal when the good of the service so requires. In 1789, when the statute creating the Department of Foreign Affairs was before the Senate, the proposition to re-

[13] D. B. Chidsey, *The Gentleman from New York: A Life of Roscoe Conkling* (New Haven, 1935), chap. xxx.

quire the consent of the Senate for the removal of its Secretary was defeated by the casting vote of Vice-President John Adams.[14] Alexander Hamilton supported the Senate's claim as the intention of the Constitution, while James Madison took the contrary stand. Presidential practice since has followed the latter. But while the Presidents made good the power to dismiss officers appointed on indefinite tenure, the question was still open as to whether Congress might require by statute consent of the Senate for those appointed for a term of years. In the years immediately following the Civil War, Congress, in its struggle with President Andrew Johnson, attempted to take over the duties of his office so far as possible under the Constitution.[15] Johnson had retained Lincoln's cabinet, but, soon at loggerheads with Secretary of War Stanton, attempted to get rid of him. Congress in 1867 had passed the Tenure of Office Act, setting a definite term for the cabinet officers and prohibiting their removal without the consent of the Senate. One of the articles of impeachment preferred against the President was this violation of the Tenure of Office Act. The measure was modified in 1868 and entirely repealed in 1869. Another act, passed in 1876, provided for the appointment of postmasters of the first three classes by the President, with the advice and consent of the Senate, for a four-year term, and their removal by the same means. It was not until 1920 that this law was challenged, by the removal by President Wilson of Frank S. Myers, postmaster at Portland, Oregon.[16] Upon his death the administratrix sued for his salary from the date of his dismissal to the time of his death. Chief Justice Taft, in a long and carefully considered opinion, ruled that the power of the President to dismiss officers appointed by him could not be abridged by statute; that so to do would violate the intention of the Constitution, which was to give the President power effectively to discharge the duty of seeing that the laws were faithfully executed. Among the officers whom this decision declared it within the power of the President to remove without the consent of the Senate are heads of departments and bureaus, United States district attorneys and marshals, collectors of customs, internal-revenue collectors, ambassadors and other foreign ministers. This is ample to give a sanction to the President's power of direction; for a large percentage of these officers have subordinates whom the President may thus indirectly control.

POSITION OF THE INDEPENDENT BOARDS AND COMMISSIONS · Does the President's power of removal extend equally to the members of the independent boards and commissions which have been created outside the ten regular departments, such as the Interstate Commerce Commission

[14] *Annals of Congress*, Vol. I, pp. 368 ff.; J. Hart, *Tenure of Office under the Constitution* (1930), pp. 217–222; E. S. Corwin, *The President's Removal Power under the Constitution* (1927), pp. 10–23.

[15] W. E. Binkley, *The Powers of the President* (1937), chap. vii.

[16] E. S. Corwin, *The President: Office and Powers* (1940), pp. 84–90; *Myers* v. *United States*, 272 U. S. 52 (1926).

and the Federal Tariff Commission? These, with their long, overlapping terms, originally had been created with the intent of keeping them outside partisan politics. The issue for the first time came before the Supreme Court early in the F. D. Roosevelt administration. On July 25, 1933, the President addressed a letter to William E. Humphrey, chairman of the Federal Trade Commission, asking for his resignation.[17] The act establishing the commission stated that the President might remove a commissioner for "inefficiency, neglect of duty, or malfeasance in office"; but the President disclaimed motivation by any of these reasons, placing his request on the ground of policy alone, namely, that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my selection." The President had put forward a theory as to the nature of the commission at variance with that implicit in its creation. The issue then clearly brought forward was whether Congress could create such a body outside the direction of the President. Was the act a violation of that clause of the Constitution which vested the executive power in a President of the United States? The Court answered that it was not a violation of the Constitution; and its reasoning on this difficult question was summarized as follows:[18]

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government. . . .

The meaning obviously is, conceding that all executive power must be vested in the President and his subordinates, that a species of law enforcement called "quasi-legislative" or "quasi-judicial" can be placed beyond his reach, which may be a distinction without a difference.

COMMANDER IN CHIEF OF THE ARMY AND NAVY · "The President shall be commander-in-chief of the army and the navy of the United States, and of the militia of the several States when called into the actual service of the United States."[19] This is a position which could not well be denied the President when he had been clothed with the duty to see that the laws

[17] E. S. Corwin, *The President: Office and Powers* (1940), pp. 91–94.

[18] *Humphrey's Executor (Rathbun)* v. *United States*, 295 U. S. 602 (1935).

[19] *United States Constitution*, Art. II, sect. 2. For a discussion of the constitutional questions involved cf. E. S. Corwin, *The President: Office and Powers* (1940), chap. v; J. G. Randall, *Constitutional Problems under Lincoln* (1926), pp. 34–41.

were faithfully executed. Hamilton explained that this was not an excessive and dangerous delegation, since the President was checked by the power of Congress to declare war, make regulations for the army and navy, and provide funds for their support. "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy."[20] The President may appoint officers and issue orders for the governance of the army and navy supplementary to those of Congress. He might in person lead the armed forces if he so chose. During the Civil War, Lincoln at times directed the movements of the army and navy. The responsibility resting on a President in these respects is too grave for any man to assume without the advice of a staff of technical advisers. As commander in chief the President might easily create a situation where Congress would have no other choice than to declare war. President Polk's dispatch of the army across the Nueces River in 1846 in the course of the boundary dispute with Mexico provoked bloodshed and a declaration of war by Congress. President Theodore Roosevelt's dispatch of the fleet around the world in 1906 might have had a similar result, and President F. D. Roosevelt's establishment of a naval patrol of the North Atlantic in 1941 was a step toward hostilities with the Axis powers.

The title of commander is also the basis of an extensive ordinance power over the civilian population of the United States in time of war.[21] Without any new legislation from Congress, Lincoln in 1861 increased the regular army and navy, raised a volunteer army, borrowed money on the credit of the United States, spent money for the prosecution of the war not appropriated for that purpose, proclaimed a blockade of the Southern ports, and caused the arrest and trial of persons accused of treasonable practices.[22] Lincoln regarded the use of the army on that occasion the same as the calling out of a posse by a sheriff to enforce the laws. President Woodrow Wilson, in the First World War, used his power as commander to create a Committee on Public Information and a War Industries Board, which respectively enforced a "voluntary" censorship and took control of materials and supplies necessary to the equipment of the army. Other extensive powers over the civilian population were exerted under authorization of Congress acting under its power to "raise and equip armies."[23] Even greater powers exerted by President F. D. Roosevelt were based on his office as commander or on powers given him by Congress.[24]

THE PARDONING POWER · "He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeach-

[20] *The Federalist* (Lodge ed. 1888), No. LXIX.
[21] C. A. Berdahl, *War Powers of the Executive of the United States* (1921), chap. xii.
[22] J. G. Randall, op. cit. pp. 51–59.
[23] C. A. Berdahl, *War Powers of the Executive of the United States*, chap. xi.
[24] *United States Constitution*, Art. II, sect. 2.

ment," is the declaration in section 2 of Article III.[25] No limitations are included except that the power extends only to convictions in the Federal courts and does not extend to persons convicted on impeachment. Blackstone calls the pardoning power the "most amiable prerogative of the crown."[26] The extension of mercy or grace, however, is only one phase of the power; for justice requires that somewhere there be lodged authority to set aside or lessen penalties where mistakes have been made. The pardoning power is a rudimentary survival of the ancient prerogatives of kings, who as dispensers of equity could set aside the ordinary law where injustice had been done.

The President may pardon before, during, or after the trial.[27] A *reprieve* is a postponement of the sentence; *amnesty*, the granting of pardons or commutations to several or many persons, for instance, for having participated in rebellion. *Commutation* is a lessening of the severity of the sentence.

The President's pardoning power as a whole is well administered, but occasionally there is a slip. President Taft related how he had been importuned to pardon two seriously ill prisoners so that they could go home to their families to die. The pleas were supported by special investigators appointed by the President, and both prisoners were pardoned. One died and kept his contract, but the other promptly recovered normal health.[28] Though agents of those desiring pardon sometimes talk to the President personally, he normally acts only upon the advice of the Attorney-General. Applications are filed with supporting papers, which are passed on by the office of the Pardon Attorney, and finally by the Attorney-General.[29] The annual reports of that office give the names of all applicants, with such data as where, when, and of what convicted, the penalty imposed, the amount of the term served, the recommendation of the Attorney-General to the President, and his decision. Not often does a President pardon a prisoner contrary to the Attorney-General's recommendation.[30]

President Taft thus characterized the power and the way in which it should be discharged:

> The duty involved in the pardoning power is a most difficult one to perform, because it is so completely within the discretion of the Executive and is lacking

[25] W. H. Humbert, *The Pardoning Power of the President* (1941); E. S. Corwin, *The President: Office and Powers* (1940), pp. 136–148.

[26] W. Blackstone, *Commentaries on the Laws of England* (Chitty ed., 1848), Bk. IV, p. 396.

[27] *United States* v. *Wilson*, 7 Peters, 150 (1833).

[28] W. H. Taft, *Our Chief Magistrate and His Powers* (1916), p. 123.

[29] W. H. Humbert, op. cit. pp. 82–94.

[30] The applications for Presidential clemency now average in the neighborhood of 1500. Of the 1499 applications in 1936, 390 were granted in full or part. One hundred and fifty-five were conditional commutations, 152 were restorations of civil rights, 49 were remissions of fines or forfeitures, 28 were full commutations, 4 were reprieves, and 1 was a full pardon. W. H. Humbert, op. cit. p. 98.

so in rules or limitations of its exercise. The only rule he can follow is that he shall not exercise it against the public interest. The guilt of the man with whose case he is dealing is usually admitted, and even if it is not, the judgment of the court settles that fact in all but a few cases. The question which the President has to decide is whether under peculiar circumstances of hardship he can exercise clemency without destroying the useful effect of punishment in deterring others from committing crimes.[31]

The President may not pardon in cases of impeachment, and the power otherwise is slightly restricted. The third section of the Fourteenth Amendment forbids anyone to hold Federal or State office who has engaged in rebellion against the United States and who previously as such an officer had taken an oath to support the Constitution. In Congress is vested the power to remove such a disability by a two-thirds vote. Statutes giving the Secretary of the Treasury authority to remit certain penalties and forfeitures connected with the collection of the taxes, and giving witnesses immunity from prosecution on the basis of their testimony before certain administrative commissions, have been held valid.

### *POWERS CONFERRED BY CONGRESS*

Powers conferred by acts of Congress account for the greater part of the difference between the Presidency as held by Washington and as held by F. D. Roosevelt. A careful study of the bulky *Code of Laws of the United States* would be necessary if one were to have a detailed knowledge of the multitudinous powers and duties of the office. What Congress gives it may, of course, take away. Some powers are given as semipermanent: others, for only a short period. It is almost impossible for Congress to legislate without thrusting new powers on the President or his subordinates. Generally speaking, it makes little difference, so far as the President's personal work is concerned, whether the statute names him or one of the heads of departments to perform the duty. Naming the head of a department simply fastens the duties on that department, subject to the President's direction; anyhow, if the President is named, the work will be performed not by him but by one of the administrative agencies. Thus the Pure Food and Drug Act sets up an inspection service in the Department of Agriculture and makes the Secretaries of Agriculture, the Treasury, and Commerce a board of three to make "uniform rules and regulations" for carrying out the purposes of the act, and the Packers and Stockyard Act of 1921 names the Secretary of Agriculture as its administrator; but both of these look to the President for general direction. The National Industrial Recovery Act of 1933, on the other hand, left the President entirely free "to establish such agencies" as he might think proper for carrying out its purposes.

[31] *Our Chief Magistrate and His Powers*, pp. 118–124.

The statutory powers of the President cover a wide range. He sets the open season for the hunting of migratory birds; withdraws public lands from the market; and sets aside tracts for the use of the army or navy, for national forests, and for game refuges. He may call out the State militia and the military and naval forces of the United States for the suppression of combinations too powerful for the Federal and State police to cope with. Under an act of 1936 he is authorized to limit the shipment of red-cedar shingles into the United States from Canada; and under the famous Lease-Lend Act, of March 11, 1941, to manufacture and build weapons, munitions, aircraft, and vessels to sell or otherwise dispose of to "the government of any country whose defense the President deems vital to the defense of the United States."[32] In 1938 he transferred the administration of two tiny coral islands, Canton and Enderbury, to the Secretary of the Interior.[33]

## *POWERS DERIVED FROM CUSTOM AND PRACTICE*

It has been seen how greatly the courts have expanded the law by their rulings in cases brought before them. In a similar manner the Presidents step by step have built up the powers of their office by adopting new practices to meet new conditions. Among these are the right of the President to conduct public business while absent from the United States, as President Wilson did in 1919 at Paris and Presidents F. D. Roosevelt and Truman later at various points in Africa, Asia, and Europe. Wilson broke an ancient rule by signing bills passed by Congress after its adjournment. A few of the more important instances are worthy of more careful examination.

1. WASHINGTON AND THE CREATION OF THE CABINET · The framers fully appreciated that the chief executive of the new government would need an advisory council. Oliver Ellsworth, on August 18, 1787, expressed the opinion that this council should consist of the president of the Senate, the Chief Justice of the Supreme Court, "and the ministers as they might be established for the departments of foreign and domestic affairs, war, finance and marine; who should advise but not conclude the President."[34] Late in August, Gouverneur Morris submitted some resolutions for the creation of a Council of State, which were referred to the Committee of Detail.[35] Membership was to consist of the Chief Justice and the Secretaries of Commerce and Finance, Domestic Affairs, Foreign Affairs, War, Marine, and State. On August 22 Rutledge, from the Committee of Detail, reported a proposition for a "privy council," to be composed of the presiding officers of the two houses of Congress, and of

[32] 55 Stat. 31.
[33] Presidential order of March 3, 1938, 3 Federal Register, 525.
[34] M. Farrand, op. cit. Vol. II, pp. 328, 329.
[35] August 20, 1787. M. Farrand, op. cit. Vol. II, pp. 342, 344.

the heads of five named departments as they should be established from time to time; these were to advise but not "conclude" the President.[36] The final draft of the Constitution, however, did not specify the creation of administrative departments but provided that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. . . ."[37] The idea of an executive council, other than the Senate acting in that capacity, was not embodied in the Constitution. President Washington on three separate occasions sought to use the Senate as a council in deliberating and advising on treaties with Indian tribes, but was received so coolly that he abandoned the attempt; and no President has subsequently made a similar one.

In setting the new government in motion, Congress in 1789 organized the three departments of War, Foreign Affairs, and the Treasury, the second mentioned soon being changed to the Department of State.[38] In September the office of Attorney-General was established, but only to represent the United States and act as legal counsel to the executive officers. Not until June 22, 1870, was the Attorney-General made the head of a separate Department of Justice. It must be understood that these statutes, while they created administrative officers and departments, did not create a cabinet. A cabinet is a council which the chief executive regularly consults in the discharge of his duties. Since the framers had failed to institute any such body, one could come into being only upon the positive action of the President. During his first year President Washington seems to have consulted informally and irregularly with the few leading men of the slimly staffed Federal government at New York City: the Chief Justice, Congressional leaders such as Madison, Vice-President John Adams, and such heads of departments as had been appointed and had taken up their work. On August 27 President Washington sent out a circular to the three heads of departments, the Chief Justice, and the Vice-President asking for advice on particular questions. When the act to incorporate the first Bank of the United States came to the President, he asked for written opinions from the three secretaries and the Attorney-General. James Madison must have been consulted, for he drafted a veto message for the President. On April 4, 1791, on setting out for a two weeks' tour in the South, the President addressed a letter to the three secretaries asking them to meet together for consultation, should matters of importance demand it, and to include the Vice-President in the meetings. Jefferson, Secretary of State, called a meeting and included also the Attorney-General. During the year 1792 there were informal and irregular cabinet meetings, and written consultations by the President with the four officers. Questions growing

[36]Ibid. p. 367.
[37]*United States Constitution*, Art. II, sect. 2.
[38]H. B. Learned, *The President's Cabinet* (1912), chaps. iv-vi.

out of the French Revolutionary War of 1793 led to frequent consultations of the President and his advisers, and it is from this period that Jefferson later dated the beginning of the regular cabinet meetings. Men now began to refer to this council as a "cabinet." At this time the President propounded to the Supreme Court a list of moot legal questions, which that body refused to answer on the ground that theirs was a judicial and not a legal advisory function. This incident must have convinced the President that the Chief Justice could not well be included in his cabinet council, even had he been willing.

The cabinet, therefore, is purely a creation of custom. Should a President fail to call such meetings, the ten secretaries would remain as purely administrative officers. This is exactly what happened under Andrew Jackson. Friction among the heads of departments, resulting in several changes in personnel, probably accounts for his failure to summon them. To take their place he advised with a coterie of close political friends who came to be known as the "Kitchen Cabinet."

The cabinet has been summoned regularly by all succeeding Presidents, although Grant and Woodrow Wilson did not lean very heavily on it for advice, the latter on more than one important occasion not acquainting it with decisions of supreme importance which he had made.[39] The latest change in the system was the addition of the Vice-President by President Harding, in 1921. The custom was broken in the next administration, when Vice-President Charles G. Dawes asked to be excused; but Vice-President Charles Curtis sat in the Hoover cabinet, as did Vice-Presidents Garner, Wallace, and Truman in turn in those of F. D. Roosevelt. With a vacancy in the Vice-Presidency in 1945, due to Truman's accession to the Presidency, the invitation was extended to the president of the Senate, Kenneth C. McKellar.

The cabinet meets regularly twice a week, on Tuesdays and Fridays, in the Executive Offices. It has no secretary, no minutes are kept, and it has only such weight as the President wills. A great variety of questions are brought up and discussed. The deliberations naturally are mostly on questions of policy; questions pertaining to the technique of administration are better settled within a department or between the President and its head. During the course of the years several cabinet members have published accounts of what happened in these meetings. President F. D. Roosevelt's innovations were a council of advisers, picked here and there to supplement the regular cabinet, and known as the "Brain Trust," and later, during the war, irregular meetings of an inner group chosen from the regular departments and the war agencies.

2. PRESIDENT JEFFERSON AND PARTY LEADERSHIP · It has been seen that rudimentary political parties had developed early in Washington's adminis-

[39] H. B. Learned, *The President's Cabinet*, chap. xiii; M. L. Hinsdale, *History of the President's Cabinet* (1911), pp. 207–217; L. C. Hatch and E. L. Shoup, *A History of the Vice Presidency of the United States* (1934), pp. 44, 45.

tration and grew steadily in strength thereafter. But not until the time of Andrew Jackson, when universal manhood suffrage had been attained, did the party paraphernalia as known today come into being. Jefferson, however, set himself, early in his term as Vice-President under John Adams, to the organization of a political party. His work lay more with leading public men than with local politicians and the voters. Jefferson represented a liberal political philosophy and sought to consolidate the democratic forces of America into an organization which would shape its political institutions and run the government on those principles. When he became President, in 1801, his inaugural address set forth the objectives of his administration and the policies which he would follow. The "Revolution of 1800," as he called the overthrow of the Federalists, was more than an impulsive popular reaction against the party in power: it had a philosophical basis of enduring quality which marked its leader, Jefferson, as a political exemplar for all time to come. Jefferson was the first occupant of the White House to combine the constitutional duties of the Presidency with the leadership of a nation-wide political party.[40] When the backwoodsmen and their fellows crowded into the White House on March 4, 1829, to eat Andrew Jackson's cake and cheese and drink his liquor, and the "politicians" descended upon him with outstretched hands for the spoils of office, the union of the President's office with full party leadership had been brought to completion. Thereafter no President has attempted to govern without the party as an instrument. Conspicuous incumbents like Lincoln, Woodrow Wilson, and the two Roosevelts used their respective party organizations as integral parts of their governments.

3. ABRAHAM LINCOLN AND THE WAR POWER · The Civil War first indicated the possibilities, inherent in the various constitutional clauses which together make up the war power, for increasing the civil powers of the Presidency. The power to raise and equip armies furnishes a legal basis for all sorts of regulations affecting the civil population. During the Civil War some disloyal newspapers were suppressed, large numbers of civilians were arrested and imprisoned, the privilege of the writ of habeas corpus was suspended, and the emancipation of the slaves in certain areas was proclaimed. Increase of executive power at that time, however, was small compared with the increase during the First World War.[41] Then a food administration for civilians was established, a public-health program affecting all people was conducted by the military, and national prohibition was instituted by executive decree. The Second World War saw the entire population mobilized and regimented under Federal civil administrators appointed by the President and governed by Presidential ordinances.

4. FRANKLIN D. ROOSEVELT AND THE ORDINANCE POWER · The courts have interpreted the separation-of-powers principle of the Constitution

[40] E. Channing, *The Jeffersonian System, 1801–1811* (1916), chap. i.
[41] J. G. Randall, op. cit. chaps. vii-viii.

to mean that legislation, for instance, must be performed by a legislative body and may not be delegated to executive officials. The result has been to make American statutes generally enter into details in the establishment of governmental bodies and their procedure. As government steadily increased its regulatory duties after the Civil War, administrative bodies were given a wider power in issuing orders and regulations, which might be classed as subordinate legislation; and the courts cautiously picked their way among such statutes, declaring some invalid as delegations of legislative power, and others valid, as merely grants of authority to "fill in the details."[42] State boards and commissions first appeared with such powers; and then, in 1887, the Federal Interstate Commerce Commission, followed by many others, with power to issue orders and regulations. Numerous other Federal administrative agencies have been created, culminating with the great array to carry on the ambitious programs of the New Deal and mobilization for the Second World War. The unprecedented accretions of the President's ordinance power in the Franklin D. Roosevelt administration were caused by the need for haste, and by the fact that the formidable nature of the regulation to be undertaken called for an administrative machine too complex to be planned entirely in advance or cast into a rigid mold. The far-reaching National Industrial Recovery Act of 1933, for instance, after stating a sweeping objective, provided, "To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, . . . to appoint such officers and employees" as should be necessary.[43] He was authorized also "to prescribe such rules and regulations as may be necessary to carry out the purposes" of the act. The codes regulating business, industry, and commerce were given final approval by him, were issued in his name, and had the force of law. The Economy Act of 1933 gave the President sweeping power, within designated limits, to reduce the salary scales of Federal administrative employees.[44] These and many other acts loaded the President with "ordinance" powers which were thinly disguised legislative powers.

5. FRANKLIN D. ROOSEVELT AND THE SPENDING POWER · The use of patronage for enhancing the President's power and tying the majority party together became firmly established after the days of Jackson. But the consolidation of the political strength of the individual Senator and Congressman in his home State and district, through the construction of public works, was always something which that politician had handled himself. The annual rivers and harbors bill was the vehicle through which favors were awarded, and members of Congress were under no obligation

[42] J. P. Comer, *Legislative Functions of National Administrative Authorities* (1927), chap. iii; M. E. Dimock, *Modern Politics and Administration* (1937), pp. 195–201.

[43] 48 Stat. 195 (June 16, 1933).

[44] 48 Stat. 8 (March 20, 1933).

to the President for them. When, in 1933, the unemployment situation brought the Federal government into the field of relief, with its outright gifts to the local governments, it was manifestly impossible for Congress to itemize in detail the huge appropriations that were needed. Lump sums, with only a few general purposes designated, were appropriated, and the duty of allocation was given to the President. For the first time in national history the "power of the purse," constitutionally and traditionally a legislative one, fell in a great measure to the executive. Members of Congress watched with anxious eyes the allocation of the money, fearing that it might result in political advantage to an opponent, but hoping for an enhancement of their own prestige.

The outstanding instance of the kind was the joint resolution of 1935 appropriating $4,000,000,000 for relief purposes, "to be used in the discretion and under the direction of the President," and an additional $380,000,000 from the unexpended balances of certain named appropriation acts such "as the President may determine are not required for the purposes for which authorized."[45] The policy-declaring part of Congress extended to the naming of the types of relief which should be employed. Highway, road, and street construction and grade-crossing elimination were given $800,000,000; rural rehabilitation and relief in stricken areas, water conservation, and irrigation, $500,000,000; rural electrification, $100,000,000; housing, $450,000,000; assistance for educational, professional, and clerical workers, $300,000,000; the Civilian Conservation Corps, $600,000,000; and loans or grants for work projects of States and their political subdivisions, $900,000,000. To the President and his subordinates were left the tasks of approving projects and apportioning the money among the States and their subdivisions. Specification of the seven fields of spending and the allocation of the money among them in large lump sums would detract little from the political power which thereby was placed in the President's hands. The limitations, such as they were, were weakened by the provision that the President might increase any one or more of the items by not more than 20 per cent of the entire total of the appropriation, subtracting a corresponding amount from one or more of the remaining items.

### *QUALIFICATIONS, COMPENSATION, AND PRIVILEGES*

The sum total of the President's constitutional, statutory, and customary powers is greater than those of the chief executive of any other free country with the possible exception of the prime minister of Great Britain. The latter is the head of both the legislative and the administrative department. He is not dependent on the legislature for a declaration of war nor on one of the houses for the approval of a treaty. But in other respects he is in a

[45] 49 Stat., 115.

less favorable position. He has no fixed term of office, but may be displaced on short notice, and so is more directly responsible to public opinion. The President has four years in which to build up an administration before rendering an accounting to the electors. Moreover, as both actual and ceremonial head of the state, he has a position of honor, prestige, and power unrivaled among the rulers of the world today.

TERM OF OFFICE · The President is elected for a term of four years, and there is no constitutional bar to successive re-elections. Based largely on the refusal of Washington, Jefferson, and Jackson to seek more than two terms, the two-term limitation had long been regarded as one of the unwritten laws of the Constitution.[46] The House of Representatives in 1876 had put itself on record with a resolution condemning the third term, and the Senate in 1913 had proposed a constitutional amendment to that effect. Grant and Theodore Roosevelt had sought third terms, but only after an intervening administration. President F. D. Roosevelt's election to a third term in 1940 and to a fourth in 1944 reduced the rule from the dignity of an unwritten law to only a handicap.

The sentiment in earlier years against a third term had the same democratic slant as the principle of rotation in office: the objection to one man's holding the office so long and the belief that in a land of equality many persons were well qualified to hold the position. There was also the fear that the power might become perpetual in the hands of one man or his family. In recent years it has been argued that a term beyond eight years breaks down the constitutional guarantees by giving the President the control over the entire personnel of the Supreme Court, the independent boards and commissions with their long, overlapping terms, as well as the mass of lower appointive administrative offices outside the merit system; furthermore, that numerous elements of the population acquire a pecuniary interest in the indefinite continuance of an administration in power. The chief counterargument is that the people should have the right freely to continue in office a Chief Executive who has proved a valuable public servant.

QUALIFICATIONS FOR THE OFFICE · The Constitution required that the President should be a "natural-born" citizen or a citizen of the United

[46]For a recent volume on this subject cf. C. W. Stein, *The Third-Term Tradition* (1943). In the forty years from 1889 to 1929, eighty-five more proposals have been introduced in Congress forbidding a third term for the President. Several are now (1945) pending in Congress. C. W. Stein, op. cit. p. 341; M. A. Musmanno, *Proposed Amendments to the Constitution* (1929), pp. 51–60. Stein concludes: "Therefore it might be well to introduce the single-term principle into the presidential office or even to revert to the previous two-term rule, which worked so admirably in the first 150 years of our history. . . . Only by such a regression can the American people, in the eyes of the present writer, safeguard and perpetuate those free institutions which they have cherished since the earliest days of the Republic" (p. 352). For a contrary view cf. W. Thornton, *The Third-Term Issue* (1939); cf. also E. S. Corwin, *The President: Office and Powers* (1940), pp. 35–38.

States at the time of the adoption of the Constitution.[47] The last clause was included to leave the way open for certain leaders of the time, including Alexander Hamilton, James Wilson, and Robert Morris, who had been born outside the thirteen colonies. The Fourteenth Amendment's "born in the United States" is the authoritative definition of "natural-born." Would a person born abroad of American parents be eligible to the office? Presumably such persons are citizens because of a collective naturalization act of Congress. Congress, however, as early as 1789 had declared such persons natural-born citizens, and any court action to deny the office to such a person, if he had been duly elected, would probably be unenforceable. The Constitution requires also that he shall have "been fourteen years a resident within the United States," with no specification as to whether this shall have been continuous and immediately before his election or piecemeal during his lifetime. Either probably would be sufficient as within the letter of the law.

It is required also that he shall have "attained the age of thirty-five years." Of the thirty-three Presidents, only six were over sixty years of age when inaugurated, six were under fifty, and twenty-one in the fifties, with the median for all at fifty-four. It would seem that a party and office-holding career stretching through middle age is the normal prerequisite for attainment to the highest office within the gift of the party and the nation. It is significant that of the six men inaugurated before their half-century mark, one, Theodore Roosevelt, came to the office through the death of the President; another, Grant, at the end of a great war in which he had won high fame; and three, Pierce, Polk, and Garfield, as "dark horse" candidates not seriously considered before the meeting of the nominating convention. The nomination of the sixth, Grover Cleveland, was dictated by the exigencies of a situation which demanded a New Yorker and a reformer and independent who might attract votes to the minority from the majority party.

COMPENSATION · Congress is empowered to set a compensation for the President's services, which may not be either diminished or increased during the time for which he was elected; nor may he during that time receive "other emolument" from a State or the United States.[48] The wording of the constitutional phrase, it seems, would not preclude Congress from changing a President's compensation for his second term. Since 1909 the President's salary has been set at seventy-five thousand dollars a year, which is less than salaries paid many corporation presidents and general managers, as well as motion-picture stars. From George Washington until Ulysses S. Grant the President received only twenty-five thousand a year; from Grant's second term through Theodore Roosevelt's second the compensation was fifty thousand. Besides this monetary sum the President receives other valuable things: a free residence with food and

[47] *Constitution of the United States*, Art. II, sect. 1, clause 5. [48] Ibid. Art. II, sect. 1, clause 7.

service included, transportation for his trips throughout the country, and a yacht, battleship, or air liner for his sea trips. The budget for the executive for 1943 was $529,480, which included $226,210 for the White House staff and other expenses properly attributable to the routine operations of government.[49]

PRIVILEGES AND IMMUNITIES · The President of the United States is not subject to arrest, subpoena, or other legal process. This is not due to any specific immunity stated in the Constitution but to the nature of the office, the logic of the situation, and the general principles of public law. To permit the annoyance of the President with legal writs would entail great inconvenience to the operation of the government. Chief Justice John Marshall, indeed, did order a subpoena served on President Jefferson to appear as a witness in the trial of Aaron Burr for treason, but the President quietly ignored the summons.[50] There are a number of unwritten and customary privileges accorded the President. He may not be quoted directly on any statement unless with his consent. The only punishment which might be visited on a newspaper reporter who violates the rule would be his future exclusion from the White House press room, which is quite sufficient to enforce the rule. If a statement issued by the President results in a hostile popular reaction, he may explain later that he had been misquoted or misinterpreted, and the reporter must bear the odium. A more recently acquired privilege is a cleared channel over the radio when he wishes to speak to the nation.

THE SUCCESSION TO THE PRESIDENCY: THE VICE-PRESIDENT · The Constitution recognizes four contingencies any one of which would create a vacancy in the office of President: removal from office (presumably by impeachment), death, resignation, or inability to discharge its powers and duties. In any such case "the powers and the duties of the said office shall devolve on the Vice President."[51] But if the office of Vice-President for any of the foregoing reasons is vacant at the time, Congress by law shall provide "what officer shall then act as President, and such officer shall act accordingly, until the disability be removed or a President shall be elected."

These provisions are not so clear of uncertainties as they may seem. Does the office of President devolve on the Vice-President, or only its "powers and duties" as Acting President?[52] At the death of President Harrison the Whig cabinet had addressed Tyler as "Vice-President," and members of that party had moved to use the term "Vice-President, now exercising the office of President." Tyler, however, assumed the title of

[49]For the maintenance of the White House and grounds the estimate was $145,570. Besides his salary the President was given a fund of $30,000 for traveling and official-entertainment expenses, to be expended at his discretion and accounted for on his certificate only. *The Budget of the United States Government, 1943*, pp. 38–40.

[50]A. Beveridge, *Life of John Marshall*, Vol. III (1916–1919), pp. 444–447.

[51]*United States Constitution*, Art. II, sect. 1, clause 5.

[52]L. C. Hatch and E. L. Shoup, op. cit., chap. v.

President, and in no subsequent case has the issue been seriously raised. What constitutes "inability to discharge the powers and duties" of the office? Who is competent to say when a disability begins or ends? President Garfield for a period of three months after the attack on him, and President Wilson for several weeks and possibly months, were unable to perform any of the duties of the office; and yet neither Arthur nor Marshall made any attempt to perform the duties which the Constitution imposes on the Vice-President. No provision exists for the declaration of a disability. Members of Congress have often claimed the power for Congress, but the question is one of extreme delicacy. During the quiet summer of Garfield's illness the public services suffered little from the lack of a Chief Executive; but the period of Wilson's disability coincided with the bitter Senate debate on the ratification of the Treaty of Versailles. Thus a decision fraught with the most profound consequences for the future of the United States was made without the aid of the leading actor. Does the absence of the President from the United States for several months constitute a disability? The practices and expressed beliefs of authorities up to 1919 would seem to answer in the affirmative. While President Wilson was abroad, Vice-President Marshall at his request presided in the cabinet meetings; but, lest there should be misunderstanding, it was announced that he was acting "informally and personally" and was not "undertaking to exercise any official duty or function." This incident, and later absences from the country of Presidents Hoover, Harding, F. D. Roosevelt, and Truman, established the point that absence does not constitute a legal disability.

The adoption of the Twentieth Amendment, in 1933, supplied several other defects in the provisions for the succession. If the President-elect should die after the meeting of the Electoral College, the office would fall to the Vice-President; if the President-elect should fail to qualify for the office or if no one should have been elected before inauguration time, the Vice-President would assume the office until the President had qualified; and if neither a President nor a Vice-President should have qualified, Congress, by existing law, would designate who should serve as Acting President. If the election of President, through the failure of any candidate to receive a majority in the Electoral College, has been thrown into the House of Representatives and if one of the three highest candidates to be voted on has died or otherwise become disqualified for the office, Congress by law may supply the deficiency.

THE POSITION OF THE VICE-PRESIDENT · The office of Vice-President ranks next to that of the President in dignity but not in power. The position of the Vice-President from John Adams down has more often than not been an unenviable if not an unhappy one. Chosen usually to appease a rival faction of the party, he often finds himself at loggerheads with the President. Vice-President Marshall ruefully observed that his chief duty popularly was supposed to be to ring the White House bell every morning

and ask the state of the President's health.[53] Seemingly to occupy his time, he was made presiding officer of the Senate; but there more often than not his presence is resented by the majority party, which naturally prefers a presiding officer of its own choosing. Vice-President Charles G. Dawes made a vigorous if sophomoric attempt to revise the Senate rules, but without avail. Beginning with the Harding administration, all the incumbents except Dawes have sat in the President's cabinet. President F. D. Roosevelt chose assistants who, in effect, act as Vice-Presidents. Vice-President Henry A. Wallace was the first to be given an active role in executive affairs. Appointed chairman of the wartime Board of Economic Warfare, he indulged in a controversy with the head of another agency and was removed from that position, but, of course, not from the office of Vice-President of the United States. The perquisites of the office are a salary of fifteen thousand dollars, with an extra ten thousand dollars for clerk hire, and an automobile and chauffeur; but he enjoys no other of the privileges accorded his chief.

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[53] T. R. Marshall, Recollections of Thomas R. Marshall (Indianapolis, 1925), p. 368.

CHAPTER XXV

# *The National Administrative System*

At the end of the fiscal year 1940, the last before the increase occasioned by the impact of war, over one million nonmilitary persons were engaged in the administration of the Federal laws. Almost every vocation and profession known to private life was represented: business executives, bankers, clerks, typists, plumbers, charwomen, day laborers, social workers, chemists and physicists, lawyers, physicians, nurses, dentists, and teachers. This great aggregation of officers and employees posed an organizational and managerial problem of the first order. How they should be grouped best to perform the functions of government, how the overlappings and conflicts of authority were to be reduced to a minimum, how equitable rates of compensation were to be set, and who was to give orders to whom were only a few of the questions to be met.

ORGANIZATION BY FUNCTIONS · Generally speaking, but with many exceptions, the officers and employees are organized into units on the principle of the function to be performed.[1] Nine of the ten great departments perform chiefly the functions indicated by their names, such as War, Navy, Justice, and Treasury; but to each are attached a few services not directly connected with the main one. The Corps of Engineers of the War Department, for instance, is in charge of the improvement and maintenance of rivers and harbors for navigation, and the Bureau of Narcotics of the Treasury Department is in charge of the suppression of the traffic in narcotic drugs. The Department of the Interior is a catchall for a great variety of functions, among which are the enforcement of Federal game laws; the administration of Indian affairs, the national parks, Federal power projects, and the chief territorial possessions; and the reclamation of waste lands. The various Federal boards and commissions, on the other hand, are created to perform one particular service and seldom are saddled with any other. Within each functional department the distinction is often made between the staff and the line officers and employees. The former are those concerned with the operation of the department or bureau itself; the latter, those who render services directly to the people. In the National Park Service, for instance, the chiefs of planning and of information and the clerical employees in the office of the director are staff officers, while the local superintendents, forest rangers, and guides are line officers.

[1]For a statement of the general principles of the American administrative system cf. L. D. White, *Introduction to the Study of Public Administration* (Rev. Ed., 1942), chap. iii; W. F. Willoughby, *Principles of Public Administration* (1927), chap. iii; H. Walker, *Public Administration in the United States* (1937), chap. i.

HIERARCHICAL FORM · The general plan of organization in the Federal administration is hierarchical. By this is meant that from the top down there are successive ranks of officers, each responsible to a single one above and wielding authority over several below. This can be pictured by thinking of a pyramid built of stones. At the apex is the President; next below him, in one layer, the ten heads of departments; below each of these, the chiefs of bureaus; and below each chief the heads of services, and so on. The layer at the base is composed of a wide variety of employees, clerks, and laborers responsible to officers above, but themselves having authority over no one. This is an idealized picture, since no two departments are exactly alike, and the terminology for the various grades of offices shows little regularity. But the general plan is inevitable, since the employees must be grouped for specialized work under managers, or chiefs, who in turn must be guided by authorities still further up the line.

SINGLE HEAD VERSUS COMMISSION · Why, in some instances, is the job of administering a piece of work placed in the hands of a single head and sometimes in those of a board or commission?[2] In some instances the answer is the desire to create more places for deserving politicians, but experience has pretty firmly established certain determining principles. Generally, where the task is the direct performance of a piece of work, with no considerable field of discretion involved, the single head is the best organization. This is entirely apparent where the work is a project like the paving of a street and involves the handling of labor; but much the same considerations would hold for the conduct of a geological survey, the operation of the laboratories of the Bureau of Standards, or the operation of a statistical bureau. Control by a multiple head, on the other hand, is preferable where the work is of a mixed legislative and judicial character, which involves making rules and ordinances to have the force of law, and applying these and the statutes of the legislature to particular cases. To combine in a single individual so great power over the acts and property of individuals goes beyond the point of safe administration. Other places where the multiple type of control is preferable are those involving a large delegation of discretionary powers. A project, for instance, of the size of the Tennessee Valley Authority, irrespective of whether quasi-judicial powers are involved, is better headed by a board, even though at some risk of loss in efficiency. In private hands such a project would undoubtedly be in charge of one person. Multiple control permits also the representation of the two chief rival interests affected or the two major political parties. Consistent with this are the long, overlapping terms designed to ensure that the political appointing authority shall not control the work of the commission in the interest of the party in power.

GRAND DIVISIONS OF THE NATIONAL ADMINISTRATION · Until 1883 a blueprint of the Federal administration would have shown a symmetrical

[2] L. D. White, op. cit. pp. 89–91.

plan.[3] There was scarcely a Federal employee anywhere who was not responsible directly or indirectly to one of the heads of departments making up the cabinet. Then the first important body outside the departments, the Civil Service Commission, was created. The Interstate Commerce Commission followed four years later, the Federal Reserve Board and the Federal Trade Commission in 1914, and the United States Tariff Commission in 1916. These came to be listed as the Independent Establishments. Within four years of F. D. Roosevelt's first inauguration nearly sixty new boards, commissions, or offices were created and placed outside the regular Departments, thus further distorting the old hierarchical plan of the national administration. As a matter of fact, the heads of most of these were subject to removal by the President, and so were independent only of the regular departments. A third grand division of the Federal administration consists of the thirty or more emergency war agencies created since 1940. These are responsible to the President through the Office of Emergency Management.

## *THE TEN ADMINISTRATIVE DEPARTMENTS*

Nearly all the old-line functions of the Federal government are administered through ten departments, whose heads are individually responsible directly to the President. Each was established by a separate act of Congress. Their respective organizations and functions have been changed from time to time by later acts and by Presidential orders. Five of these, the State, War, Navy, Justice, and Post Office departments, are truly functional, all the bureaus or divisions of each playing a distinct but related part in furthering its general objective. The other five, the departments of the Treasury, Labor, Commerce, Agriculture, and the Interior, particularly the last named, sometimes called the "parent-company" type, have as component parts a series of bureaus or offices which may have no more relationship to each other than to bureaus in other departments or commissions. The establishment and general work of the various departments will be considered below; their part in the administration of the chief functions of government, in succeeding chapters.

DEPARTMENTAL ORGANIZATION · A department is a unit of the administration established to perform certain functions of government allocated to it.[4] The secretary at its head has the general task of management and co-ordination. For this purpose he is given a central clerical staff and a group of aides. All departments have one or more assistant secretaries;

[3]The growth of Federal administrative agencies from the beginning to 1922 is described in L. M. Short, *The Development of National Administrative Organization in the United States* (1923). *The United States Manual*, published periodically by the Office of War Information, is the most adequate source of information as to the various Federal administrative agencies.

[4]S. Wallace, *Federal Departmentalization* (1941), chap. v; A. W. Macmahon and J. D. Millett, *Federal Administrators* (1939), pp. 9–18.

and four (the departments of State, the Treasury, Agriculture, and the Interior), undersecretaries. Their appointment is vested in the President, generally with the advice and consent of the Senate, an arrangement which often has resulted in loading the secretary with counselors who have been unfit or with whom he has not been in sympathy. The secretary must attend to matters brought to him for decision by the bureau chiefs; hear complaints and requests coming from outside, as well as from disgruntled employees within; determine questions of finance, personnel, and public relations; and sign a multitude of papers involving departmental matters, contracts, and leases. He has a large rule-making power delegated to him by Congress. He holds hearings of a quasi-judicial nature with respect to the regulatory functions given his department, and he prepares Presidential orders for matters pertinent to his department.

The operating unit of the department is usually referred to as a *bureau*, but the law recognizes no uniformity, using variously, without any particular reason, the terms *division*, *office*, *service*, and *administration*. The bureau is in charge of a particular kind of work, as indicated by such names as Entomology and Plant Quarantine, Human Nutrition and Home Economics, Rural Electrification, Mines, Weather, Engraving and Printing, and Labor Statistics. Its chief, like the departmental head, has tasks of management and co-operation. Some bureaus have only a few hundred employees; a few run into several thousands; the typical one has somewhat less than a thousand. Some are created by act of Congress; others are set up by departmental order. The Department of Labor has only six bureaus; those of the Interior and the Treasury, in the neighborhood of twenty-five. The chiefs of bureaus are appointed variously: by the President and the Senate, in which case the principle of patronage usually prevails; by the President alone; or by the Secretary, from the competitive civil service. The last-named method should be the general rule, since the work is more technical than policy-making.

THE DEPARTMENT OF STATE · President Washington administered his office for more than three months without the aid of a regular organization.[5] On July 27, 1789, an act was passed establishing a Department of Foreign Affairs, changed on the following September 15 to the Department of State, the more accurately to fit its varied duties. Its secretary was and is more intimately connected with the office of President than any of the other department heads. He is the keeper of the grand seal of the United States, and is the medium for correspondence between the President and foreign powers and the governors of the States. From his office issue the Presidential proclamations and the commissions for certain officers. His office is the depository of the statutes of Congress, constitutional amendments, and treaties. He proclaims the admission of new States to the

[5] G. Hunt, *The Department of State of the United States* (1914); B. D. Hulen, *Inside the State Department* (1939).

Union, the exchange of ratifications of treaties, and the ratification of constitutional amendments. To him the governors send official lists of the electoral votes. He issues passports and visas for travel in foreign countries. His chief work, of course, is to act as the agent of the President in the conduct of foreign relations.

THE DEPARTMENT OF WAR · The next in seniority is the Department of War.[6] To this was originally given the administration of the army and the navy and of Indian affairs. The Second World War required a great expansion. The Department of War has long been charged also with the administration of a number of nonmilitary functions, such as river and harbor development, river-flood control, the approval of bridges and piers on navigable waters, and the operation of the Panama Canal.

THE DEPARTMENT OF THE TREASURY · An act of September 2, 1789, established the Department of the Treasury, the last of those set up during Washington's administration.[7] The secretary was to "report and give information to either branch of the Legislature, in person and in writing, as he may be required," and he was "to perform all such services relative to the finances, as he shall be directed to perform." It was not specified who should do the directing, but the wording of the statute seemed to indicate Congress. In practice, however, his relation to the President has been no different from that of the other secretaries. Although the collection of the taxes and the care and disbursement of the public funds were the primary functions of the department, other duties were given it, such as the administration of the public lands and the issuing of patents and copyrights. Today the Department carries on a great range of activities.

THE DEPARTMENT OF THE NAVY · The trouble with France led to the passage of the act of April 30, 1798, establishing a separate Department of the Navy.[8] Besides the administration of naval affairs this department since the Spanish-American War has had direct charge of the governments of American Samoa and Guam, and some of the uninhabited coral island way stations in the Pacific.

THE DEPARTMENT OF JUSTICE · The office of Attorney-General was created by the Judiciary Act of September 24, 1789.[9] His duties were principally two: to represent the United States in all suits in which it might be involved, and to act as legal counsel to the President and the department heads. Although the act did not establish a department, Washington included the Attorney-General in his cabinet council, a practice followed by succeeding Presidents. Not until June 22, 1870, was a Department of Justice established, with the Attorney-General as its head. By act of August 2, 1861, the district attorneys and the United States

[6]Established August 7, 1789. 1 Stat. 49.
[7]1 Stat. L. 65.
[8]1 Stat. L. 553.
[9]1 Stat. L. 73, 93; H. B. Learned, *The President's Cabinet* (1912), pp. 105–107.

marshals had been placed under his superintendence. A Solicitor-General was provided as his first assistant.

THE POST OFFICE DEPARTMENT · The post-office services of the old Confederation were continued and placed under a Postmaster-General in the Treasury Department. A statute of 1825 referred to it as a "department," but not until the act of June 8, 1872, was it made co-ordinate with the other departments.[10] As early as Jefferson's administration the Postmaster-General's office had been recognized as of political importance because of its patronage; and Jackson in 1829 made it a cabinet position, appointing significantly, as the first person to hold that place, William T. Barry, of Kentucky, a member of the central Jacksonian committee of the late campaign. This department, the largest of all, has its functions confined to the administration of the mails. For years its chief has been ex officio party manager and patronage secretary of the President, for which reason the chairman of the national committee of the winning party usually is appointed to the office. During the F. D. Roosevelt administration Postmaster-General James Farley attained unusual power and prestige because of the greatly swollen patronage list and because of his retention throughout of the party offices of chairman of the Democratic National Committee and of the Democratic State Committee of New York.

DEPARTMENT OF THE INTERIOR · In the First Congress it had been proposed to establish a Home Department, such as in some countries administers city and provincial government.[11] Since these, in the United States, were reserved to the States, opposition was raised to the proposal for such a department by those who feared it would lead to an aggrandizement of the internal powers of the national at the expense of the State governments. President Madison, in 1816, and President John Quincy Adams, in 1825, renewed the recommendation; but certain home affairs were left with the Department of State, where they had originally been placed.[12] The acquisition of the Mexican territories and the growing duties of the State Department, however, made the addition of another department imperative. On March 3, 1849, President Polk signed a bill creating a department, designated both as "Home" and "Interior"; but the latter term soon came to be the accepted one.[13] To it was given charge of the Patent Office, the Census Bureau, the Public Land Office, and of mines, Indian affairs, and pensions. Many other services, from time to time, have been allocated to it until today it is a catchall for services not otherwise classified.

THE DEPARTMENT OF AGRICULTURE · Various plans for the establishment of Federal agencies for the encouragement of agriculture came before the early Congresses, but not until May 15, 1862, under the stress of war,

[10] H. B. Learned, op. cit. pp. 229–236.
[11] *Annals of Congress*, Vol. I, pp. 385, 692–695.
[12] L. M. Short, op. cit. chap. ix.
[13] 9 Stat. 395 (March 3, 1849).

was any action taken.[14] The bill of that date established a Commissioner of Agriculture and a "department" within the Department of the Interior, as a companion piece to the Morrill land grants to the States for the establishment of agricultural and mechanical colleges. With the vast expansion of tilled land in the Middle West and the growing need for the application of the findings of science to agriculture, the demand that the new organization be raised to the rank of a full department could not be resisted. This was done in the act of February 9, 1889.[15] The department, with nine major bureaus or divisions and with employees in the neighborhood of one hundred thousand, deals with every phase of agriculture, including farm marketing and finance. A peculiarity of the department is that its subject matter is primarily within State jurisdiction, and that the services which it renders are mostly not mandatory on the States or individual farmers.

DEPARTMENT OF COMMERCE · President Theodore Roosevelt, in his annual message of December, 1901,[16] had urged the establishment of a Department of Commerce. Legislation was not immediately forthcoming, but on February 14, 1903, a Department of Commerce and Labor was established.[17] New bureaus were created, and several previously existing in other departments, including those of steamboat inspection, navigation, and lighthouses, were transferred to it.

DEPARTMENT OF LABOR · Ten years later a separate Department of Labor was created in response to the needs of the fast-growing industrial population of the United States.[18] Its chief concerns are the promotion of the wage-earners' interests and the investigation of matters pertaining to child welfare. Its work is now conducted by seven bureaus or divisions.

## *THE "INDEPENDENT ESTABLISHMENTS"*

The boards, commissions, and offices which are independent or otherwise placed outside the regular departments lack any such consultative organization as the cabinet. So far as they deal with the President, they do so directly or through the White House staff. They now number about thirty-five, approximately half of which are large and exert far-reaching administrative powers.[19] Those made independent of the President perform principally regulatory functions. In order that they may be free

[14] 9 Stat. L. 523 (May 15, 1862).

[15] 25 Stat. 659 (February 9, 1889); L. M. Short, op. cit. pp. 382, 383.

[16] December 3, 1901. J. D. Richardson, *Messages and Papers of the Presidents*, Vol. X, p. 425. He recommended an Office of Commerce and Industries "to deal with commerce in its broadest sense, including among many other things whatever concerns labor and all matters affecting the great business corporations and our merchant marine."

[17] 32 Stat. 825.

[18] 37 Stat. 79 (March 4, 1913).

[19] *United States Government Manual, 1945* (1st ed.), pp. 420 ff.

from political influence and that their action may be consistent and uniform, the membership is bipartisan, and the terms of office are long and overlapping. In theory agencies of Congress, they act as fact-finding and rule-making bodies. In the work of regulation they issue orders, hold hearings, and commence prosecutions, performing functions usually referred to as quasi-judicial. The best-known agency of this type is the Interstate Commerce Commission.

The greater number are directly responsible to the President, and are independent only in the sense of being outside any regular department. The heads of commissions are appointed by the President and subject to removal by him. The President's Committee on Administrative Management recommended the creation of two new departments of cabinet rank, a Department of Social Welfare and a Department of Public Works.[20] When Congress refused to take such action, the President attained somewhat the same result by creating, under his ordinance power, three great new units, the Federal Works Agency, the Federal Loan Agency, and the Federal Security Agency, each headed by an administrator.[21]

There is even less regularity in the internal organization of an "independent establishment" than in that of a department. At the head is a board, a commission, or an administrator, assisted by the usual headquarters staff. The major divisions may be bureaus, committees, boards, councils, divisions or offices, some of which may be only vaguely responsible to the head.

GOVERNMENT CORPORATIONS · The ready adaptability of the corporation for management in the field of private industry suggested its use in government enterprises of a business character.[22] In some instances the unit is incorporated under State laws; in others it is incorporated by act of Congress. Among the Federal corporations are the Panama Railroad Company, the Inland Waterways Corporation, the Tennessee Valley Authority, the Reconstruction Finance Corporation, and a whole series of banks. By this device such agencies escape many of the hampering restrictions common to government practice. They are the most independent of all the "independent establishments." They may borrow money on the credit of their properties; they usually escape the restrictions of the civil-service laws and at the same time are able to resist the pressure of politicians for jobs; they may contract and buy and sell with the usual freedom of a corporation; and they may employ the more expeditious and efficient methods of management used by private concerns. The arguments against them center on what is alleged to be their irresponsibility and escape from proper political control.

[20] *Administrative Management in the United States* (1937), chap. v.

[21] President's Reorganization Plan I, April 25, 1939. 4 Fed. Reg. 2727. By Executive Order No. 9070, February 24, 1942, several of the units of the Federal Loan Agency were transferred to various other agencies, and all other units to the Department of Commerce. 7 Fed. Reg. 1529.

[22] Cf. infra, Chap. XLII.

THE FEDERAL SECURITY AGENCY · The functions of the Federal Security Agency are those typical of a department of public welfare.[23] The old Food and Drug Administration was shifted to it from the Department of Agriculture; the Office of Education, from the Department of the Interior; and the Public Health Service, from the Department of the Treasury. Its most important function is the administration of the Social Security Act. The much attenuated Civilian Conservation Corps and National Youth Administration also were transferred to it.

THE FEDERAL WORKS AGENCY · The seven divisions of the Federal Works Agency are mostly concerned with matters of the maintenance of public buildings, the administration of the Federal highway funds, and the Federal housing program.[24] The New Deal work-relief organizations, the Works Projects Administration (WPA) and Public Works Administration (PWA), are included.

OTHER "INDEPENDENT ESTABLISHMENTS" · The more important of the independent boards and commissions are considered in the next chapter in connection with the functions of government which they administer. The oldest, the United States Civil Service Commission, was slated by the Committee on Administrative Management to be added to the President's staff; but this was not approved by Congress. About a dozen in all are bodies of major importance. Six are chiefly regulatory: the Interstate Commerce Commission, for transportation; the Federal Trade Commission, for business practices; the Federal Communications Commission for radio, telegraph, and telephone; the Federal Power Commission, for power projects on navigable rivers; the Securities and Exchange Commission, for stock exchanges and dealings in securities; and the National Labor Relations Board, for labor-employer relations. The United States Tariff Commission is a fact-finding body to aid Congress in the framing of its tariff laws. Four establishments are engaged in the management and operation of distinct enterprises: the United States Maritime Commission controls the merchant marine of the Federal government; the Tennessee Valley Authority, the great power and flood-control properties of the Tennessee Valley; the Veterans Administration, the hospitals and other facilities for the care of war veterans; and the Board of Governors of the Federal Reserve System, the activities of Federal reserve banks and their member banks.

## *THE EMERGENCY WAR AGENCIES*

The demands of total war called for the mobilization or the regimentation of the entire civilian population, to the end that adequate food and military equipment be provided. An organization of great complexity and magnitude had to be created on short notice. Much of this was set

[23] *United States Government Manual, 1945* (1st ed.), pp. 438–446.
[24] Ibid. pp. 462–469.

up by Presidential ordinance and under very general authorizations by Congress. The nearly forty agencies present as a whole a shifting panorama. Most of them doubtless will disappear with the demobilization of the military and naval forces. Only the main controlling organizations will be described here. Unlike the "independent establishments" described above, these in theory are accountable to a common office, the Office for Emergency Management, which is directly responsible to the President. It is easily seen that much of the work performed by the emergency agencies is in fields reserved to the States in peacetime. No one seriously questions their constitutional basis, however; for the legislative power of Congress "to raise and support armies" and "to provide and maintain a navy," and the ordinance power of the President as "commander-in-chief of the army and navy," provide a broad base for action.[25]

THE WAR PRODUCTION BOARD · Modern warfare is as much an industrial contest as a clash at arms. No nation, however valiant, has a chance of success if it does not have access to the requisite raw materials (iron, copper, oil, cotton, and many others), and a factory system to transform them into arms and munitions. Even countries as richly endowed as the United States, Great Britain, and Russia find their resources tried to the uttermost. The War Production Board was established to secure and allocate raw materials, and to direct the factories and forges in a grand scheme of co-ordinated production.[26] Only the main features of its vast and intricate organization can be described here. The board itself is composed of twelve members: four drawn from the cabinet, several from the emergency boards, and the special assistant to the President as a liaison officer. Under the board is a series of units dealing with specialized phases, such as the Aircraft Production Board and the Management Labor Council. Regional offices are maintained in every State of the Union, Puerto Rico, Hawaii, and Canada. Under its direction, plants engaged in civilian production were transformed to the production of war materials, and new ones were built, some financed by the treasury. Its personnel was recruited mostly from conspicuous leaders of American industry. After a slow start it performed its task with notable efficiency.

THE OFFICE OF PRICE ADMINISTRATION AND CIVILIAN SUPPLY · The First World War, although the United States was a participant little more than a year and a half, witnessed a runaway race between wages and the cost of living. Many persons on fixed incomes found themselves in real want. The Office of Price Administration and Civilian Supply was created by executive order, April 11, 1941, to forestall a similar development in the Second World War.[27] In particular, it was empowered to stabilize prices; to prevent unwarranted and speculative increases in the prices of

[25] For the Emergency War Agencies cf. ibid. pp. 58–184; L. D. White, op. cit. pp. 599–619.
[26] *United States Government Manual, 1945* (1st ed.), pp. 102–114; L. D. White, op. cit. pp. 607–609.
[27] *United States Government Manual, 1945* (1st ed.), pp. 136–144.

food, clothing, and rents; to assure an equitable allocation of each among consumers; and to foster voluntary co-operation between the government and producers and processors. Rents in critical areas were "frozen" as of a specified date in 1941; price ceilings were established for numerous consumer commodities; and rationing was instituted for scarce necessities.

An administrator is at the head of the organization, which numbers over seventeen thousand full-time and nearly seventy-five thousand part-time and unpaid employees. He is assisted by a staff, including a senior deputy administrator and six deputy administrators, each in charge of a specialized division. Local boards, of volunteer helpers, are in charge of the distribution of rationing books and the local administration of the laws.

The Office of Price Administration has accomplished much. The necessities of life have generally been well distributed according to needs; but a steady, if slow, increase of prices has not been prevented. Price and wage scales are entirely interdependent, and so are the work of this organization and of the National War Labor Board. Radical increases in the wage scales of one group of workers increase the cost of living for all classes, and in turn call for wage increases in other groups, which is the usual pathway of inflation. The crux of the difficulty was the disproportionate increase in the prices of some commodities and in the wages of certain groups in the year and a half before regulation was instituted.

THE NATIONAL WAR LABOR BOARD · The necessities of modern warfare require that there should be little or no concerted stoppage of production, whether from strikes or from lockouts.[28] This was the main reason for the establishment of the National War Labor Board, January 12, 1942. Three procedures for settling labor disputes were provided: direct negotiation between the two parties; resort to the Commissioners of Conciliation of the Department of Commerce if that failed; and, as a last resort, certification of the case to the National War Labor Board. This board may then proceed to deal with the dispute by mediation, voluntary arbitration, or any other method which it thinks suited to the case.

The National War Labor Board is composed of twelve members: the chairman, vice-chairman, and two others representing the public; four labor-union officers representing the employees; and four industrialists representing the employers. Twelve regional boards, located in the great war-production centers, hear local cases or delegate them to special panels chosen for the purpose. The board has a full-time staff of over eighteen hundred employees and a part-time staff of more than forty-five hundred. The board has been generally effective, but has not prevented extensive stoppages of work in the production of vital war materials. Outstanding was the coal strike in the autumn of 1943, in the course of which the United Mine Workers defied the authority of the

[28]Ibid. pp. 68–70.

National War Labor Board, throwing the case to the President, who overruled the decision of the board.

THE WAR MANPOWER COMMISSION · This is essentially an organization for the mobilization of the nation's man power. For the success of the war effort it was necessary that labor be directed into essential lines of production.[29] The adjustments were difficult because of the natural disposition of people to continue in the work to which they are accustomed, the rivalry of industrial concerns seeking skilled labor, and the differences in their wage scales. It is the commission's task to estimate the requirements of man power for the various industries, including agriculture, for both civilian and war production and for the army itself; to issue regulations to fill these needs; and to recommend needed legislation. Various government agencies are required to conform to the policies of the commission, including the Selective Service System, the Civil Service Commission, the Works Progress Administration, and the War Production Board.

The commission of ten members is headed by a chairman and has the usual headquarters staff. The work is carried on through nine bureaus and committees, and a staff of nearly fifty thousand full-time and one hundred and sixty thousand part-time and largely unpaid employees. The commission operates through thirteen regional offices; while its Bureau of Selective Service has head offices in each of the States, as well as boards in each county or city. The commission and its subordinate bodies have performed well a task of great difficulty.

OFFICE OF CIVILIAN DEFENSE · This organization, headed by a director, was set up in May, 1941, to co-ordinate Federal and State activities with respect to the civilian population.[30] More especially, it develops programs for training volunteers to safeguard the civilian population by such means as blackouts, camouflage, defense from bombs, evacuation and care of civilian casualties, auxiliary police, and fire forces. Organizations to supply medical aid and emergency base hospitals have been developed. One of the eleven divisions of the office has the task of assisting the States and localities in the organizing of defense councils. Another has enlisted a civil air patrol; and still another assists the states and localities in developing centers for the presentation of war-information programs.

BOARD OF ECONOMIC WARFARE · The chief duty of this board is the strategic control of the export and import of goods and raw materials to aid the war effort of the United States, its allies, and friendly neutrals, and to hamper their enemies.[31] While exerting a measure of direct control, it is chiefly a co-ordinating and policy-making agency, as shown by the membership of the board, which consists of seven cabinet members and the

[29] *United States Government Manual, 1945* (1st ed.), pp. 95–102.
[30] Ibid. pp. 72–75.
[31] Ibid. p. 611; L. D. White, op. cit. pp. 604, 605.

heads of the War Production Board, the Office of Co-ordinator of Inter-American Affairs, and the Office of Lend-Lease Administration. It safeguards the stocks of critical and strategic war materials, gives aid to industries in friendly countries supplying materials to the United Nations, and facilitates export to them of supplies needed for their industries, public health, and morale. Vice-President Wallace, for a time, was chairman of the board.

OFFICE OF LEND-LEASE ADMINISTRATION · This is the most important of the emergency agencies dealing with our allies and with friendly neutrals.[32] The genesis of the idea was the President's action in September, 1940, transferring to hard-pressed Great Britain fifty "over-age" destroyers in exchange for certain air and naval bases. The Lend-Lease Act of March 11, 1941, which changed the status of the United States from neutrality to "nonbelligerency," authorized the President to lend, lease, transfer, or sell defense articles to the government of any country whose defense the President deemed vital to the defense of the United States. Under its terms great quantities of raw materials and tanks, guns, armored vehicles, and munitions were furnished Great Britain and Russia at a time when the United States was still unprepared to place large armies of its own in the field. Smaller quantities of such supplies were sent to China, Turkey, Brazil, and the French army in North Africa. The office is under a director, aided by a staff of assistants, some of whom are delegated to direct the shipment of goods to particular countries, such as Russia and China. The general Lend-Lease agreements are negotiated by the State Department with the advice of the Board of Economic Warfare and the Office of Lend-Lease Administration.

THE OFFICE OF CENSORSHIP · About two weeks after the Japanese attack on Pearl Harbor the Office of Censorship was created to supervise the dissemination of war news in the United States.[33] It was given an absolute power of censorship of all communication by mail, cable, radio, or other means between the United States and foreign countries. In performing this duty, of course, it follows the orders of the military and naval commands, the State Department, and other war agencies. Because of the First Amendment, the attitude of the press and the public, and the inherent difficulties, the law did not attempt a domestic censorship. Under the guidance of the office, however, a voluntary censorship was agreed to by the press and the radio. Detailed codes specifying what types of news may or may not be published are in the hands of all publishers and radio stations. In addition, orders may be sent out for the withholding of specific pieces of news already in their hands. The office is advised with respect to

[32] To June 30, 1944, lend-lease aid to our Allies had been given to the value of $28,270,000,000. *Sixteenth Annual Report to Congress on Lend-Lease Operations* (1944), p. 5; E. R. Stettinius, *Lend-Lease, Weapon for Victory* (1944).

[33] *United States Government Manual, 1945* (1st ed.), p. 135.

policy by a Censorship Policy Board, composed of five cabinet members, the Vice-President of the United States, and the Director of War Information.

THE OFFICE OF WAR INFORMATION · The Office of War Information was designed in general to supply the void created by the Office of Censorship.[34] It is authorized "to facilitate the development of an informed and intelligent understanding, at home and abroad, of the status and progress of the war effort, and of the war policies, activities, and aims of Government." To this end it may obtain and analyze war information and advise the agencies concerned with its dissemination (including the press and the radio) as to the most appropriate and effective means of keeping the public adequately and accurately informed. It co-ordinates the war-information services of the various government agencies, and reviews, clears, and approves all proposed radio and motion-picture programs sponsored by Federal departments.

The office has two chief divisions, Domestic Operations and Overseas Operations. The latter is frankly a propaganda agency. Programs, under the general supervision of an Overseas Planning Board, are prepared and beamed to different enemy, allied, and neutral countries. The Domestic Operations Branch reviews and clears war-news releases, radio news, and material for news reels; the Radio Bureau clears all government messages which go out over the air. The Bureau of Motion Pictures is the contact point for dealings with that industry; it reviews and passes on all proposals for the production of motion pictures by government departments, and itself directly produces wartime movie shorts.

The Office of War Information has been more constantly under fire than any other emergency war agency. This doubtless would have been true no matter how well it had been conducted; for its duties run counter to the wishes of a public habituated to the free publication of news, to the ambitions of thousands of trained journalists and reporters, and to the natural function of the newspapers. The general criticisms of the office, however, had some merit. Censorship of the press and radio, of which the activities of this office are only the positive side, can be justified in a democracy, even in wartime, only by the necessity of keeping information of military and naval significance from the enemy. The fault was in the basic instruction in the executive order establishing the office, which seemed distrustful of the ability of the people to take the news of defeat without faltering, and that of victory without a slackening of effort. The tendency was to foster given opinions on the problems of the war and the peace by the handing out of ready-made formulas rather than to promote a maximum diffusion of news and permit public opinion to be what it might be after normal free and fair discussion.

OFFICE OF DEFENSE TRANSPORTATION · Early in the First World War the transportation system of the country broke down, and the government

[34] *United States Government Manual, 1945* (1st ed.), pp. 88–95.

took over and operated the railroads and steamship lines. Because of the extensive system of hard-surfaced highways and motor transport the transportation system was in a much better condition in 1941. To make it equal to the unprecedented need for the movement of materials, armament, and troops, an Office of Defense Transportation was created soon after our entrance into the war.[35] Its authority was extended over all railroads, inland waterways, pipe lines, motor and air transport, coastwise shipping, and even all privately owned passenger motor cars. The office acts as a supreme general traffic manager, routes freight and passenger trains, prohibits special trains without permit, and provides clear terminals and storage space in port areas. The office consists of nearly five thousand employees, is headed by a director, and is organized in numerous divisions. It has operated smoothly and produced highly satisfactory results.

War Shipping Administration · This organization does for transportation on the high seas what the Office of Defense Transportation does for domestic transportation.[36] All vessels owned by the United States Maritime Commission were turned over to it, and it was authorized to purchase, requisition, or control all vessels under the flag of the United States. These it allocates to the army and navy and other government agencies as needed. The administration necessarily works in close collaboration with the War Production Board in prescribing priorities for the movement of commodities and war materials. At its head is an administrator, who is aided by deputy and assistant deputy administrators, each in charge of specialized divisions dealing, for instance, with utilization of vessels, construction, tankers, ship operations, and labor relations.

National Housing Agency · The National Housing Agency was created chiefly through the consolidation of several peacetime New Deal boards and commissions under a new head.[37] Included are the Home Owners' Loan Corporation, the Federal Home Loan Bank System, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, and the Federal Public Housing Authority. The central purpose of the agency is to ascertain the housing needs of war workers and to devise ways and means of supplying them. Persons with surplus rooms or buildings are urged to make them available for war workers; private builders are encouraged to construct new buildings and are given priority ratings for materials; and the government itself attempts to supply the remaining deficiency by construction of its own. The agency, headed by an administrator, operates chiefly through the agencies named above. It maintains ten regional offices.

Office of the Co-ordinator of Inter-American Affairs · The Office of the Co-ordinator of Inter-American Affairs is charged with the creation of good will among the nations of the Western Hemisphere.[38] Much of

[35] Ibid. pp. 80–84.
[36] Ibid. pp. 116–119.
[37] Ibid. pp. 122–125.
[38] Ibid. pp. 76–80.

its effort was directed to offsetting Axis propaganda funneled through Fascist Spain. On the economic side it undertook to displace the control of the airlines by Axis corporations; helped to establish steel production in Brazil; and in general aided agricultural production and the development of propaganda. In propaganda the office works through the press, the radio, and motion pictures. It publishes a monthly magazine in Spanish and Portuguese which is widely distributed, and a biweekly *American News Letter* sent out by air mail. It sponsors specially prepared air programs, and it acts in an advisory capacity to the motion-picture industry for the production of films fitted to the Latin-American public. The Co-ordinator is aided by four assistant directors and ten directors in charge of specialized divisions.

OTHER WAR-EMERGENCY AGENCIES · Space does not permit the detailed consideration of about twenty other emergency agencies which perform work essential to the war effort. The Board of War Communications attempts to link all branches of communication to the war effort. The Alien Property Custodian is empowered to control the business management of all foreign-owned properties in the United States; the Office of Scientific Research and Development co-ordinates and supplements scientific and medical research; the War Relocation Authority provides for the removal of persons from areas needed for military purposes; and the War Relief Control Board controls the collection and distribution of funds for war charities and war relief in the United States and abroad. Important in furthering co-operation in the war effort with our allies are about half a dozen joint boards with Great Britain and Canada. Among these are the Combined Food Board, the Combined Production and Resources Board, and the Combined Raw Materials Board. The Inter-American Defense Board includes representatives from all the American republics.

## *THE PRESIDENT'S CONTROL OF NATIONAL ADMINISTRATION*

Can the President effectively oversee and co-ordinate the work of the vast system which now employs more than two million persons? Obviously the task is possible only if there is an organization which groups the workers under different ranks of chiefs culminating in key men sufficiently few in number so that the President can easily keep in contact with them. This was the situation until about the turn of the century. President Grover Cleveland, in his first administration, was able to exert his administrative control by dealing with only the eight heads of departments. At the time of a proposed reorganization in 1937 the number of separate Federal agencies was listed as one hundred and thirty-three, and President Roosevelt asserted that he must deal with over a hundred.[39]

[39] President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (1937), chaps. iii-v.

The picture on paper exaggerated the real situation, which was bad enough. Actually, only sixty had budgets and a paid personnel. The others called for little or no attention from the President, because they were simple co-ordinating committees, were temporary in character, or were already subordinate in fact to some other agency. Of the sixty the great "independent establishments," such as the Interstate Commerce Commission, were outside the President's direction.

THE NEED FOR REORGANIZATION · The need for a general overhauling of the Federal administrative system had long been recognized. President Taft had appointed a Committee on Efficiency and Economy; President Harding, a commissioner to study the problem and make recommendations.[40] President Hoover's repeated recommendations to Congress brought forth the act of June 30, 1932.[41] This gave the President wide powers to reorganize by executive order, which would become effective unless either house within sixty days should vote disapproval. His executive order of the following December 9, embodying a broad scheme of reorganization, received a vote of disapproval by the Democratic House of Representatives.

THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT · President Roosevelt made considerable changes in the administrative organization under the authority of the act of 1932 and subsequent acts, but the job was far from complete. The Senate, early in 1936, set up a committee under the chairmanship of Senator Harry F. Byrd, of Virginia, to study the problem.[42] Aided by a body of paid experts, this committee made comprehensive reports and introduced a number of bills, but without result. Meanwhile President Roosevelt had set up his own committee, which was known as the President's Committee on Administrative Management, whose activities came to eclipse those of the Senate committee.

The President's committee announced that its recommendations were controlled by the purpose "to make democracy work today in the National Government; that is, to make our Government an up-to-date, efficient, and effective instrument for carrying out the will of the Nation."[43] The President, as "the one and only national officer representative of the entire Nation," should be given the means to make him adequate to the task of national administrative manager. The changes advocated fall under

[40]The history of attempts at national administrative reorganization and various proposals are given in W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government* (1923); L. Meriam and L. F. Schmeckebier, *Reorganization of the National Government* (1939). The latter has a series of articles in the *American Political Science Review* on current reorganization running through 1937 to 1940.

[41]47 Stat. 413.

[42]For the findings of the Select Committee on Investigation of the Executive Agencies of the Government, cf. Senate Report No. 1275, 75th Cong., 1st Sess. (August 19, 1937).

[43]President's Committee on Administrative Management, op. cit. pp. 3, 4.

five headings: an expansion of the White House staff; the creation of new and the strengthening of the old managerial staff agencies of the President; the grouping of the 132 Federal agencies into twelve departments with heads directly responsible to the President; the extension of the merit system; and the displacement of the existing independent system of auditing and accounting by one placed in the Treasury Department.[44] These were debated at length in Congress, and were approved in part in the act of April 3, 1939. By five successive orders the President proceeded to carry out the plan of reorganization.[45] They will be explained as the various phases of the national administration are taken up for consideration.

## *THE EXECUTIVE OFFICE OF THE PRESIDENT*

The President's Committee on Administrative Management had recommended "the establishment of appropriate managerial and staff agencies" in order that the chief executive might become the "center of energy, direction, and administrative management."[46] The act of 1939 furnished him the means. By executive order, the officers and employees associated with him were organized into a unit of six divisions known as "the Executive Office of the President."[47] This comprises the White House Office, the Bureau of the Budget, the National Resources Planning Board, the Office for Emergency Management, the Liaison Office for Personnel Management, and the Committee for Congested Production Areas. The purpose of the last named is to co-ordinate the work of various "area directors," who deal with the problems of congested population and manufacturing activities resulting from the war. It seems out of place here; but probably it represents a matter in which the President had particular interest. The Liaison Office for Personnel Management assists the President in appointments and the shifting of personnel from one service to another. The other five are staff agencies of orthodox pattern.

THE WHITE HOUSE OFFICE · This is the unit most intimately connected with the President's daily routine. It comprises the President's private secretaries and clerks; his special assistant; and six administrative assistants. The Committee on Administrative Management had recommended the creation of the last-named offices, to be filled with men in whom the President had personal confidence, possessed of "high compe-

[44]President's Committee on Administrative Management, op. cit. p. 4.

[45]53 Stat. 1423. Reorganization Plan No. 1, effective July 1, 1939, 4 Fed. Reg. 2727; Reorganization Plan No. 2, effective July 1, 1939, 4 Fed. Reg. 2731; Reorganization Plan No. 3, effective June 30, 1940, 5 Fed. Reg. 2107, 54 Stat. 1231; Reorganization Plan No. 4, effective June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1234; Reorganization Plan No. 5, effective June 30, 1940, 5 Fed. Reg. 2223, 54 Stat. 1238.

[46]President's Committee on Administrative Management, op. cit. p. 3.

[47]The organization as thus effected is set forth in the *United States Government Manual, 1943–1944*, pp. 53–60, and the five reorganization plans.

tence, great physical vigor, and a passion for anonymity." Their chief function would be, when any matter was presented to the President for action, to assist him in obtaining quickly all information pertinent to the subject. The importance attributed to these men is shown by the annual salary of ten thousand dollars and the missions assigned to them (in one case a trip to Chungking, China, for a personal report to the President).

THE NATIONAL RESOURCES PLANNING BOARD · The need for an adequate factual basis for legislation involving broad social policy has become increasingly apparent. Laws to fit such involved questions as the conservation of natural resources, social insurance, and agricultural production, for instance, are doomed to failure unless drawn in view of actual conditions and needs. In the past the standing or special commissions of legislatures had gathered the data for proposed new laws. It might be argued that the task should remain with the legislative, or policy-making, department. Indeed, the legislative councils established in about half a dozen States were created largely in response to this need. On the other hand, a numerous body, like a legislature, is not so well qualified as the executive to maintain a permanent research staff; moreover, the chief executive of nation or State exercises a share of the legislative power.[48]

The National Resources Planning Board, established by executive order on April 29, 1939, the successor of two earlier and similar bodies, was the planning body of the President's staff. It was composed of a staff of three, paid per diem, and a large, full-time research staff headed by a director. Its purposes were to collect and prepare data for a planned development of natural resources; to advise the President concerning the trend of business activity and the threat of business depression and unemployment; to collect information concerning Federal, State, and local plans for public works; and to act as a clearing house for government and private planning bodies in general. Eleven regional offices were maintained, scattered throughout the United States and Puerto Rico.

The board carried to completion extensive and valuable studies of such matters as the use of land, the water resources of the United States, urban factors in national development, and basic trends in population. At the time of its abolition it was working on problems of industrial relocation, the trends of employment, and other broad questions respecting postwar adjustments.

THE BUREAU OF THE BUDGET · The Bureau of the Budget, created by the Budget and Accounting Act of June 10, 1921, was transferred from the Treasury Department to the Executive Offices in May, 1939.[49] It always had worked under the immediate direction of the President, but now be-

[48]The National Resources Planning Board was discontinued by act of Congress of June 26, 1943; 57 Stat. 169.

[49]Infra, Chap. XXXIII.

came formally one of his staff agencies. Its first duty is the preparation of the President's annual budget, on the basis of estimates of needs and expenditures submitted by the various departments and commissions. As originally conceived, the Bureau of the Budget was to act as a central control and co-ordinating agency for the entire administration, on the principle that whoever controls the expenditures controls the work. The act provided that it should study the departments and establishments so that the President might be able to determine what changes should be made in the existing organization, activities, methods of business, and grouping of services, and what appropriations should be made for each. The bureau never has had a staff sufficient to perform the functions of control, nor has any President chosen to use it as a co-ordinating agency. The bureau was rendered still less effective by an executive order of June 10, 1933, which abolished its Chief Co-ordinator, who had made some studies and recommendations like the foregoing.

THE LIAISON OFFICE FOR EMERGENCY MANAGEMENT : The Liaison Office for Emergency Management is a skeleton organization designed to act as a medium for communication between the thirty-five or more emergency war agencies and the President.[50] Superficially it might be said to be to them what the cabinet is to the departments; but this is not strictly true. It is a funnel through which information passes, not a co-ordinating agency.

## *THE CABINET*

It has been shown how President Washington, by calling together the heads of the administrative departments, created an extraconstitutional executive council. The idea was a sound one; for the members were the President's own personal choice, subject to his removal, and, the cabinet members were collectively in charge of all the Federal administrative activities.

The cabinet not only owes its existence entirely to the President but is only advisory in character.[51] The meetings are held twice a week. No minutes are kept, and formal votes are seldom taken. The President determines what matters shall be taken up, listens to the discussions, but is not bound by its conclusions.

In the choice of department heads the President is guided primarily by political considerations. His late campaign manager is customarily given the place of Postmaster-General; and various economic interests, wings of the party, and geographical regions are given representation. Technical qualifications and specialized experience are given some weight,

[50] *United States Government Manual, 1945* (1st ed.), p. 60.

[51] H. B. Learned, op. cit. pp. 369–394; M. L. Hinsdale, *History of the President's Cabinet* (1911), pp. 313–328; E. P. Herring, *Presidential Leadership* (1940), chap. v.

as in the appointment of Andrew Mellon, financier, as Secretary of the Treasury by Harding, Coolidge, and Hoover, and that of Henry Wallace, editor of a farm journal, as Secretary of Agriculture by F. D. Roosevelt. One or two places are usually reserved for personal friends.

The cabinet's function as an administrative council is not so important as might be expected. No program of topics is prepared and announced beforehand. Members are called on in turn, in the reverse order of seniority of the departments, and may present what topics they desire. Conflicts between departments are seldom presented, since they are better adjusted between the two heads alone, with the President's aid if necessary. The shortcomings of cabinet deliberations, Macmahon concluded, are due in part to the unsatisfactory character of the cabinet's personnel, which normally is recruited on the basis of political influence rather than of a knowledge of national affairs. He added that it is hardly an exaggeration to say that "hard driving heads of busy departments have been cynical to the point of resenting cabinet meetings as a waste of time."[52]

### *OFFICE OF WAR MOBILIZATION*

By the autumn of 1942 the need for an organization to co-ordinate the activities of the numerous war emergency agencies was glaringly apparent. Conflicts of authority, rivalry for raw materials and man power, and differences in policy were injuring the war effort. In some cases the rows of the chiefs were aired publicly. The President, deeply absorbed with military and foreign affairs, could not furnish the leadership necessary to maintain harmony and co-ordination in the civilian agencies. A cautious beginning in the delegation of such authority was taken on October 3, 1942, in the creation of the Office of Economic Stabilization. To fill the office of Director, James F. Byrnes was taken from the Supreme Court. For a consultative body he was given an Economic Stabilization Board of fourteen members, including four cabinet members, other high Federal officials, and two representatives each from organized labor, agriculture, and management. The director was given power to develop a comprehensive policy respecting prices, rationing, wages, salaries, and related matters. These are functions, it is noted, belonging piecemeal to other agencies. The office maintains no operating units but works through existing ones, which deal individually with those matters. The director is authorized to control them through directives.

DEPUTY PRESIDENT · It became apparent during the ensuing months that the new arrangement still had not supplied the necessary administrative leadership. By an executive order of May 27, 1943, an Office of War Mobilization was created, and Byrnes was moved up as its director.[53]

[52]A. W. Macmahon and J. D. Millet, op. cit. p. 5.
[53]Executive Order No. 9347, 8 Fed. Reg. 7207.

The new Office of War Mobilization was given power to unify the activities of Federal agencies engaged in war production, and the director was authorized to issue directives, which it was the duty of all such agencies to execute. The Director of the Office of Economic Stabilization, Fred Vinson, who had been a justice of the District of Columbia Court of Appeals, retained the duty of adjusting conflicts. The duties assigned to Director Byrnes were of a broad policy-making character. He was to handle matters which formerly had come from the war agencies to the President, and to make public pronouncements on matters within his competence such as formerly had come from the White House. In effect he became the President's deputy for internal affairs concerning war production, leaving the President free to handle the pressing matters of military operations and foreign affairs. The success of this unprecedented venture in the delegation of political power would depend on the director's skill and the President's willingness to step aside.

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CHAPTER XXVI

# *The Civil Service*

The term *civil service* is commonly used in several different senses. Persons appointed to office for long or indefinite terms on the basis of examinations given to determine fitness rather than on the basis of political affiliation are usually referred to as "on civil service." In its broadest sense the civil service includes all officers or employees of the government, whether elective or appointive, civil or military; for all are "servants of the state." As used in Federal and State laws the term refers to the appointive and non-policy-forming officers and employees of the executive department, commonly designated as the "executive civil service." Excluded are the appointive and permanent employees of the legislative and the judicial departments.

THE EXTENT OF THE CIVIL SERVICE · Government is now by all odds the largest employer of labor in the United States. In 1940, before the lists were swollen by wartime needs, an estimated 4,500,000 persons, or 12 per cent of all gainfully employed persons, were in the employment of the government. Of these, one million in round numbers were in Federal employment. Of the three and a half million State and local government employees, nearly one and a half million were public-school teachers. The Federal offices in the District of Columbia employed 133,645 persons; the field offices throughout the country, 869,175.[1] The Civil Service Commission in 1940 listed 22,000 job titles, and reported that "few of the occupations in the United States listed by the Census Bureau in 1930 do not have one or more representatives in the Federal service."[2]

NATURE AND PROBLEMS · From the standpoint of the government executive the problems which concern the civil service are much the same as those which exist between employer and employee in a private undertaking.[3] Chief among these are *recruitment*, that is to say, who shall be em-

[1]United States Civil Service Commission, *57th Annual Report* (1940), pp. 34, 141. Those in the classified service numbered 726,827.

[2]Ibid. 1939, p. 62. As of June 30, 1944, there were 2,908,912 persons in the paid executive civil service of the United States, of whom 2,767,151 were full-time employees. The total number serving outside the United States was 382,400. United States Civil Service Commission, *Monthly Report of Employment* (June, 1944).

[3]The literature concerning the civil service is voluminous. For general accounts cf. Commission of Inquiry on Public Service Personnel, *Better Government Personnel* (1935); W. E. Mosher and J. D. Kingsley, *Public Personnel Administration* (1941); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* (1941); L. D. White, *The Civil Service in the Modern State* (1930); L. Wilmerding, *Government by Merit* (1936); L. Mayers, *The Federal Service* (1922).

ployed and the qualifications to be required for each position; *promotion, demotion,* and *discharge,* or how merit is to be recognized and rewarded, and what shall constitute fitting grounds for demotion or dismissal; *remuneration,* the salary scale to be set for each grade of work, with proper recognition for unusual merit and service; *retirement* and *pensions,* the age to be set for retirement from service, with sound financial provisions for pensions or lump-sum allowances; and the various problems of *personnel organization* and *management.* An organization, including a proper division of labor, effective supervision, and the economical use of men and materials, must be established so that a maximum of production and work may result. The task of each agency is to build a harmonious working organization, avoiding an excess of red tape, eschewing the bureaucratic spirit, and calling forth the personal initiative of its members. From the standpoint of administration the civil service should not offer a haven for the time-server, the defective, or the "deserving politician." The administrator has a specific piece of work allotted him by law or his superior, and, no less than in private industry, needs an able, alert body of workers who are zealous to see that the bureau succeeds in its undertaking and who labor in the knowledge that excellence in service will bring its due reward in rank and salary.

THE SOCIAL VIEWPOINT · The civil service has a significance other than the efficient discharge of a governmental function. Government now employs about one in twelve of all people gainfully employed, which means that it is the direct source of livelihood of about that proportion of the total population. The salary scale in terms of housing, food, shelter, and other items of the standard of living is therefore of social importance. Government as a great employer of labor has the same responsibilities as the industrialist and capitalist. This does not mean that it ought to retain the lazy and inefficient on its pay roll or hire larger numbers of persons than it needs for its work in order to afford them a living, but does call attention to the fact that more than efficient government is involved.

THE POLITICIAN'S VIEWPOINT · To the politician or statesman the civil service has still another significance. His ambition, if out of office, is to get into a place of power; and, if there already, to stay in.[4] If his friends are appointed to the civil service, they and their associates will reward him by extending their political support. Offices are a means for building up a popular majority which will maintain the party in power. In the European democracies men from the wealthy or aristocratic classes were often willing to serve the government as an obligation of their class or for reasons of prestige or power. As America lacks such a permanent leisure class, all but a comparatively small number here seek office as a means of making a livelihood. The two parties use places in the civil service, so far as they find it expedient, to maintain themselves in power. *Spoils system* is

[4]W. D. Foulke, *Fighting the Spoilsmen* (1919).

the name given the practice of using public office as a reward for party services. The state of public opinion today is a check to the wholesale practice of the spoils system; but the party in power may well balance against the odium of its use the great advantages of a civil service manned with politically loyal employees. The temptation is particularly strong for a party newly returned to power. Thus during the early stages of the F. D. Roosevelt administration a large portion of the newly created offices were excepted by statute from the merit system, a step which in three years resulted in the reduction of the percentage of Federal positions under the merit system from 80 per cent of the total (the percentage during the Hoover administration) to 60 per cent.[5]

## *THE FEDERAL CIVIL SERVICE*

THE CONSTITUTIONAL PLAN · At the time the national convention was deliberating at Philadelphia in 1787, no government in the world had a well-organized system of appointing civil servants. The problem had not been visualized; for governments performed few functions in those days, and the number of employees was small. The making of appointments was a personal matter. The king or prince or his chief officers of state made the appointments or empowered their underlings to do so. The small corps of national employees in the period from 1776 to 1789 had been appointed by Congress or by officials so appointed, but events had brought a general conviction that the old system must be changed. The proposal to give the appointing power to the President, however, brought out fears that it might lead him to aggrandize his powers, and so a proposal to associate with him a council in the making of appointments was pressed.[6] The State of New York had a special council of appointments which remained until the constitutional revision of 1821, and in several other States the governor's council was given a part in this function. Finally it was decided to substitute the Senate for a special council of appointments. The clause reads:

> [The President] shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.[7]

To summarize. Four methods are provided for the filling of positions in the Federal civil service: (1) nomination by the President, subject to the

[5] United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present (1947)*, pp. 118, 119, 122–126.
[6] Max Farrand, *Records of the Federal Convention*, Vol. II, p. 367.
[7] *United States Constitution*, Art. II, sect. 2, clause 2.

ratification of the Senate by a majority vote; (2) appointment by the President without the requirement for ratification by any other agency; (3) appointment by the courts of law; (4) appointment by the heads of the administrative departments. Which method is to be followed for each office is determined by Congress by statute, except that only "inferior" officers may be appointed by any of the last three methods enumerated. "Superior" officers must be chosen by the first method, namely, nomination by the President and confirmation by the Senate. Legally, therefore, the merit system cannot be applied to "superior" officers, who include diplomatic officers of high rank, judges of the Federal courts, and an undetermined number of other officers created by statute.

PRESIDENTIAL OFFICES · The line between "superior" and "inferior" officers has never been drawn by the courts. In the former category would doubtless be found the ten heads of departments and the members of the great independent agencies, such as the Interstate Commerce Commission; but that the constitutional minimum exceeds one hundred seems hardly probable. Before the increase in government personnel under the New Deal after 1933, approximately twelve thousand offices by statute were filled by the first method: nomination by the President and confirmation by the Senate. Only a small percentage of these represented actually "superior" officers. How might a President intelligently fill as many places as that? The answer is in an unwritten part of the Constitution which in effect transfers this power to the individual members of the Senate. As has been seen, President Washington attempted to use the Senate as an executive council to advise him on treaties, but that body refused to act in his presence.[8] The words "advice and consent" in the making of appointments evidently visualized the Senate as acting in the presence of the President as an advisory body. Almost from the beginning, however, this had resulted in practice in the President's sending the Senate a list of names for particular offices, and consideration by that body for their acceptance or rejection. In later years the names were first sent, as a routine matter, to a special committee for consideration and report.

So long as the political parties remained weak, the suffrage limited, and Presidential electors were chosen by the State legislatures, the Senate did not attempt to assert control over the discretion of the President in making nominations. Even before Jackson, however, the pressure had begun. In 1820 Senator Ninian Edwards, of Illinois, wrote President Monroe recommending several men for Federal offices in that State, suggesting that they be apportioned by regions; and later he urged that nominations be left to the Senators to divide equally among their respective parties.[9] William Wirt, Attorney-General, replied that he thought no President of the United States "should permit himself to be influenced by considerations

[8] E. S. Maclay (Ed.), *Journal of William Maclay* (1890), pp. 128–132.
[9] C. R. Fish, *The Civil Service and the Patronage* (1904), pp. 99–101.

of local parties in a State, and that he should not nominate with reference to the local effect on the respective Senators in their States." He suggested, however, that the President should "nominate no person whom either senator declares unworthy of an office, if he can find a deserving man in the State free from such objections."

It was the latter formula, rather than Edwards's, which became the unwritten law of the land. A President may refuse to nominate a person suggested by the Senator, but he will normally not nominate a person to whom a Senator has previously voiced an objection. The procedure is substantially as follows. The Senator communicates to the President his suggestions for appointments to various Federal offices and, if the places are of sufficient importance, or if important questions of local party strategy are concerned, confers with the President about them. Then the President sends nominations to the Senate, where they are considered by special committees and then taken up in an executive session. If the Senator from the State objects (if he is a member of the majority party), the rule of courtesy requires that his colleagues vote against the confirmation. This means simply that the Senators, in collaboration with the President, make the appointments individually, not the Senate as a body.[10]

This block of offices is that portion of the civil service which is used to maintain the "standing army" of the political party. Composed largely of postmasters, United States marshals, collectors of the customs and of internal revenue, they furnish a living for party representatives in every locality of the Union. It is readily seen that no Senator may make decisions on appointments arbitrarily. Often not only his own political future but that of his party in the State is dependent upon having a corps of officers which will produce party harmony. If the Senators from the State and the local party leaders are not able to agree, sometimes the President himself or his Postmaster-General intervenes to make a compromise. While the cause of good administration would undoubtedly be furthered by the placing of all but a few hundred of these officers on the merit system, that step is not likely to be taken in the near future. All politicians and some students of government believe that a patronage list, perhaps not nearly so large as this, is necessary for the efficient working of the system of government by political parties.

NONPRESIDENTIAL OFFICES · Outside the so-called "Presidential offices" is the army of one million civil servants who receive their appointments through the President alone or through heads of departments and bureaus. They are concerned mostly with other matters than policy-making. Their work is administration, technical, clerical, scientific, or mechanical. Upon their shoulders falls the task of maintaining the services of the government on an even keel, year in and year out, despite changes in the Presidency and the heads of departments. Government policy and popular attitude

[10]C. R. Fish, op. cit. chap. viii.

toward these offices have fluctuated from decade to decade; but three periods representative of distinct policies may be distinguished: (1) From George Washington to Andrew Jackson, 1789–1829; (2) from Jackson to the passage of the Civil Service Act of 1883; (3) from that time to the present.[11]

FROM 1789 TO 1829 · President Washington began his administration with a clean slate. The Constitution had established no offices, and there were few officials in the old Confederation to look for reappointment. Soon after his inauguration Washington recognized the problems that came from his new power of appointment. "I anticipate that one of the most difficult and delicate parts of the duty of my office will be that which relates to nominations for appointments," he wrote Edward Rutledge. Both Washington and Adams proclaimed the rule of appointing men to office on the basis of fitness, "the best qualified to discharge the functions of the departments to which they shall be appointed." Few removals were made, and all on the ground of the efficiency of the service. Jefferson, entering office as the representative of new policies, was irked at finding the office filled with Federalist appointees. He used party loyalty and service as a test for appointments, and removed 109 out of a total of 403 Presidential officers; but he required of his appointees fitness for the office.

Madison and Monroe made fewer removals than Jefferson, and continued the policy of appointing on the basis of party service and fitness for the position. J. Q. Adams, who emphasized fitness and largely ignored party loyalty, was rewarded for his devotion to high principle in this respect by a stormy administration due in no small part to disloyal and uncooperative underlings. The law of 1820, which abandoned the practice of indefinite and life tenure in favor of four-year terms for the chief regional Federal officers, district attorneys, customs officers, land officers, and others, laid the foundation for a quadrennial rotation in office, the Jacksonian spoils system, and the Senate's seizure of a larger share in the appointing power.

FROM 1829 TO 1883 · Jackson's election in 1828, which was regarded as completing the revolution of 1800, was generally taken to be the signal for wholesale removals. At the time of the inauguration the streets of Washington swarmed with people who had come to witness the beginning of the new order and apply for places on the pay roll. Jackson announced the adoption of the rotation-in-office doctrine in his first message to Congress, opposing it to the scheme of a trained and permanent body of civil servants. He said:

> There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable

[11] A historical account of the system of appointments given in C. R. Fish, op. cit., is generally followed in this and the succeeding paragraphs.

to the faithful discharge of their public duties. Their integrity may be proof against improper considerations immediately addressed to themselves, but they are apt to acquire a habit of looking with indifference upon the public interests and of tolerating conduct from which an unpracticed man would revolt. Office is considered as a species of property, and government rather as a means of promoting individual interests than as an employment created solely for the service of the people. . . . The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience.[12]

This amounted to a declaration that all positions were open. Fitness for office was measured chiefly by loyalty to Jackson and service to the party. "Not until 1829," wrote an eminent historian, "did the genuine spoils system come into existence; and since that date it has continued without break, though with some diminution."

Buchanan rounded out the spoils system in 1857 by ruling that all offices generally should be vacated after four years, even though held by Democrats, thus making good in practice Jackson's announced rotation-in-office principle. By 1850 the members of Congress as delegations had secured control of the Federal patronage in their respective States. When heads of departments objected to their subordinates' being named by Congressmen, President Pierce laid down the rule that every nomination must be approved by the head of the proper department. Washington, because of the time at which he came, controlled appointments more fully than any succeeding President. Under Monroe the heads of the departments possessed the maximum of control over the appointment of their subordinates; under Pierce, the Congressional delegations were at the height of their power in this matter. Senatorial courtesy became permanent after 1865. After 1850 the increase in the size of the service and the inability of the President longer to give appointments his personal supervision aroused questionings of the system. The years following the Civil War were filled with the rapid settlement of the West, the building of transcontinental railroads, the exploitation of our rich natural resources, and the development of great industries in the East. The spoils system was now at its height in the Federal service. The civil service, augmented to perform the increased functions of government, now exhibited the blighting effects of the system, and reformers inspired by the trend in England began to advocate the making of appointments upon the basis of merit as measured by examinations.

FROM 1883 TO THE PRESENT · In the spring of 1881 President Garfield, without consulting the New York Senators, Roscoe Conkling and T. C. Platt, sent the name of one of his supporters to the Senate for the office

[12]J. D. Richardson, *Messages and Papers of the Presidents*, Vol. II, pp. 448, 449.

of collector of the port of New York. The nominee was a political enemy of the two Senators, and they regarded the move as a challenge to their political position at home. Both resigned from the Senate and were supported by the Postmaster-General, the Vice-President, and most of the Republican members of the New York Congressional delegation. A disappointed office-seeker, excited by the contest, shot the President, and many people regarded the President as a martyr to the cause of civil-service reform. The occasion for the contest, however, was the President's attempt to assert his independence in making nominations as against the claims of Senatorial "courtesy." The incident was sufficient to start the floundering civil-service-reform bill through to passage.

THE BEGINNINGS OF REFORM · Already a few half-hearted gestures had been made in the direction of the merit system.[13] In 1853 a statute provided that pass examinations should be used for filling clerkships of the lowest grade; but these were administered by the head of each department, and meant only what each wished. For some time, examinations had been used in the Treasury Department with considerable success. Later it was provided that a limited number of appointments to the consular service should be made on the basis of examinations, those showing proficiency to be recommended to the President for promotion.

Meanwhile the success of England, Prussia, and several other European countries in establishing a permanent nonpolitical civil service had attracted the attention of American reformers.[14] Charles Sumner, inspired by the English experience, introduced in 1864 a bill "to provide for the greater efficiency of the civil service." In 1865 Thomas A. Jenckes, of Rhode Island, after a careful study of the English system, introduced a bill to establish the examination system. In July, 1866, a joint committee of the two houses was charged with the duty of examining the expediency of amending the laws to provide for the selection of subordinate officers after due examination, and for doing away with the use of the civil service in party patronage. On May 25, 1868, it presented an elaborate report carefully summarizing the systems in China, Prussia, France, and England, and a bill adapting a system of examinations to American conditions. Although rejected, the bill became the basis of further argument and agitation. President Grant urged the reform upon Congress; and an act was passed empowering the President to prescribe such rules and regulations for the admission of persons into the civil service of the United States as would best promote its efficiency. Grant appointed an advisory board of seven, headed by George William Curtis, a leader in the civil-service-reform movement. After two years Congress refused to appropriate money for the board, and the system of examinations had to be abandoned. Examinations, however, were retained for certain bureaus, including the New

[13] C. R. Fish, op. cit. chap. x.

[14] D. B. Eaton, *Civil Service in Great Britain* (1880), chap. xix.

York customs office. (1879). President Hayes and President Arthur, after the death of Garfield, gave the movement support. A vigorous national Civil Service Reform League, founded in 1881, with persons drawn from all sections of the country kept up the fight.[15] On January 16, 1883, a bill drafted by Dorman B. Eaton, and introduced by George H. Pendleton of Ohio, became law.[16] The heart of the law was the provision for the appointment of civil servants upon the basis of open competitive examinations and the setting up of machinery for making the mandate effective.

SCOPE OF THE MERIT SYSTEM IN THE FEDERAL SERVICE · The adoption of the Civil Service Act of 1883 did not of itself extend the merit system to the entire Federal service. Instead it required open competitive examinations for such positions as were now or hereafter might be "classified." Thus the terms *classified service* and *merit system* are broadly coterminous. President Theodore Roosevelt strengthened the law by ruling that all persons appointed to any executive office whose duties are of the character of those performed by classified employees should come under the examination system.[17] If positions are to be excepted from the merit system, Congress must shoulder the responsibility by positive action.

The merit system has only gradually been established in the Federal service. Beginning in 1883, with 13,780 positions, or 10.5 per cent of the total, by 1940 it had reached 726,827 out of 1,002,820, or 72.5 of the total.[18] The largest recent accessions were made by two acts, the Ramspeck-O'Mahoney Act of 1938 and the Ramspeck Act of 1940.[19] By the former the nearly 15,000 postmaster positions of the first, second, and third classes were added to the rolls of the classified service. At the expiration of the terms of the present incumbents the positions are to be filled by their reappointment after they have passed a noncompetitive examination; and after they have passed from the scene the positions are to be filled by open competitive examinations or by promotion of employees from the ranks. The flaw in the act, however, is that nominations for these offices still must be made by the President subject to ratification by the Senate. The act of 1940 authorizes the President by executive order to cover into the classified service "any offices or positions" in the executive departments or agencies, its effect being to remove the ban from such action provided in many separate acts of Congress establishing new offices. It was estimated at the time that 182,000 positions were affected by the act.[20]

[15]W. D. Foulke, op. cit. chap. i.

[16]22 Stat. 403.

[17]Executive Order No. 279, November 29, 1904.

[18]United States Civil Service Commission, *57th Annual Report* (1940), pp. 136, 137.

[19]52 Stat. 1076 (June 25, 1938); 55 Stat. 599 (July 18, 1941); 54 Stat. 1214 (November 26, 1940).

[20]The only positions excluded from classification by the act were those in the Tennessee Valley Authority, which had established a sound personnel system of its own; those of the Works Progress Administration; the positions of district attorney; and Presidential positions. By Executive Order No. 8743, April 23, 1941, President Roosevelt extended the classified service to include nearly all previously excepted positions, save those specifically excepted by the Ramspeck Act.

## *ADMINISTRATION OF THE FEDERAL MERIT SYSTEM*

THE CIVIL SERVICE COMMISSION · The responsibility for the administration of the merit system in the Federal service rests squarely with the President of the United States. Congress authorizes the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter."[21] To aid him in this task, the act of 1883 provided for a Civil Service Commission of three members, appointed by him with the approval of the Senate for overlapping terms of seven years, only two of whom might be members of the same political party. The commission is authorized to aid the President, as he may request, in preparing suitable rules to carry out the examination system, and to investigate and report upon "all matters touching the enforcement and effects of said rules and regulations." It is required in its annual reports to note all positions especially excepted from the open competitive examinations, and all instances of political activity by the employees. In 1930 it was given the duties of the Personnel Classification Board, created in 1923 to carry through a classification of the offices in the Federal service. In 1920 it had been given the administration of the Civil Service Retirement Act. The combined effect of these laws was to make the Civil Service Commission an examining board and the guardian of the merit system in general. The administration of the Employees Compensation Act of 1916 was placed in a United States Employees Compensation Commission of three members appointed by the President.

ORGANIZATION OF THE COMMISSION · The commissioners are assisted by an executive director and a chief examiner, who acts also as the chief executive and technical officer of the organization.[22] The internal organization of the commission is consistent with its position as the personnel agency of the greatest employer of labor in the world today. There are ten divisions, whose designations in most cases indicate the character of their work. These are labeled Examining and Personnel Utilization, Budget and Finance, Information, Investigations, Medical, Administrative Services, Personnel Classification, Personnel, Retirement, and Service Record. In addition there is the Board of Appeals and Review.

THE DISTRICT SYSTEM · The steady increase in the numbers in the field service made necessary a sharp decentralization of the commission's administrative machinery. The country is divided into thirteen civil-service districts, each in general charge of a district manager, whose duty it is to keep in touch with the recruitment problem of the various Federal agencies

[21] 16 Stat. 514.

[22] *United States Government Manual, Winter, 1945* (1st ed. 1945), pp. 559–567.

in his district. The district offices are the centers for the diffusion of information about the need for employees and forthcoming examinations. They recruit applicants, receive and review applications, rate papers, and certify eligibles for appointment. Under their general supervision are the five thousand local examining boards and the various rating boards established at points where large numbers of new employees are needed. Postmasters and heads of other local agencies may now promptly secure recruits from the eligible lists furnished by the district offices.

## *CLASSIFICATION OF EMPLOYEES*

The United States Civil Service Commission lists as many as twenty-two hundred different kinds of occupations found in the Federal service. The law requires that the examinations shall be such as "will fairly list the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." Obviously this requirement cannot be met unless the employees are so classified that examinations may be fashioned for each kind of job according to its nature. By classification is meant the arrangement of positions in categories, and in grades within the categories, according to some principle such as similarity in the nature of the work, function performed, or physical situation. The mass of employees thereby takes on form and becomes an organization rather than a mere aggregation. Classification therefore amounts to a method of controlling the organization of the working services. Grades of workers are properly related to other grades and to management. The duties of each class are standardized so that proper tests may be evolved for entrance into it, promotion to other grades or categories, or transfer to others.

THE CLASSIFICATION SCHEME · The method of classification used by the act of 1923 was to group together positions alike in character under descriptive titles, so that proper tests of fitness and schedules of compensation might be set.[23] Positions were combined into classes, the duties of which were approximately alike in kind, difficulty, and responsibility. The classes were then arranged hierarchically in "promotion" series. The first grouping is into "services," which in turn are subdivided into "grades." There are five of the former, subdivided into a total of forty-seven grades. There are as follows: (1) The *professional and scientific service.* This is defined as those positions which embrace routine, advisory, administrative, or research duties, based upon the established principles of a profession or science and requiring professional, scientific, or technical training equivalent to that required for graduation from college or university. (2) The *subprofessional service.* The positions of this class also require professional, scientific, or technical training, but inferior to that represented by gradua-

[23] W. E. Mosher and J. D. Kingsley, op. cit. chap. xix; O. P. Field, *Civil Service Law*, chap. iv.

tion from a college or university; and the duties are incidental, subordinate, or preparatory to the work required of those in the foregoing service. (3) *Clerical, administrative,* and *fiscal service.* This includes all classes of positions where the duties are to perform clerical, administrative, or accounting work, or any other commonly associated with office, business, or fiscal administration. (4) *Custodial service.* Here are all positions whose duties are to supervise or perform manual work concerned with the custody and maintenance of public buildings and property, and the transportation of officers, employees, property, or papers. (5) The *clerical-mechanical service.* This includes all classes of positions not in a recognized trade or craft, the duties of which are to perform or to direct manual or machine operations requiring skill, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or mechanical operations. Examples of these are found in the Government Printing Office, the Bureau of Engraving and Printing, and the mail-equipment shop. Each of these services and grades was given a salary range dependent on the qualifications required for entrance, the character of the duties, and the term of office.

CRITICISMS OF THE SCHEME · The initial fault of the Classification Act of 1923 was that it was made to apply only to the employees in the District of Columbia.[24] Classification of the much more numerous employees in the field service was left to be made by the local or regional heads of those offices. While in general these officials have followed the classes and grades established by the Civil Service Commission, the classifications often are not comparable. The Ramspeck Act went far to remedy this defect by authorizing the President to extend to employees in the field the provisions of the Classification Act.

The division of positions into forty-seven separate grades, many of which overlap, is thought to be too minute. But the most serious criticism is the failure to provide steps by which a young person entering the government service may look forward to a life career. The most interesting proposal to remedy this defect was put forward in 1935 in the report of a commission of experts appointed by a number of learned societies, whose recommendations were embodied in a volume *Better Government Personnel.* The commission's recommendations were based on the assumption that the government service would be greatly improved by the recruitment of persons who might regard their initial appointment as only the first step in a life career, with the opportunity for successive advancements to positions of greater dignity and responsibility. The ladders of ascent were to be provided by a reclassification of all positions. The lowest rung of each would be the positions requiring the least skill and experience. The five suggested correspond to the kinds of employment found in private industry. They are administrative work, including such matters as general management, or-

[24]Commission of Inquiry on Public Service Personnel, op. cit. chap. iii.

ganizing, and budgeting; professional work, the use of professional skills such as those of engineers, doctors, lawyers, and social workers; clerical work, the handling of papers and records; skilled and trades work, the use of the special skills of carpenters, masons, and electricians; and unskilled work. Examinations fitted for entrance to each category could be fashioned, and the upper positions be open to all on the basis of their ability. Persons qualified by education and experience could enter the government service with assurance that they were not in a blind alley.

The career scheme of classification has never been enacted into law, but a small beginning was made in 1934 by the creation of the grade of junior professional assistant. The examinations are designed for college seniors who have specialized in public administration, statistics, economics, chemistry, and the like.[25]

### *RECRUITMENT FOR THE CIVIL SERVICE*

The heart of the merit system is the system of examinations for determining the fitness of the applicants for the positions to which they aspire. To devise examinations which will accurately measure the required abilities is a matter of great difficulty. The problem may be approached from two viewpoints. If the primary purpose is to secure recruits who will shortly be able to perform the duties to which they are assigned, the examination will be devised to measure technical training. But if, on the other hand, the recruits are chosen for potential ability to advance to posts of higher responsibility, the examination will be directed to their general education and qualities of personality. The British civil-service examinations typically are of the latter character;[26] the American originally were of the former, but lately progress has been made toward examinations to measure capacity and general education.

Recruitment for the Federal service is administered chiefly by the Examining and Personnel Division of the United States Civil Service Commission. Strong efforts are made to keep the public informed of opportunities for employment. In a single year more than ten million information circulars and application forms are distributed. Commission officials address schools and colleges, scientific associations, and trades and industrial organizations. Notices of examinations are sent to newspapers throughout the country, and to more than four thousand five hundred post offices, as well as to libraries, veterans' bureaus, and public employment offices, for posting. Examinations with the lower age and educational requirements are publicized among high schools and business schools. Those requiring specialized technical or professional training are adver-

[25] W. E. Mosher and J. D. Kingsley, op. cit. p. 42.

[26] L. D. White, "The British Civil Service," in L. D. White and others, *Civil Service Abroad* (1935), pp. 27–36.

tised in schools of that type. Recruiting for the newly established junior professional and junior scientific positions is done largely through the educational institutions. Letters are sent to the heads of college departments, and releases to college newspapers. As a result 43,973 persons applied for the first examination in June, 1939.[27]

For the convenience of applicants twelve regional offices of the commission are maintained, each in charge of a director.

### *EXAMINATIONS*

The purpose of the civil-service examinations is to make a valuation, or rating, of all the facts concerning an applicant that are pertinent in determining his fitness for employment. The law of 1883 requires that the examinations, with exceptions, shall be "open and competitive," that is to say, open to all qualified persons who apply, with preference to those making the highest marks. Closed examinations for positions excepted from the classified list by Presidential order are entirely noncompetitive and require only a passing mark. These are used only for positions of a confidential nature or those where the services of a particular person are required. For instance, in 1939, President Roosevelt excepted, among others, the positions of special attorneys employed on a temporary basis for specific litigation, and Chinese, Japanese, and Hindu interpreters.[28]

"Assembled" examinations are those given to the applicants assembled at one or several designated centers and are used for positions of a lower grade, where numerous applicants are desired and many appointments are to be made. "Nonassembled" examinations, usually reserved for the upper-bracket positions, are given individually. Each applicant files a statement of his education and experience, and a rating scale gives due weight to these factors.[29]

Examinations may be written or oral or both, and personal interviews may or may not be required. Practical or manual tests are given where they seem best, as for typists, machinists, mail-handlers, engineers, and inspectors of different types. Tests may be used to measure general or special aptitude, personality, achievement, or health. The rating system for experience and training is used for many positions, both to eliminate candidates without minimum qualifications and as one of the weighted factors in the examination.[30]

ADMINISTRATION OF THE EXAMINATION SYSTEM · The commission's Examining and Personnel Utilization Division is in general charge of the examinations. Under it are the five thousand local boards of examiners

[27]United States Civil Service Commission, *57th Annual Report* (1940), pp. 5–8; W. E. Mosher and J. D. Kingsley, op. cit. pp. 125–137.

[28]United States Civil Service Commission, *56th Annual Report* (1939), p. 75.

[29]L. Mayers, *The Federal Service* (1922), pp. 358–377.

[30]W. E. Mosher and J. D. Kingsley, op. cit. pp. 167–179.

scattered among the thirteen civil-service districts. Information and examining centers are maintained at about six hundred and fifty places, including post offices and customhouses. Assisting the examiners are the more than one hundred and fifty rating boards located at large government industrial establishments, such as navy yards and arsenals.

Applications for taking examinations are received at both the central office of the Civil Service Commission and its district offices. Sometimes more than a hundred thousand applications are received for one position. During the year 1939–1940, 1,196,042 applications for examinations were received, 556,571 were given, and 254,095 were passed.[31] The first step is to sift from the applicants those who do not meet the basic requirements of age, citizenship, and physical condition, after which applicants are tabulated as to residence, veteran preference, and other items covered by law. Admission cards are then sent out to those who have successfully passed the screening test. The papers of applicants for unassembled examinations are sent to the Examining Division for a review and rating of qualifications.

APPEALS · The commission soon found itself confronted with numerous requests for a review of its decisions on the part of those who had failed in an examination, received low marks, or been denied the right to take an examination. In 1930 a Board of Appeals and Review was established to take care of appeals from examination grades made and other questions decided by its own staff or the district managers. The matters on which appeals may be taken are numerous, including ratings in all examinations, debarment from competitive examinations, decisions on promotions and transfers, and other personnel actions. The appellants submit written statements, and in some cases appear in person before the board.[32]

THE REGISTERS · Those who pass the examinations are placed on so-called registers, which are lists of persons who have qualified for specific positions.[33] The names are arranged in columns in the order of the marks made in the examination. The commission maintains more than fifteen hundred registers, each of which in turn is further broken down into "options." For instance, the register of "junior engineer" is broken down into options for civil, mechanical, mining, architectural, and seventeen other types of engineering. The register of social-science analyst, covering the five fields of political science, economics, agricultural economics, sociology, and social research, has more than thirty options.

CERTIFICATION AND APPOINTMENT · The examinations create a reservoir of talent from which appointments may be made. Upon notification of a vacancy in a department or agency, the Civil Service Commission certifies to its appointing officer the three names standing at the top of the register,

[31] United States Civil Service Commission, *57th Annual Report* (1939–1940), pp. 149, 150.
[32] W. E. Mosher and J. D. Kingsley, op. cit. pp. 187, 188.
[33] L. Wilmerding, op. cit. pp. 132–135; United States Civil Service Commission, *56th Annual Report* (1939), pp. 31–34.

one of whom must be taken.[34] If several vacancies exist, enough names are certified to enable him to consider three names in connection with each vacancy. For the first vacancy he must select one of the three names at the top; for the second, one of the two rejected or the fourth name on the list; and so on, always selecting from among the three highest names remaining on the list. Names which have been rejected three times by an appointing officer are not recertified to him. A limitation on the freedom of appointment is the requirement that appointments to the services in the District of Columbia shall be apportioned among residents of the States in proportion to their population.

VETERAN PREFERENCE · The appointment of war veterans to public positions as a means of showing gratitude for their sacrifices is a much older expedient than the United States government.[35] An act of March 3, 1865, provided that persons discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty should be preferred for appointment in the Federal civil service, provided they were found to possess the business capacity necessary to the proper discharge of the duties of the office. The practice was continued by executive order under the act of 1883. Before 1919 preference had been given only to those disabled in the service; thereafter it was extended to all honorably discharged. The law was a windfall for over fifteen thousand civil-service clerks of the War and Navy Departments, who were transferred to the enlisted service but continued their routine civilian duties, thus becoming entitled eventually to higher salaries, noncompetitive examinations, the bonus, disability pensions, free hospitalization, as well as veteran preference in appointments. Full privileges of veteran preference are extended to all honorably discharged soldiers, sailors, and marines, to their widows, and to the wives of disabled veterans who themselves are not qualified to serve in office. Thus are included persons who have served in no war, graduates or ex-students of the military, naval, and Coast Guard academies, as well as nurses who have left the service nurse corps. By 1938 more than one fourth of those appointed to the civil service on the basis of veteran preference were too young to be veterans of any war.

Veteran preference in the civil service is chiefly of two kinds: preference in the examinations and preference in appointments. All veterans are exempted from whatever age limitations are required for admission to examination, with a slight exception, provided they are below the retirement age. The Civil Service Commission is authorized to hold quarterly examinations for positions not on any existing register, open only to disabled veterans or their wives and to all widows of veterans. These, moreover,

[34]W. E. Mosher and J. D. Kingsley, op. cit. pp. 251–256; L. Mayers, op. cit. pp. 413–429.

[35]W. E. Mosher and J. D. Kingsley, op. cit. pp. 235–242; United States Civil Service Commission, *History of the Federal Civil Service*, pp. 97–102; J. F. Miller, "Veteran Preference in the Civil Service," in C. J. Friedrich and others, *Problems of the American Civil Service, 1935*, pp. 243–291.

may enter open competitive examinations after the date for receiving applications from other persons has passed. Except for a few positions, all veterans are exempted from height and weight requirements, and at the discretion of the commission may be admitted to examinations in spite of illness or physical defects which legally debar others.

Another form of preference is the marking up of grades made in the examinations. Veterans with service-connected disability, or their wives, and the widows of all veterans, are entitled to a ten-point augmentation of their grades; all others, to five points. Thus the generally required passing mark of 70 becomes 60 for the former and 65 for the latter.

Preference in the matter of appointment has to do chiefly with the position of the names on the registers. All persons with the ten-point preference, who pass the examinations, must be placed in their relative order ahead of all other eligibles. Those with the five-point preference are not advanced to the head of the list, but their names are placed ahead of all nonveterans who have made equal grades. Under these requirements a disabled veteran passing with a 60 per cent mark might conceivably be chosen over a nonveteran with a 90 to 100 per cent standing. When an appointing office passes over a veteran and selects a nonveteran, he must file the reasons for so doing with the Civil Service Commission. Furthermore, veteran preference appointments are not subject to the requirement for apportionment among the States.[36]

For 1940 the claims for veteran preference had risen to over one hundred thousand; and about 21 per cent of all appointments to the civil service were on this basis. Moreover, about 31 per cent of those so appointed were too young to have served in the First World War.[37]

PROBATION · The law of 1883 requires that appointment to the civil service shall be for a trial period of six months, which by agreement between the commission and the department concerned may be extended to a year.[38] The theory of the plan is that observation of the appointee at work will give information about his capacity which the examination has not revealed. Unfortunately, however, experience has shown that appointing officers are very reluctant to make recommendations against a person who has once been admitted to the service. The situation has been somewhat improved of late by the making of periodic ratings of all appointees during the probationary period. It has been suggested by some personnel experts that more than one probationer be appointed to each position so that the department head will be forced to weed out the least competent, but no such change has been instituted.

[36]L. Wilmerding, op. cit. pp. 139–141.
[37]United States Civil Service Commission, *57th Annual Report* (1940), pp. 15, 134.
[38]W. E. Mosher and J. D. Kingsley, op. cit. pp. 263–267; L. Wilmerding, op. cit. pp. 286–288.

## *PROMOTIONS AND TRANSFERS*

One of the greatest obstacles to the effective operation of the civil service, as compared with private industry, has been the lack of an inclusive and well-ordered scheme of promotions. One of the first questions in the mind of a young person entering employment is, "What are the possibilities of further advancement?" He is more likely to be happy in the beginning job at a low salary if he knows the way is open ahead. Promotion should be held out as a reward for good service. From the standpoint of the government it is a means of recruiting able workers for the higher positions, on the basis of observation, and of utilizing the valuable training and experience gained in the course of employment.

BASIS OF THE WEAKNESS · The Federal service has been slower to rely on promotions than that of either the British or the Germans. Several factors are responsible. One was the traditional Jacksonian theory that any person is qualified to perform the work of administration. Government positions were looked at as jobs of considerable ease and relatively good pay. Government service was not sought as a career but as a place to start in life with the hope of later securing better positions in private industry. This in turn influenced the type of examinations given, which stressed special skills rather than general ability. Finally, the routine, and therefore low-paid, positions were vastly more numerous than those calling for creative, executive, or other abilities requiring initiative. The result was that most of the positions were filled with persons who entered with little hope of promotion, while the upper positions were filled from outside the service, often on the basis of politics. Another factor was the feeling against promotion by transfer from other departments.

NEW PROVISIONS FOR PROMOTION AND TRANSFER · Although the Civil Service Act of 1883 authorized promotions within the classified service, no orderly plan was immediately established.[39] Examinations for promotion were confined to noncompetitive selections within the respective departments. An executive order by President Roosevelt of June 24, 1938, was the basis for a general change. The Civil Service Commission was directed to establish a general competitive promotion system. Its Promotion Section is charged with the development of regulations for well-defined promotion procedures, and the formulation and supervision of corresponding examinations throughout the service. The commission conducts tests for filling positions which are common to more than one department, thus permitting the transfer of personnel from one to another, while the various departments conduct competitive examinations for promotions to positions which are peculiar to each. The commission is authorized to review all examination requirements and otherwise co-ordinate the whole promotion policy of the service. For the year 1939–1940, 31,206 open competitive

[39] W. E. Mosher and J. D. Kingsley, op. cit. chap. xv.

examinations were given, and 19,128 persons won promotion, transfer, or reinstatement.[40]

SERVICE RATINGS AND PERSONAL RECORDS · In the private business concern the administrative officer, because of personal contacts, is usually able to make accurate and fair recommendations for the promotion of his subordinates. Several factors, including size, make it more difficult in the public service. An instrument now being more highly developed is the service record, by which each employee's qualities of competence are rated. The problem is to devise a system of measurements which will be accurate and well balanced. Qualities necessary to competence are listed, marked by the personnel officer, and together properly weighted to give a rating. "Lazy," "Always courteous," "Uses poor judgment," "Too easy-going," "Always reliable and dependable," "Not a good team worker," "Accepts responsibility," "Usually quits ahead of time," are examples of the criteria variously used.[41]

No system of service ratings has yet been developed to an entirely satisfactory point. For this there are a number of reasons, among which is the inherent difficulty in selecting the qualities which count for efficiency and in measuring them numerically. There are always gaps which are difficult to cover in a formal report. Employees working in different departments or divisions are likely to be under different rating systems which are not comparable, and this is an obstacle to interdepartmental transfer. Administrators find the task of keeping the records laborious and object to the substitution of such formal records for their own judgment. The records, consequently, are used chiefly as a guide but not as the sole basis for making promotions.

TRAINING FOR THE PUBLIC SERVICE · Interest in training for the public service has grown with the extension of government activities into many new fields.[42] Aside from the general educational background given by the schools and colleges, the only training for entrance to the public service until recently was that of the professional and technical colleges for specialized positions. However, since 1930 many colleges have established undergraduate courses in political science, economics, and psychology designed as partial training for administrative posts; while a few universities have organized special schools for that purpose. Some have experimented with internships, by which graduates in public administration are placed in government bureaus for a period of months or a year to learn by doing. Government's participation in pre-service training is still confined chiefly to the restricted fields of West Point and Annapolis.

[40]United States Civil Service Commission, *57th Annual Report* (1940), p. 130.

[41]W. E. Mosher and J. D. Kingsley, op. cit. chap. xxii; L. D. White, *Introduction to the Study of Public Administration* (1942), chap. xxiv.

[42]M. B. Lambie (Ed.), *Training for the Public Service* (1935); L. D. White, op. cit. chap. xxiii; L. Meriam, *Public Service and Special Training* (1936); University of Minnesota, *University Training for the Public Service* (1932).

IN-SERVICE TRAINING · The growing extent and complexity of government functions have forced the issue of training for employees already in service.[43] Those newly appointed need to be oriented and prepared in the shortest possible time to do their work accurately and quickly. The highly specialized character of some jobs often calls for a training not obtainable anywhere outside. A further important objective is to give the employee the opportunity for self-improvement so that he may take advantage of promotional opportunities. Many government agencies, with their staffs of scientifically trained men and ample equipment, are well qualified to carry on an educational program.

As far back as 1879 the Bureau of Engraving and Printing of the Department of the Treasury established a training school for engravers; and in 1908 the National Bureau of Standards instituted a training program for its staff. By laws of 1892 and 1901 Congress ordered that "the facilities for study, research and illustration in the Government departments . . . shall be accessible . . . to scientific investigators, and to duly qualified individuals, students, and graduates of any institution of learning."[44] The Department of Agriculture in 1920 established a broad program of in-service training, including a graduate school giving credits through regular courses but granting no degrees. Since that time, in-service training programs, large or small, have been instituted in all of the ten departments and in many of the independent agencies. The best-known are the National Police Academy of the Federal Bureau of Investigation and the Foreign Service Officers' Training School of the Department of State. But there also is specialized training in the proper agencies for such diverse employments as those of revenue agents, forest rangers, border patrols, public-health officers, and prison wardens.

THE NEW BASIS FOR IN-SERVICE TRAINING · An executive order of June 24, 1938, adopted what already had been instituted by individual departments and made it into a program.[45] The Civil Service Commission was ordered to establish practical training courses for employees in both the home offices and the field services. In so doing it was authorized to co-operate with the Federal Office of Education and with public and private institutions of learning. The commission established a Co-ordinator and Director of Training, whose functions are largely planning and supervising. Directly in charge of the training program in each department or agency is its director of personnel.

REMOVAL FROM OFFICE · The two prongs of the spoils-system pitchfork are firing the vanquished and hiring the victor.[46] One of the prime ob-

[43]L. D. White, op. cit. pp. 362–367; H. Walker, *Training Public Employees in Great Britain* (1935).

[44]27 Stat. 395; 31 Stat. 11–1039; E. Brooks, *In-Service Training of Federal Employees* (1938).

[45]United States Civil Service Commission, *History of the Federal Civil Service*, pp. 84, 85, 116, 128–130; United States Civil Service Commission, *57th Annual Report* (1940), pp. 31–34.

[46]W. E. Mosher and J. D. Kingsley, op. cit. pp. 399–401; C. J. Friedrich and others, op. cit. pp. 129–134; L. Mayers, op. cit. pp. 492–508; O. P. Field, *Civil Service Law*, chap. ix.

jectives of the original civil-service reformers was the elimination of the after-election discharge of government employees solely on the basis of party affiliation. Students of civil-service problems have long been divided as to whether or not the chief of an agency should be restricted by hard and inflexible rules in the discharge of his employees. Those who believe he should, the "closed-front-door and closed-back-door" school, argue that without such a rule political dismissals will be numerous and the purpose of the merit system be lost. In some cities civil-service laws based on this theory permit appeals from the discharging officer to the civil-service commission, which may order a reinstatement much to the detriment of discipline in the department. Those standing for a rule of easy discharge, the "closed-front-door and the open-back-door" school, point out that the administrative chief, bound by the register of eligibles and so unable to appoint his friends, will have no political motive for making discharges. They argue that the right to discharge for proper cause is necessary to good administrative management, and that unduly to hamper it is to place the right to a job above the rights of the public.

The Federal system adopted the latter principle. A law of 1912 provides that no person in the classified civil service shall be removed "except for such cause as will promote the efficiency of said service."[47] Certain safeguards are set up: the reasons for removal and the charges preferred against the employee must be in writing, and he must be allowed a reasonable time for answering them in writing. All papers respecting the case are filed for reference, and the officer making the charge may or may not grant a hearing. No appeal may be taken to the Civil Service Commission unless proof is offered that the removal was made for political or religious reasons. Even then, the commission may not overrule the discharging officer, but it may in its discretion certify the discharged employee for appointment elsewhere. Experience has fully justified the principle on which the law was drawn. The closed front door did eliminate the incentive for removals. Very few are made, administrative chiefs seemingly preferring to retain poor or incompetent employees rather than face the disagreeable duty of separating them from the service.

POLITICAL INFLUENCE IN APPOINTMENTS · Persons in the various States customarily looked to members of Congress to obtain jobs for them in the executive civil service. Rare was the person who won a seat in Congress without making, during the heat of the campaign, pledges for appointments to office. Those who drafted the Civil Service Act of 1883 inserted a provision that persons giving examinations or making appointments should not receive or consider any recommendations from any member of Congress concerning an applicant "except as to character or residence."[48] The law was legally unenforceable and never has been strengthened by later

[47] 37 Stat. 555 (August 24, 1912).

[48] 22 Stat. 406, chap. 27, sect. 10. L. Mayers, op. cit. pp. 148–151.

legislation. Its chief value has been moral, as a statement of the spirit of the merit system. Many times Congressmen have been embarrassed by a public revelation of their importunate demands for offices. Another rule of much the same character forbids an appointing officer to consider any recommendations for promotions except from the person under whom the employee has served. This too is a futile prohibition, but it could be made effective by a law penalizing the employee for the solicitation of such aid.[49]

POLITICAL ACTIVITY OF CIVIL SERVANTS · The spectacle of its members' using their time and energies in election campaigns tended to maintain an atmosphere of partisanship about the whole civil service. The Civil Service Commission attempted a corrective by adopting the following rule:

> No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.[50]

The principle was enacted into law by the Hatch Acts of 1939 and 1940. The first extended the prohibition to all Federal employees of the executive branch, whether classified or not, except policy-determining officers appointed by the President with the confirmation of the Senate; the second, to State and municipal employees compensated in part by Federal subsidies, and estimated at nearly 2,600,000 in number.[51]

Much depends on what constitutes political activity. The Civil Service Commission has not attempted a hard and fast definition, but has listed a number of specific things.[52] These include activities in political campaigns, such as the organization of rallies, the making of speeches, the distribution of literature, the publication of statements for or against any candidate or party, the solicitation of funds, or aid in getting out the vote. Service on party committees or as a delegate to a party convention and, of course, running for elective office are under the ban. The Attorney-General has ruled that the civil servant does not violate the law by attending mass meetings or caucuses if he does not participate in their deliberations, or by membership in political clubs if he is not active in organizing them. These laws have not been in effect long enough to permit a judgment of their efficacy; but it seems that they may have attempted too much, and there is doubt as to the power of Congress to exert such authority over employees of the States and localities.

[49]L. Mayers, op. cit. pp. 148–149. [50]L. Mayers, op. cit. chap. v.

[51]53 Stat. 1147 (August 2, 1939); 54 Stat. 767 (July 19, 1940); United States Civil Service Commission, *History of the Federal Civil Service*, pp. 133–135; M. Marx (Ed.), *Public Management in the New Democracy*, p. 207.

[52]United States Civil Service Commission, *57th Annual Report* (1940), pp. 19–21.

RETIREMENT AND PENSIONS · The purposes of a retirement and pension system are both to make the service attractive and humane and to add to its morale and efficiency. The Congressional Joint Commission on Reclassification of Salaries wrote in 1920: "Thousands of superannuates encumber the payrolls and reduce the morale of the departments. Some are brought to their desks in wheeled chairs, and in one case an employee frankly told your Commission that he had no duties 'because he was blind.' "[53] The Taft Efficiency and Economy Commission reported in 1912 that one out of every fourteen government employees in the District of Columbia was over sixty-five years of age, and a considerable number past eighty.[54] The retention of old and disabled employees not only lowers the quality of work but demoralizes by blocking the path of promotion to the young and healthy.

Government in the United States lagged behind governments in the states of western Europe in developing retirement systems; this is perhaps a corollary of the original "job" theory of our civil service.[55] The present comprehensive Federal retirement system is based on the acts of Congress of 1920 and 1930. It is mandatory for all full-time employees, excluding political officers and persons serving the government as contractors. The law sets retiring ages and provides pensions. In general, to be eligible for retirement upon a pension, employees must have reached the age of seventy and have rendered fifteen years of service. But a special list including mail-carriers and certain employees in the Indian service may retire at the age of sixty-five; certain others in hazardous occupations, at sixty-two. Employees who have rendered thirty years of service may retire two years under the established lines.

The annuity and disability benefits are paid from a fund built up by a regular deduction of 3.5 per cent from each salary, and a contribution of 2.45 per cent of each salary by the government. The amount of the benefit, therefore, is dependent on the salary and the years of service at the time of retirement. Each employee is given a choice between two kinds of pensions: a larger one which terminates at death and a smaller one with the provision that the unexpended amount shall go to his heirs. If the employee dies, resigns, or is discharged before the retirement age, the contributions are refunded to him with interest at 4 per cent. The magnitude of the system is shown by the accumulation by 1940 of over half a billion dollars in the retirement fund, and the payment in that year of $59,252,240.81 in benefits; while the deductions from pay rolls amounted to $42,944,829.42.[56]

[53]Quoted in L. Wilmerding, op. cit. pp. 203, 204.

[54]Commission on Economy and Efficiency, *Report to the President on Retirement Allowances* (1912); *62d Cong., 2d Sess., House Document No. 732*, pp. 7, 8, 181–188.

[55]L. Wilmerding, op. cit. pp. 207–210.

[56]United States Civil Service Commission, *57th Annual Report* (1940), p. 142.

UNIONS OF EMPLOYEES · In a day when the unionization of workers in private industry has become widespread, it is not surprising that the movement should have spread to government employees. The rapidly fluctuating body of civil servants characterizing the spoils system, as well as the hostile attitude of public opinion, was a deterrent. The early unions of civil-service employees were chiefly of a social and benevolent character.[57] It was natural that the first union to appear should be in the postal service, owing to the number of its employees and the commercial character of its work. Today a dozen or more unions embrace an estimated 40 per cent of the Federal, State, and local executive civil services. Those dominant in the national field are the National Federation of Federal Employees, formed in 1917; the Federal Workers of America, founded in 1932 and affiliated with the American Federation of Labor; and the United Federal Workers of America, dating from 1937 and affiliated with the Congress of Industrial Organizations. The American Federation of State, County, and Municipal Employees, founded in 1936, is the strongest in that field.

The unionization of public employees raises some problems. Have these unions the rights which government itself guarantees to those of employees in private industry? May they bargain collectively, go out on strike, and establish picket lines?[58] The constitutions of almost all the civil-service unions deny the use of the strike, but the question has not been passed on by the courts. That these unions now have the strength to play pressure politics is not to be denied. President Theodore Roosevelt, a pioneer civil-service reformer, followed by President Taft, forbade members of the classified service to solicit salary increases. President F. D. Roosevelt denounced any threat on their part to strike, while administrative regulations in almost all cities have a positive ban to the same effect. Nevertheless, there have been a few strikes.

The civil-service unions stress such objectives as the promotion of good feeling among their members, the extension and protection of the merit system, and the improvement of working conditions and the quality of public administration. On the whole they have been a constructive force, throwing their influence behind such reforms as the Classification Act of 1923, the Federal Reorganization Act of 1939, and the Ramspeck Act of 1940.

## *THE CIVIL SERVICE OF THE STATES AND LOCALITIES*

NATURE OF THE PROBLEM · The conditions in the States and their political subdivisions are much less favorable to the establishment and maintenance of efficient personnel systems than those prevailing in the

[57]S. D. Spero, "Employer and Employee in the Public Service," in C. J. Friedrich and others, op. cit. pp. 179–246; W. E. Mosher and J. D. Kingsley, op. cit. pp. 558–585; L. D. White, op. cit. pp. 426–441; S. D. Spero, *The Labor Movement in a Government Industry* (1924).

[58]D. Ziskind, *One Thousand Strikes of Government Employees* (1940).

Federal service. It would be difficult to find a State, county, or city in which there exists a public opinion favoring the merit system as strong as that brought to bear on the Federal service. Newspapers of general circulation, journals devoted to the subject of personnel administration, as well as various good-government associations of national scope, are quick to publicize and criticize infractions of the Federal civil-service rules. This is one instance of the sum of the parts not equaling the whole. The more impersonal character of the distant Federal service is another factor giving it immunity from interference.

A second consideration is the need of the local party machines for the nourishment of patronage, and their proximity to the appointing powers. As was shown in an earlier chapter, the national political parties, from one point of view, are federations of city and State machines. The numerous city-hall and county-courthouse employees, dependent on the public pay roll for their livelihood, are the neighbors and friends of the ward and precinct politicians. Job brokerage is a personal and neighborhood matter. There is no distance to lend enchantment to the view of the merit system.

In the next place, the democratic principle of the popular election of public officials is deeply ingrained in the localities. State administration, with its numerous self-governing units, affords a broad opportunity for the use of the ballot. The counties and townships generally elect nearly all their principal administrative officers, as well as their boards of commissioners and trustees. With the exception of a few States, the State officers analogous to the members of the President's cabinet are popularly elected.

Federal personnel administration, finally, is greatly strengthened by the very magnitude of its field. The problems of job analysis and classification, of salary scales, promotions, and retirement, for instance, are complex, requiring a highly developed, expert, and well-financed administration. Only the very largest cities, counties, and States have the resources to meet the need, the numerous small and weak political subdivisions having inadequate means for this purpose. The situation in some regions is alleviated by giving them the services of the State civil-service commission or that of a large city of the area.

EXTENT OF THE MERIT SYSTEM · New York established the first State merit system in 1883; since then twenty other States have fallen in line.[59] In six of these, California, Colorado, New York, Ohio, Louisiana, and Michigan, the program rests on provisions in the State constitution; in the remaining ones, only on acts of the legislature. The States without a general program have departmental merit systems for those who participate in the administration of the Social Security Act. The State systems differ in details, but generally include the making of registers of eligibles based on examinations, the classification of employees, and the regulation of promotions,

[59] W. E. Mosher and J. D. Kingsley, op. cit. pp. 77–85; Civil Service Assembly, "Merit Systems in the States," *The Book of the States, 1943–1944*, pp. 215–222.

demotions, and transfers. The Civil Service Assembly estimates that approximately 1180 governmental jurisdictions throughout the country have merit-system programs in operation.[60] These include 936 cities, 184 counties, the 48 States, the Federal government, and 8 miscellaneous governmental units. Of the 1072 cities of ten thousand population or more, 570 had employees under the merit system; but this included all but 8 of the 92 cities of one hundred thousand or more.[61] None of these had all its employees in the classified service; generally, however, the larger the city the larger the percentage. The Ohio constitution requires that all non-policy-forming employees of all political subdivisions be placed on the merit system; while New Jersey gives each county and city the right to decide by referendum. New York from the beginning made the merit system compulsory for municipalities; and in 1941 it extended the requirement to the counties, but permitted each to choose one of the optional forms set up by the legislature.[62]

TYPE OF ORGANIZATION · The first States to adopt merit systems were generally influenced by the Federal system. The personnel agency was a bipartisan commission of an odd number of members appointed for overlapping terms. Today the designation "civil-service commission" is used in only five instances, while such new terms as "state personnel board," "department of civil service," "personnel department," and "department of employment and registration" are found.[63] These signify a broader conception of the functions to be performed than that originally held. The commission or agency may serve on a part-time or full-time basis. It generally has policy-making and sometimes judicial functions, leaving the administrative work in the hands of a single executive officer appointed by the commission itself or by the governor on the basis of examination. The personnel agencies of the cities and counties are usually of the commission type. The State agencies of nine States, including California, New Jersey, and New York, are authorized to give services to cities and other political subdivisions.

FUNCTIONS OF THE PERSONNEL AGENCY · The authors of a recent comprehensive study of public-personnel problems list twenty-six different functions which the central personnel agency ought to perform.[64] These together cover in general the whole field of personnel management. No central State or city agency possesses such an extent of power, and many fall far short of it. Besides the basic duties of recruitment and examination, certification, service ratings, promotion, and retirement are included

[60]Civil Service Assembly, *News Letter, January, 1944.*

[61]J. M. Mitchell, "Personnel Administration, Developments in 1942," *Municipal Year Book, 1943*, p. 204.

[62]Ibid. p. 196. Since that time 55 out of the 62 counties have selected optional forms. The cities and school districts have been in the system since 1884.

[63]Council of State Governments, *Book of the States, 1943-1944*, p. 218.

[64]W. E. Mosher and J. D. Kingsley, op. cit. pp. 89–100.

those of hearing employees' grievances, cultivating good public relations, promoting health, recreation, and welfare programs, and co-operation between the employees and between management and employees. The more recently amended and adopted systems have included more and more of the latter features.

IN-SERVICE TRAINING · Much progress has been made in a few States and a considerable number of cities in establishing programs of training for employees already in service.[65] New York, California, and Maryland have training programs for a wide variety of employees, including such specialized positions as those of State police and of prison, hospital, medical, and nursing staffs. Leagues of municipalities in nearly half the States have taken the lead in promoting such training, particularly for policemen and firemen. The basis for a much wider program, however, was provided by the George-Deen Act, of June 8, 1936.[66] This extended the existing system of Federal vocational-training subsidies to "public and other service occupations."

The State of New York was already organized to take immediate advantage of this new form of Federal-State co-operation. Its Conference of Mayors and Other Municipal Officials and its Association of Towns, in co-operation with the State Education Department, in 1928 had begun a program of in-service training for local employees. Beginning with firemen and policemen, it was expanded by 1931 to twenty classes of employees. In 1935 the Regents chartered a group of municipal officials as the Municipal Training Institute of New York State, to take over the program; and in 1935 a second group, the Town and County Officers' Training School of the State of New York, was chartered. Both of these receive funds under the George-Deen Act. The Bureau of Public Service Training of the State Department of Education works with the large urban centers to establish in-service training courses. The city of New York in 1939 established, in its civil-service commission, a Bureau of Training, which is in charge of programs extending to more than half of all the principal departments and agencies. In its first year thirty of the city departments requested training for a total of twenty-six thousand employees.

THE MERIT SYSTEM IN NEW JERSEY · The civil-service setup in New Jersey will serve to illustrate those of the better-organized States.[67] At its head is the bipartisan commission of five members appointed for indefinite

[65]W. E. Mosher and J. D. Kingsley, op. cit. pp. 279–303. For accounts of in-service training programs cf. E. Brooks, *In-Service Training of Federal Employees* (1938); G. W. Bemis, *Internship Training for the Public Service in Los Angeles County* (1939); Mayor's Council on Public Service Training, *Training New York's Employees* (1940).

[66]49 Stat. 1489, sect. 6.

[67]New Jersey State Civil Service Commission, *Thirty-sixth Annual Report* (1943); Princeton Local Government Survey, *Local Government in New Jersey* (1937). The annual reports of the various State civil-service commissions contain valuable material on State personnel administration. Cf. the special studies, State of Minnesota, Department of Education, *A Merit System for Minnesota* (1937), and *First Report of the New York State Commission on Extension of the Civil Service* (1940).

terms by the governor and senate. It is a policy-making body, with an executive officer known as the Chief Examiner and Secretary. Its jurisdiction extends over the State employees and those of all counties and municipalities which choose by referendum to come under it. By 1943 eleven of the twenty-one counties, with 13,691 employees, and forty-three municipalities, with 30,691 employees, were included. The total of about 80,000 in and outside the classified service represented one in fourteen of all persons gainfully employed in the State.

The commission has the usual personnel functions of recruitment and examination, classification of positions, making of salary adjustments, administration of veteran preference, hearing of appeals from dismissals, and research and recommendations. It maintains eleven local offices in various parts of the State. In the year 1943 it received 4772 applications, gave 560 open competitive examinations, and certified 1281 new appointments and 667 promotions.

SUMMARY · Much progress has been made in the development of sound personnel practices in the States and their subdivisions, but the mere recital of laws and organizations is somewhat deceptive. More than half the States and 47 per cent of the cities of over ten thousand population have no State-wide systems whatsoever. Even with many of the units so listed the merit system is not much more than a name. The lack of an enlightened and aggressive public opinion is responsible for many of the administrative weaknesses. The head personnel agency is frequently underfinanced and manned with amateurs and persons not sympathetic toward the merit principle. The plan of classification, the key to the success of any system, often is inaccurate or incomplete. Powerful political machines frequently make sport of the system and turn it to their own advantage. Typical abuses are sham classification titles, favoritism in grading examination papers, and the application of pressure to those at the top of the registers to force them to waive their priority for appointment. For purposes of favoritism, positions are arbitrarily made exempt from the classified service. There is also a wavering conception as to the proper relation of the civil-service commission to the chief executive. One view is that it should be one of his staff agencies, as in a private industrial concern; the other, that it should stand in a semi-isolated position, as independent as possible of executive influence. Consistent with the latter conception is the power frequently given to review all dismissals and make reinstatement. Chief executives have frequently found their hands tied in administrative direction by the reinstatement of incompetent employees, with a consequent loss of loyalty in the working forces. Raymond Fosdick, in his study of police systems, found that the power of the personnel agency to reinstate robs the police executive of initiative and leadership, and so "undermines the whole principle of responsible leadership."[68] There

[68] R. B. Fosdick, *American Police Systems* (1920), p. 291.

is a noticeable tendency for the merit system, instituted for the public good, to be transformed into an instrumentality to protect jobs in the interests of the job-holders.

Nevertheless, what have been pointed out here are only imperfections in a newly instituted reform which represents one of the most important advances in modern democratic government.

## *READING LIST*


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CHAPTER XXVII

# *The Governor and State Administration*

In the eyes of the law the States are entities of great dignity and formidable powers. Thirteen of them antedate the national government itself. The Tenth Amendment, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is still the basic rule defining their capacity. But it is a rule beclouded with an ever-increasing number of exceptions. Nevertheless, the States are not administrative subdivisions of the Federal government, the governor is not the administrative subordinate of the President of the United States, and State officers in general may not have duties imposed upon them by acts of Congress. This is the constitutional picture, which does not show the vast amount of voluntary co-operation existing between the Federal and State administrations.

## *FEDERAL-STATE RELATIONS*

ADMISSION OF STATES TO THE UNION · The power to admit new States to the Union rests with Congress.[1] While the procedure has varied considerably, these are the typical steps. The region already has passed through the phase of unorganized territory to that of full organization, with an elected legislature and governor and with courts appointed by the President. At the proper time, for which the gauge chiefly is a population of sufficient size to justify the dignity, the territorial legislature petitions Congress for permission to hold an election for delegates to a constitutional convention and to submit its work to a referendum of the people of the territory. Congress, if favorably impressed, passes an enabling act authorizing the legislature to call a convention and to apply for admission. A constitution approved by the electors of the territory is submitted, and on this basis Congress then may vote to admit the State to the Union.

Congress is the judge as to whether the Union should be increased by the admission of any new applicant; it is under no legal obligation to act favorably. The last territories of the mainland disappeared in 1912 with the admission of Arizona and New Mexico. The prospects of the only two fair probabilities for future Statehood, Alaska and Hawaii, are dimmed by several factors: distance and detachment from the homeland in both cases; severity of climate and small population in the former; and mixed popu-

[1] *United States Constitution*, Art. IV, sect. 3.

lation, as well as considerations of military and naval strategy, in the latter. As prerequisites for admission, Congress may impose conditions not all of which may be permanently binding on the State. Thus President Taft vetoed the resolution admitting Arizona to the Union because the constitution submitted contained a provision for the recall of judges by popular vote.[2] Thereupon the offending clause was stricken out, but was reinserted after the resolution of admission had been passed. Similarly, the enabling act for Oklahoma in 1906 and the constitution submitted provided that the State capital should be removed from Guthrie before 1913.[3] But an act of the legislature of 1910, providing for an immediate removal to Oklahoma City, was approved by the United States Supreme Court on the grounds that the determination of the location of its capital is a right reserved to the States and that States must be admitted on an equal footing with the others.

Other court decisions, however, have upheld, as binding, certain conditions in the enabling act of a commercial nature, such as the use of proceeds of lands given to the State and the nontaxability of the Federal lands located in the State.[4]

Congress is further restricted by the constitutional provision that no new State may be erected within the jurisdiction of any other State or may be formed by the junction of two or more others or parts of others without the consent of the legislatures.

GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT · The United States also guarantees every State a republican form of government.[5] What constitutes a republican form of government is chiefly for Congress to decide. The question did come before the Supreme Court when an Oregon telephone corporation refused to pay a tax levied by a law adopted by the initiative and the referendum.[6] The corporation had contended that a State government ceased to be republican if it legislated other than through a representative legislature. The Supreme Court refused to pass on the question, on the ground that the question was a political one belonging to Congress. Undoubtedly that body would refuse to recognize as republican any State which denied popular participation in lawmaking or in which dictatorial rule had been established. Louisiana under the Huey Long regime probably did not fall far short of the prohibition. Congress has a ready means for bringing such a State to terms in its right to refuse to receive its Senators and Representatives.

GUARANTEE AGAINST DOMESTIC VIOLENCE · It is the duty of a State to maintain peace and order within its borders.[7] If it is unable to discharge

[2]Aug. 15, 1911. *Congressional Record*, 62d Cong., 1st Sess., pp. 3964–3966.
[3]*Coyle* v. *Smith*, 221 U. S. 559 (1911).
[4]*Stearns* v. *Minnesota*, 179 U. S. 223 (1900); *Ervien* v. *United States*. 251 U. S. 41 (1919).
[5]*United States Constitution*, Art. IV, sect. 4.
[6]*Pacific States Telephone and Telegraph Company* v. *Oregon*, 223 U. S. 118 (1912).
[7]*United States Constitution*, Art. IV, sect. 4.

this responsibility, the President is empowered, upon the request of the legislature or of the governor (if the legislature is not in session), to send in Federal troops.[8] Fortunately, few such requests have been necessary. The President may send troops into a State without the request of its authorities if Federal laws are being violated, as Grover Cleveland did during the Pullman car strike in Illinois in 1894.[9]

VOLUNTARY CO-OPERATION OF STATE AND FEDERAL OFFICIALS · The success of our system of government is very largely dependent upon the co-operation of State and Federal officials entirely outside stated constitutional requirements.[10] For instance, during the Civil War the governors of the States recruited military units which then were mustered into the Federal service. Much of the work of the Department of Agriculture depends for its efficacy on co-operation with similar State departments, their agricultural colleges, and county agents. Reporting for the United States Public Health Service is carried on by the State health departments, and the two collaborate in the preparation of their regular health bulletins. The aid of secretary of state and local election boards is necessary to the proper functioning of the system of elections for President and members of Congress. The national social-security system is dependent on concurrent state legislation and the co-operation of the State agencies concerned with the collection of the taxes and the distribution of the benefit funds.

FEDERAL SUBSIDIES FOR STATE ACTIVITIES · As has been explained in connection with particular functions, Federal control over many State activities has been secured by grants-in-aid.[11] The funds are granted on the condition that they be matched by State appropriations and that they be applied to the purposes and according to the standards laid down by Federal law. Among the matters thus brought under Federal control are highway construction, vocational education, infant and maternity hygiene, vocational rehabilitation, military training in the State colleges, and the equipment and training of the State militia.

## *INTERSTATE RELATIONS*

To the new national government created by the constitution of 1787 were delegated those powers which it was thought required uniform action throughout the United States. All those reserved to the States might be administered in such manner as each might wish. Such matters as marriage and divorce, the inheritance of property, the making of contracts,

[8] *Luther* v. *Borden*, 7 Howard 1 (1849).

[9] G. Cleveland, *Presidential Problems* (1904), pp. 79–117.

[10] J. P. Clark, *The Rise of a New Federalism* (1938), pp. 12–45, 81–108; G. C. S. Benson, *The New Centralization* (1941), chap. iv.

[11] Chaps. XVIII and XLIV; A. F. Macdonald, *Federal Aid: A Study of the American Subsidy System* (1928); V. O. Key, *The Administration of Federal Grants to the States* (1937); E. D. Fite, *Government by Cooperation* (1932).

the rights of property, the relation of employer and employee, and the regulation of industry were thought to be properly the concern of each individual State. The necessity for a certain amount of co-operation and give and take among the members of the federation, however, was recognized by the framers, and such provision was made. It is a generally recognized principle of public law that the authority of a state ceases at its boundary line, and whatever force its laws have beyond is due only to the courtesy of the second state affected. The rights of individuals and nations on the high seas are governed by international law, but whatever rights they may have in the territory of a foreign state depend on its tolerance or treaty agreements. The clauses of our Constitution governing interstate relations therefore are analogous to similar provisions in the treaties which we have negotiated with foreign nations.

FULL FAITH AND CREDIT · Obviously one of the most important matters needing adjustment in such a federation as that of the United States is the protection of the legal rights of the citizen of a State against persons who default by removing to other States. Without some such national safeguard, persons owing money could avoid suit and payment by moving outside the State's jurisdiction; and persons likewise could escape their obligations as husband, guardian, employer, trustee, or whatever it might be. To remedy this difficulty, the Constitution provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and gives Congress the power to enforce the obligation by proper legislation.[12] This does not mean that one State is obliged to enforce the criminal laws of another, but that the certified legal instruments of one, such as wills and deeds, must be accepted at face value in the other. For instance, if Jones receives judgment against Smith, a fellow resident of Cleveland, Ohio, in the amount of five thousand dollars and Smith moves to Illinois without paying it, the former may present the judgment of the Ohio court to one in Illinois and obtain a decree for the amount of the judgment. Likewise, wills, deeds, and other legal instruments given judicial approval in one State are enforceable in that to which the party has removed.[13]

Somewhat more difficulty has been experienced with respect to divorces. As the strength of a chain is that of its weakest link, so the divorce laws of the laxest State influence those of all others. Four States, New York, North Carolina, Pennsylvania, and South Carolina, give only a qualified recognition to divorces given in others. The Federal courts hold that a decree of divorce granted by the courts of a State in which neither party is domiciled need not be recognized in another;[14] nor if the person suing for divorce is not a bona fide resident, even if the nonresident defendant voluntarily

[12] *United States Constitution*, Art. IV, sect. 1.
[13] *Reynolds* v. *Stockton*, 140 U. S. 254 (1891).
[14] C. G. Vernier, *American Family Law* (1932), Vol. II, pp. 159–162.

submits to the jurisdiction.[15] A divorce decree given the plaintiff in another State against the defendant who remained at the matrimonial domicile, and was not served with process and did not appear in the suit, need not be recognized.[16] However, full faith and credit must be given to divorces of a court in the State where the couple lived as husband and wife, even if the nonresident defendant was served with process within the State and did not appear.[17] The unsatisfactory character of this phase of interstate relations has led to some agitation for a constitutional amendment which would place the subject under laws of Congress.

INTERSTATE RENDITION · *Extradition* is the word used in international law for the surrender of a fugitive from justice to the nation from which he has fled. No nation has the right to pursue criminals into the territory of another, and whether the fugitive will be surrendered depends upon the existence of a treaty of extradition with the country of refuge, or, lacking that, its grace and sympathetic attitude. The crimes for which a request for extradition will be honored are enumerated in the treaty. Nations generally will not extradite their own citizens for any cause, or aliens accused of political crimes. It has been seen that the "full faith and credit" clause does not require one State to enforce the criminal laws of another, but that a further provision requires the surrender of a person charged with crime who has fled from justice to another State.

Any person charged with "treason, felony, or other crime" is subject to extradition, whether it be a crime in the State of refuge or not.[18] The steps in the rendition procedure are simple. The governor of the State sends a demand for the person as a fugitive from justice, accompanied with a certified copy of the indictment; the governor of the State to which such person has fled causes his arrest, and turns him over to the agent of the demanding State, usually a sheriff.[19] The rendition clause may not be used as a flimsy basis for deporting a person. He must actually have been charged with the violation of criminal law, and he can be surrendered only to the State in which the crime was committed.

In spite of the emphatic "demand" and "shall" of the constitutional phrase, no governor can be forced to deliver up a fugitive against his will. Chief Justice Taney, writing for the Court in the case of *Kentucky* v. *Dennison*, declared that it was a moral duty only; for the "federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[20] So it often is a matter of public speculation, when occasions for extradition arise, whether or not the demand will be honored. The governor may refuse, on the grounds

[15] *Bell* v. *Bell*, 181 U. S. 175 (1901); *Andrews* v. *Andrews*, 188 U. S. 14 (1903).
[16] *Haddock* v. *Haddock*, 201 U. S. 562 (1906).
[17] *Atherton* v. *Atherton*, 181 U. S. 155 (1911).
[18] *United States Constitution*, Art. IV, sect. 2, clause 2.
[19] As prescribed by the act of February 12, 1793, 1 Stat. 302.
[20] 24 Howard, 66 (1861).

that the evidence does not show a presumption of guilt, that the fugitive would not get a fair trial if returned, or that too much time had elapsed before the requisition was made. One of the most famous cases involving the denial of a requisition was that relating to Governor Taylor, claimant to the office of governor of Kentucky, who fled to Indiana after being charged with the assassination of his rival Goebel in the course of a disputed election.[21] A more recent case was the refusal of the governor of New Jersey to honor the requisition of the governor of Georgia for the return of one Robert E. Burns, who made his case notorious by writing a book entitled *I Am a Fugitive from a Georgia Chain Gang*.[22]

Criminals frequently win delays in prosecution by fighting extradition in the courts. An accused person may offer the grounds that he was not in the State at the time the crime was committed, that the statute of limitations has run, that he has not been properly charged with the crime, or other technicalities.[23] Sometimes he makes a grandstand play by demanding a hearing before the governor, but no such right exists unless the State law specifically provides it.

RIGHTS OF CITIZENS IN OTHER STATES · The States'-rights atmosphere of the day gave the framers reason to fear that the citizens of one State might meet unfriendly and discriminatory treatment in another. The Constitution consequently provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[24] In its simplest terms the clause means that no State may deprive the citizens of other States of those privileges and immunities which are common to the citizens of all the States, or impose burdens on citizens of other States not imposed on its own. On the other hand, it may discriminate in favor of its own citizens in the use of natural resources by charging outsiders higher license fees for their use, and it may impose special taxes or conditions on foreign corporations doing business in the State. So, in general, the citizen of a State has the right to pass through or reside in another and, while there, to enjoy the same rights of life and property as its own citizens.[25]

INTERSTATE COMPACTS · When the Constitution made the provision that "no State shall, without the consent of Congress, . . . enter into any agreement or compact with another State or with a foreign power,"[26] it

[21]S. H. Adams, "The State of Kentucky vs. Caleb Powers," *McClure's Magazine*, Vol. XXII, pp. 465–475.

[22]R. E. Burns, *I Am a Fugitive from a Georgia Chain Gang* (1932).

[23]*South Carolina* v. *Bailey*, 289 U. S. 412 (1933); *Pierce* v. *Creecy*, 210 U. S. 387 (1908).

[24]*United States Constitution*, Art. IV, sect. 2, clause 1.

[25]The Court, in *Corfield* v. *Corvell*, 4 Wash. (U. S.) 371 (1823), said that these privileges and immunities comprehended those "which are, in their nature, fundamental: which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union."

[26]*United States Constitution*, Art. I, sect. 10, clause 2.

was an acknowledgment that compacts could be made. Though no compact with a foreign nation has ever been made, nevertheless, in the first hundred years under the Constitution, Congress gave its consent to eleven interstate compacts, all but one of which dealt with boundary questions.[27] Not until the time of the First World War were the potentialities of the compact as a means of interstate co-operation realized. Here was a means by which the abrupt barriers of State boundary lines might be hurdled, for purposes of interstate co-operation and regional administration. Between 1917 and 1943 sixty-three such compacts were made, bringing the total to more than ninety. Of the twenty-eight between 1934 and 1943, only one was concerned with a boundary dispute. Compacts are now concerned for the most part with the navigable rivers, including flood control, the conservation of fish, the building of bridges, and the use of their waters for purposes of irrigation. Perhaps the most famous of these is the Colorado River Compact of Arizona, California, Colorado, New Mexico, Nevada, and Wyoming.[28]

Of still greater interest is what the compact may have to offer in the establishment of regional co-operation and administration in matters involving the regulation of economic affairs, sanitation, and crime control. For instance, the New York-New Jersey Port Authority Compact (noted in another connection) erects an administrative agency astride State lines, and Kansas and Missouri have a compact mutually exempting the waterworks of their respective parts of Greater Kansas City from taxation. Twelve States which produce nearly 80 per cent of the nation's oil are parties to the Interstate Oil Commission. Eleven States are parties to the Atlantic States Marine Fisheries Compact, whose purpose is the conservation of marine fisheries. The Tri-State Pollution Compact, involving New York, Connecticut, and New Jersey, creates a sanitary district to deal with the pollution of the waters of New York Harbor. Minimum wages for women and children are the subject of the Concord Compact, involving chiefly the New England States. About three fourths of the States are parties to the Crime Compact of 1934, whose main purpose is the interstate supervision of paroles and probationers.[29]

[27]The acts of Congress authorizing or ratifying interstate compacts are given in the *Congressional Record*, 74th Cong., 1st Sess., pp. 11,810–11,812, July 17, 1935. As summarized by W. B. Graves in his *American State Government* (1941), between 1789 and 1932 sixty-two compacts were entered into with the specific consent of Congress, and between 1780 and 1931 sixteen were made without such consent (p. 737).

[28]Jane B. Lynch, "Recent Developments in Interstate Compacts," Council of State Governments, *Book of the States, 1943–1944*, Vol. V, pp. 51–57. Some of the others are those of Montana, Wyoming, and North Dakota for the Yellowstone River; Indiana, Ohio, Illinois, New York, Kentucky, and West Virginia to control the pollution of the Ohio River and its tributaries; and Kansas, Nebraska, and Colorado for the distribution of the waters of the Republican River, Ibid. pp. 52–57.

[29]Ibid. pp. 57–72.

The weaknesses of the interstate compacts are that the States may withdraw at their own pleasure, and that the legislatures may fail to provide the legislation necessary to make them effective.

CO-OPERATION OF STATE OFFICIALS · The various means of interstate co-operation described above are all required or countenanced by the Constitution. They have been supplemented to a considerable extent by voluntary action of State officials, some of which is sporadic and some organized.

Each State has its own body of statutory and common law, each of which differs in many important respects from that of the other States. In 1889 the American Bar Association, a national organization of lawyers, set up the National Conference of Commissioners on Uniform State Laws, which since 1892 has had a semiofficial standing through the appointment of three commissioners for each State by the governors.[30] This conference draws model laws on various subjects, such as contracts, corporations, property, and social welfare, which are then submitted to the legislatures of all the States. By 1932 all the States and territories had adopted two or more of the forty-odd laws submitted, while ten States and Alaska had adopted twenty or more.[31] The American Law Institute, founded in 1922, is another organization engaged in drafting model statutes for submission to the States.[32]

THE GOVERNORS' CONFERENCE · The first governors' conference met at the White House in May, 1908, at the call of President Theodore Roosevelt.[33] The chief topic considered was the conservation of natural resources. The conference later was organized on a permanent basis, with an executive chairman. The purpose is to act as a clearinghouse of information on administrative subjects. As a rule controversial subjects are not taken up at the annual meetings. The conference has not fulfilled the promise of its early years, but has served a useful purpose.

Less spectacular but probably more influential in promoting State co-operation are the various associations of State administrative officials.[34] Among these are the National Association of Attorneys-General; the National Association of Secretaries of State; the National Association of Commissioners, Secretaries, and Departments of Agriculture; the National Association of State Auditors, Comptrollers, and Treasurers; the Association of Dairy, Food, and Drug Officials of the United States; the Civil Service Assembly of the United States and Canada; and the Association of State Foresters.

[30]W. B. Graves, *Uniform State Action* (1934), chap. iii.
[31]Ibid. p. 39.
[32]W. B. Graves, *American State Government* (1941), pp. 748, 749.
[33]Council of State Governments, *Book of the States, 1939–1940*, pp. 35–36.
[34]Council of State Governments, *Book of the States, 1943–1944*, Vol. V, p. 45. W. B. Graves lists upwards of a hundred such associations in his *Uniform State Action*, pp. 305–325.

## *STATE ADMINISTRATION*

The national constitution recognizes only two units of administration in the United States, that of the central, or Federal, government and that of the State. It has been shown already that only a few restrictions, general in character, are laid down for the State for the administration of its reserved powers, such as a "republican form of government." It is free, in its constitution and laws, to set up whatever organization of administration it wishes. All powers might conceivably be concentrated in a bureaucracy located at the State capital, or, at the other extreme, be largely delegated to local subdivisions established for that purpose.

CHARACTERISTICS OF STATE ADMINISTRATION · As a matter of fact, the States uniformly have followed the latter alternative. State administration is highly decentralized. Here the principle of local self-government flourishes in full flower. Whereas only one Federal administrator out of a peacetime total of one million is elected by the people, several thousand are chosen in the larger States.[35] Not only is the responsibility for State administration largely delegated to its political subdivisions, but only a minimum of supervision is exerted from the State capital.

Legislatively, however, the States are centralized. The legislature declares law for the entire State and all its political subdivisions, leaving to the municipal councils and, in some cases, the county boards only a field of minor legislation. In the realm of criminal law, for instance, the definition of offenses and their punishment rests with the legislature, whereas the local councils may define misdemeanors arising out of purely local functions. The State constitutions, in varying degrees, leave even the creation of the local units of government as well as their organization to the legislature.

STATE ADMINISTRATIVE UNITS · Naturally no two plans of State administration are exactly alike, but there is a sufficient uniformity to make it possible to give a representative picture. Four levels of administration may be distinguished. (1) At the top is the central State government, including the governor and other department heads, such as treasurer and attorney-general, which is specified partly by the State constitution. (2) Next are the counties, with their boards of commissioners or supervisors, auditor, treasurer, recorder, and so on. (3) The next level is composed of the cities, villages, towns, boroughs, and townships. (4) At the bottom is the medley of districts and precincts, which are created to discharge one or more particular functions.

SCOPE OF STATE ADMINISTRATION · Unlike the Federal government, the States usually may undertake new functions without amending their

[35]H. McClosky, "The Units of Government in the United States," *Book of the States, 1943–1944*, pp. 89–95. A summary and analysis of the study by William Anderson of the same title (1942).

constitutions.[36] Industrialization, urbanization, and the growing density of population have been accompanied by a steady expansion of State functions, administration of which has been distributed among the various political units of the State. Education at the elementary and high-school levels, for instance, usually is administered by special local districts, while the colleges and universities are under the control of the central State government. Some types of poor relief may be administered by the municipality or township; others, by the county; while the larger institutions for defectives and dependents are reserved to the central government. Since the functions of government are considered individually in subsequent chapters, irrespective of the jurisdiction administering them, only a generalized picture of those belonging to the State is given here.

As is true of all governments, the State has the power to organize itself, to create offices and subordinate units like the county and the municipality, and to apportion powers to each. It can do those things which are necessary to the operation of the government itself: raise money by taxation and borrowing, expend funds for necessary expenses, provide a system of elections for filling offices, and set up a system for the organization and management of its personnel. Of a similar character is its power to maintain peace and order and punish crime, as necessary to the existence of the government itself and the well-being of society.

Next in order is a long list of functions which are in the nature of services to the people. Among these are the definition of the rights of persons and property, and the establishment of courts for their protection; the promotion of public health and sanitation; the construction and maintenance of public works, including buildings, highways, bridges, and markets; provision for public education and recreation; the establishment of standards for the professions and trades; relief and care for the poor; licensing, as a means of protection to the public; the keeping of vital statistics; the administration of the estates of deceased persons; the recording of land titles; and the conservation of natural resources.

State administration is concerned with the problems of business, labor, and agriculture, as is shown by the numerous boards and commissions bearing those names.

## *THE GENERAL ADMINISTRATION OF THE STATE*

Four different levels of State administration were distinguished in a preceding paragraph. The first, including the governor, his associates at the capital, and their subordinates in the field offices, was referred to as the "central State government." To conform to common usage and for purposes of brevity, this hereafter will be referred to simply as "State govern-

[36] A. W. Bromage, *State Government and Administration in the United States* (1936); W. F. Dodd, *State Government* (1922), chaps. ii, vi; A. N. Holcombe, *State Government* (1926), chap. xii.

ment" or "State administration." Consideration of the three lower levels, the counties, municipalities and townships, and special districts, is reserved for subsequent chapters.

NATURE AND SCOPE · Except in a few reformed State governments administration is not unified under a responsible executive.[37] This diffusion of responsibility comes from the popular election of some heads of departments and from the existence of many boards and commissions, which, while appointed by the governor, are left outside his control. Furthermore, only an occasional department is a true department, with control from top to bottom of all officers and employees concerned with the discharge of the function entrusted to it. The State treasurer's office, for instance, has little if any control over the county, city, or township tax-collectors; and the attorney-general's office is not a department of justice, with control over the county and city prosecutors and jails. A nearer approach to complete central State control is found in the organization of some of the newer functions, such as the administration of highways and liquor dispensaries.

The older State officers, such as treasurer, auditor, and attorney-general, generally have some supervisory relation to the local officers performing the same function; but this usually is slight and concerned more with forms and procedures than actual direction. The number of offices with "line," or field, employees offering direct services to the people is not large; for in spite of the expansion since 1900 the central government of the typical State still does not itself undertake a large number of functions. The greater part of the new services demanded by the times have been turned over to the local governments below or to the Federal government above. The chief line services with which State administration is concerned today relate to the central charitable, correctional, and penal institutions; the university and teachers' colleges; the employees' compensation fund; State police, health, and sanitation; examination and licensing of the professions and trades; the conservation and propagation of wild game; State forests; the maintenance of agricultural experiment stations; and the building and maintenance of through highways. In addition there is an extensive field of inspection and regulation, including mines, workshops, and factories, banks and insurance companies, the sale of securities, and the traffic in intoxicating liquors and drugs.

## *THE GOVERNOR*

THE OFFICE · The office of State chief executive has undergone even greater changes since 1789 than that of President of the United States. Beginning in 1917, a movement has been under way for the remodeling

[37] W. B. Graves, *American State Government* (1941), chap. xii; A. N. Holcombe, op. cit. pp. 384–401.

of the State administrative structure. By 1944 this had extended to twenty-seven states.[38] The effect in each instance was some strengthening of the governor's position, although in only about half a dozen was this position radically changed. To this half dozen some of the generalizations in the succeeding sections apply not at all or only with limited force.

The governor is the State's most conspicuous officer.[39] While his legal powers are relatively much inferior to those of the President of the United States, public opinion ascribes to him somewhat the same position. In case of emergency, such as fire, flood, strikes, or widespread failure of banks, he is expected to take remedial action, whether the constitution and laws specifically so authorize or not. He is in no sense a satrap of the President of the United States; and Congress may impose on him by law no duty which he is bound to exercise. His position is weakened by the fact that he is only one of several executives elected by the people at large. In all except a few States the powers of the office are much less than what are popularly attributed to it. But even at its weakest an able incumbent may occupy a position of dignity, power, and leadership.

TERM, QUALIFICATIONS, AND SALARY · The one-year term prevalent at the beginning of our national era gradually gave way to a longer one, until now it is four years in twenty-seven states, two in twenty, and three years in one (New Jersey).[40] The four-year term is the rule in the Old South and significantly has been adopted in four populous States of the Northeast and Middle West, New York, Pennsylvania, Illinois, and Indiana. In the early years, fear that the governor might perpetuate himself in office by building up a strong following was an influence making for a short term. Such is the basis, too, for the various restrictions on re-eligibility for election found in seventeen States. Twelve of these with four-year terms, all Southern except Indiana and Pennsylvania, prohibit two consecutive terms. Of the two-year States, Tennessee prohibits more than three consecutive terms, and Delaware and Oregon more than two; while New Jersey's governor is not re-eligible immediately after his term of three years.

The sentiment found in some of the older state constitutions in favor of a "frequent recourse to first principles," by sending officers back to the people often for approval at an election, seems to have lost much of its force. Not only have the terms been lengthened but the ancient prejudice against long service in office has diminished. Conspicuous instances since 1900 of repeated re-election for consecutive terms were those of George P. Hunt in Arizona, Albert T. Richie in Maryland, and Alfred E. Smith and Herbert H. Lehman in New York, who served six, four, five, and four terms respectively. The tendency toward the four-year term accords with the movement to make the governor the actual administrative head of the State.

[38] A. E. Buck, *The Reorganization of State Governments in the United States* (1938), pp. 1–10.
[39] L. Lipson, *The American Governor: From Figurehead to Leader* (1939), pp. 239–242.
[40] Council of State Governments, *Book of the States, 1943–1944*, Vol. V, p. 317.

Property qualifications for the office of governor no longer anywhere exist. United States citizenship is universally required, and residence within the State, five years being the minimum period most commonly set.

The annual salary of the governor runs from the $3000 of South Dakota to the $25,000 of New York. New Jersey pays $20,000; Pennsylvania, $18,000; Connecticut, Illinois, Louisiana, and Texas, $12,000 each; while thirty-four pay less than $10,000 each. About three fourths of the States provide the use of a "little White House," and most of them give allowances for travel, an automobile and chauffeur, and household expenses. Because of the heavy financial demands of public life the governor frequently finds himself forced to draw on his personal fortune to make ends meet.

REMOVAL FROM OFFICE · Two methods exist for the removal of the governor from office: impeachment and recall.[41] The former, which is constitutionally provided in all the States except Oregon, is an adaptation of the Federal procedure. Generally the lower house brings the charges, and the senate sits as a court for the trial. Removal by this method has proved highly unsatisfactory. In those States where the term of governor is only two years, the legislature holds its only regular session at the beginning of the governor's term and consequently before he has had time to commit any "high crime or misdemeanor." Since in many States the legislature meets in special session only at his summons, there is small opportunity to impeach him. Moreover, the uncertain nature of the law of impeachment, whether it covers only indictable crimes or political offenses in general, makes it difficult for the ordinary legislature to conduct such a trial judiciously. The time element is another consideration; for the average legislature is rushed to discharge even its normal lawmaking duties, without the loss of the weeks absorbed by an impeachment trial.

The record of the use of the impeachment process for the removal of the governor is far from impressive. Thirteen impeachments of governors in all have been instituted, and five governors have been removed from office.[42] In most cases the impeachment had its origin in a political fight. William Sulzer of New York, in 1913, was impeached and removed when the legislature was called together in the heat of August at the behest of "Boss" Charles Murphy of Tammany Hall.[43] James Ferguson of Texas was impeached and removed in 1917; but a subsequent legislature attempted to remove the disqualifications imposed against his holding office, and the people of the State soon elected his wife governor as a "vindication."[44] In Oklahoma, Governor Walton, in 1923, and Governor Johnston, in 1917,

[41]W. B. Graves, *American State Government* (Rev. Ed., 1941), p. 364.

[42]A. N. Holcombe, op. cit. p. 371.

[43]J. A. Friedman, *The Impeachment of Governor William Sulzer* (1939).

[44]F. M. Stewart, "Impeachment in Texas," *American Political Science Review*, Vol. XXIV (August, 1928), pp. 652–658.

were removed by impeachment. A student of Oklahoma politics stated that no governor of the State, from its admission in 1907 to 1930, had escaped either impeachment or a serious threat of it.[45]

Resignation under pressure has been a more effective means than impeachment for ridding the office of the unfit. In 1924 Governor Len Small of Indiana, although charged with having taken public money fraudulently while State treasurer, was not removed from office; and Governor McCray of the same State resigned after having been convicted in the Federal courts of using the mails to defraud.[46] In 1934 Governor William Langer of North Dakota was convicted of conspiracy to defraud the United States of relief funds and removed from office by the State supreme court;[47] and in 1940 Governor Richard W. Leche resigned as governor of Louisiana after conviction for fraud in the sale of trucks to the state highway department. No impeachment charges had been brought in any of these cases.

The recall applies to the office of governor in twelve States.[48] The procedure has been explained at another point. A recall petition is passed which must be signed by from 10 to 30 per cent of those who voted in the last election, 25 per cent being the common figure. The petition is filed with the secretary of state, who then places the question on the ballot: "Shall A. B. be recalled as governor of ——?"[49] Nominees to fill the place if the recall is made may be on the same ballot, or an election may follow at a subsequent date. The task of getting the requisite number of signatures is not an easy one, and so the attempts at the recall of a governor have been very few. Only one governor so far has been recalled, Lynn J. Frazier, of North Dakota, in 1921; and a year later he was triumphantly elected to the United States Senate.

THE GOVERNOR AS HEAD OF THE ADMINISTRATION · The governor is nominally the head of the State administration.[50] Such expressions as "The supreme executive power of this State shall be vested in the Governor" (Ohio) and "The governor shall take care that the laws be faithfully executed" (Michigan) are common. This is the basis for a general administrative supervision and control over the acts of his subordinates. In about three fourths of the States he may require information in writing from the heads of departments on any subject pertaining to their duties. The governor's administrative leadership comes not only from such blanket statements of power but specifically from his powers to appoint and to

[45] C. Ewing, "Impeachment of Oklahoma Governors," ibid. (August, 1928), pp. 648–652.

[46] *Literary Digest*, Vol. LXXIV (July 8, 1922), p. 12; ibid. Vol. LXXXI (May 17, 1924), p. 15.

[47] R. L. Miller, "The Gubernatorial Controversy in North Dakota," *American Political Science Review*, Vol. XXIX (June, 1935), pp. 418–432.

[48] In the order of the adoption of the recall, Oregon, California, Arizona, Colorado, Idaho, Nevada, Washington, Michigan, Kansas, Louisiana, North Dakota, Wisconsin.

[49] *Constitution of the State of Arizona*, Art. VIII.

[50] W. B. Graves, *American State Government* (Rev. Ed., 1941), pp. 364–376.

remove officers, his ordinance power, and his control of the National Guard. Not to be ignored is the prestige derived from his position as party leader.

THE POWER OF APPOINTMENT · The power to appoint and remove his immediate subordinates is a prerogative without which no chief executive can hope to direct the administration. Since the beginning of this century the governor's power of appointment has steadily increased.[51] The expansion of the State's services has generally been accompanied by the creation of new offices to administer them; and these, whether single offices or boards or commissions, are generally appointed by the governor. Appointment of the boards and commissions, however, does not greatly increase the power of direction, since in most cases these resemble the Federal "independent establishments," with mixed duties and overlapping terms sometimes longer than that of the governor. Examples of this type of appointment are the members of the railroad, utilities, and workmen's commissions, of the university board of regents, and of the boards of the various State charitable and correctional institutions. For the greater portion of his appointments the governor must have the advice and consent of another body: the council of appointment in Maine, Massachusetts, and New Hampshire, or the Senate in the most of the other States. The choice of a governor and a legislature of opposing politics, a not uncommon occurrence outside the South, is a danger signal for the governor in his task of building an administration.

THE POWER OF REMOVAL · The governor is limited in the task of administrative management by the limited extent of his power of removal.[52] He may remove only such officials as the statute creating the office directs, and the courts generally resolve the doubts to his disadvantage. Only rarely may he remove an official elected by the people, and the removal of officers appointed with the advice of the Senate is often hedged round with limitations. In a few States, including Michigan, Minnesota, Nebraska, New York, and Ohio, he may suspend or remove a few local officials connected with law enforcement. In the last named he may remove mayors, chiefs of police, and sheriffs. In no State is the power often invoked, however, since such action is popularly looked upon as the interference of an outsider in a local fight. A general implied power to remove, like that recognized in *Myers* v. *United States*,[53] has never been recognized in any State, and no governor has attempted to establish it by practice.

THE ORDINANCE POWER · One of the most striking developments of Federal administration since the First World War is executive lawmaking, or the ordinance power, as it is called. The purpose is to carry into execution the laws passed by the legislature; to supplement, or fill in details. A parallel but less pronounced development has taken place with respect

[51]L. Lipson, op. cit. pp. 196–205; W. B. Graves, *American State Government* (Rev. Ed., 1941), pp. 366–372.

[52]A. E. Buck, op. cit. pp. 15–17.

[53]272 U. S. 52 (1926).

to the governor and his heads of State departments or boards or commissions.[54] State statutes lately tend to give more leeway for administrative orders, particularly in regulation in the fields of health, utilities, and corporations. Generally speaking, however, too much detail is still used in the statutes. An office is created and given a function, and the procedure for the discharge of the function is minutely prescribed, suspended in the air, as it were, by the threads of the statute. Both efficiency and economy would often be promoted by the substitution of the ordinance power of a superior officer for the rigid details of the statute.

COMMAND OF THE NATIONAL GUARD · The governor is the commander in chief of the State militia, now known as the National Guard.[55] These forces are financed, armed, and equipped by the United States government. Although the governor is responsible for their maintenance and training, these are now carried out by regular army officers in agreement with the Federal government. In both the First and the Second World War the National Guard of the States was the first force in readiness for service after the regular army. The State constitutions generally provide that the governor may call out the National Guard in order to execute the laws, suppress insurrection, and repel invasion. Until shortly before the Civil War the State militia was much used in Indian warfare. The governor is the sole judge of the necessity for calling out the National Guard, and may send it into a locality even though the mayor has not requested it.

The original theory of the relation of the State militia to law enforcement was that it should be employed where the local officials were confronted with a situation for which the forces at their disposal were inadequate. The calls for the militia have usually been occasioned by strikes, floods, fires, or other such catastrophes. Since the First World War, however, governors in a number of instances have employed the military arm to execute their own policy of law enforcement, which perhaps is a reflection of their lack of administrative direction over both State and local civil law-enforcement officers. Governor "Alfalfa Bill" Murray of Oklahoma, for instance, called out the National Guard to enforce the collection of tolls on a bridge across the Red River separating Oklahoma and Texas; while Governors Huey P. Long of Louisiana, Talmadge of Georgia, and Langer of North Dakota used it for the thinly disguised purpose of aggrandizing their own power and overawing their political enemies. Governor Sterling's use of the militia to close the Texas oil wells in order to raise oil prices was condemned by the United States Supreme Court as an attempt to put the fiat of a State governor above the authority of the Constitution.[56]

THE GOVERNOR'S COUNCIL · Four of the older states, Maine, Massachusetts, New Hampshire, and North Carolina, have retained the gover-

[54] W. B. Graves, *American State Government* (Rev. Ed., 1941), p. 364.
[55] Ibid. pp. 373–375.
[56] *Sterling et al.* v. *Constantin et al.*, 287 U. S. 378 (1932).

nor's council, which in colonial days served as the upper house of the legislature.[57] The function of this body, ranging in membership from four to nine, is chiefly advisory. In the three New England states the approval of the council is necessary to certain appointments. In New Hampshire and Massachusetts the members of the council are popularly chosen; in Maine they are elected by the legislature; while in North Carolina they are certain State officials sitting ex officio. In Wisconsin an executive council of twenty members was created in 1931, ten of whose members are legislators and ten lay citizens appointed by the governor. Besides its advisory function it has power to investigate the affairs of any administrative department.

### *THE HEADS OF STATE DEPARTMENTS AND SERVICES*

There are about half a dozen offices, found in most of the States, which date back to the early days of the Republic. These generally were elective, and only slowly have they been made appointive in response to the demand for a reorganized administration on a centralized basis. Beside them is another group, of directors or secretaries, heading those departments which were organized to administer the more recently adopted State functions, such as the departments of labor, commerce, insurance, finance, highways, and public welfare. These usually are appointed by the governor. The third group is composed of the various commissions and boards which administer services or institutions concerned with higher education, charities, conservation, tax appeals, medical and dental examination, public utilities and workmen's compensation.[58]

THE LIEUTENANT GOVERNOR · The lieutenant governor is not an administrative officer, heads no department, and is not even the governor's assistant.[59] Like the Vice-President of the United States, he is chosen as a stand-by for the chief executive, to take his place in case of death, resignation, removal, absence from the State, illness or other disability. To give him employment, he is made the presiding officer of the senate. The office dates from colonial days and exists in thirty-five of the States.[60] In the remaining thirteen the succession is given to the president of the senate or to the secretary of state. In some of the States, upon the appearance of a permanent vacancy in the office of governor, the lieutenant governor becomes governor; in others, only acting governor.[61] In about half a dozen, he is made a member of certain administrative boards.

[57]A. F. Macdonald, op. cit. pp. 215–216.

[58]Council of State Governments, *Book of the States, 1943–1944*, Vol. V, pp. 316–321; K. H. Porter, op. cit., chap. i.

[59]W. B. Graves, *American State Government* (Rev. Ed., 1941), pp. 417–419.

[60]Council of State Governments, *Book of the States, 1943–1944*, p. 316.

[61]W. R. Isom, "The Office of Lieutenant-Governor in the States," *American Political Science Review*, Vol. XXXII (October, 1938) pp. 921–926.

The lieutenant governor frequently represents a different faction of the political party or comes from a different geographical section of the State from that of the governor. This, in a considerable number of instances, has made him quick to assume office on the absence of the governor from the State, and to sign bills or grant pardons. For instance, when Governor Lee Cruce of Oklahoma absented himself from the State for two short periods, his lieutenant governor assumed the office, and in one case issued a parole for a prisoner and in the other a pardon.[62] The State Supreme Court upheld the latter action, but ruled the former invalid when it appeared that the governor's train on the return trip had crossed the border just before the parole was issued. The court ruled that his functions as governor were suspended the moment he crossed the boundary line outward-bound, and restored the moment he re-entered the State. Generally the courts have been more lenient, holding that the absence must be of such length as would affect injuriously the public interest.

THE SECRETARY OF STATE · The office of secretary of state is a lineal descendant of the office of secretary of the colony, of pre-Revolutionary days. At that time this officer was the secretary to the governor and the custodian of his and the legislature's records. Now all the States have the office, but in only seven is the secretary a legal subordinate of the governor by reason of appointment. He is elected by the people in thirty-eight States and by the legislature in three.[63] Besides the duty of countersigning the proclamations, commissions, and other official papers of the governor, he has custody of the laws as they pass the legislature and of other official papers; issues certificates of incorporation as authorized by law; and in many States is in charge of the licensing of motor vehicles. In all but four States he is the chief election officer, with the duties of general oversight of the local boards, preparing and printing the ballots, certifying initiative and referendum petitions and election results, and publishing election statistics. In various others he issues land patents, registers trade-marks, or serves, ex officio, as a member of various boards. His duties are mostly of a routine character, leaving little for discretion.

THE TREASURER · The treasurer is another officer the duties and methods of whose office are outlined in detail by law.[64] He receives the State funds from the collecting agencies, and as custodian chooses the banks in which they are to be deposited. Payments from the treasury are made as a matter of course when so directed by the proper authority. The treasurer is elected by the people in forty-one states and chosen by the legislature in five. The character of the office is such that it logically should be filled by appointment, but only New York and Virginia have taken this step. Numerous

[62] *Ex parte Hawkins*, 10 Okla. Crim. Reports, 396 (1913).

[63] Council of State Governments, *Book of the States, 1943–1944*, Vol. V, p. 316; K. H. Porter, op. cit. chap. iii.

[64] Ibid. pp. 99–115.

cases of the mismanagement of State funds suggest that popular election has not served as an effective safeguard.[65]

THE ATTORNEY-GENERAL · There are two functions common to this office of attorney-general in all States: acting as legal advisor to the chief executive officers and representing the State when it is a party before the courts.[66] Some of the States publish volumes of the opinions of the attorney-general, which have weight as precedents in their constitutional and administrative law. In a few States he is given a limited supervision over the county prosecutors; but only in California is this sufficient to suggest the beginnings of a State department of justice. He is often ex officio a member of boards and commissions where his legal knowledge is of account, as, in Ohio, the commissioners of the sinking funds, and, in California and Wisconsin, the State board of control. In no State does he have administrative control of the penal and correctional institutions, as is the case with the Federal Attorney-General. He is elected by the people in forty-two States; he is chosen by the legislature in Maine and by the supreme court in Tennessee. Only in four, Indiana, New Hampshire, New Jersey, and Pennsylvania, is he appointed by the governor and senate or council. The necessity for his intimate connection with the various phases of State administration would suggest that the last named would be the best method of selection.

AUDITOR · According to the logical principle that the auditing of public accounts should be made independent of executive influence, but perhaps by historical accident, the auditor or comptroller is elected by the people in forty-two States and by the legislature in three.[67] In Oregon and Wisconsin the auditing is done by the popularly elected secretary of state; in New Hampshire, by a committee of the executive council appointed by the governor. The stock duties of the auditor are two: the quasi-judicial one of seeing that no money is expended except as appropriated by the people's representatives in the legislature, and the auditing of the books of all officers engaged in making expenditures. There is a growing tendency toward a State audit of the expenditures of the political subdivisions, including even the "home rule" cities, a function which is performed by field representatives of the State auditor's office. In some States the auditor has been given other duties not related to the primary function of his office, such as the supervision of banks and the collection of certain special taxes.

SUPERINTENDENT OF PUBLIC INSTRUCTION · The office of superintendent of public instruction first appeared in New York in 1812, and spread slowly to other States until by 1900 it existed in all forty-eight.[68] In thirty-three

[65]M. L. Faust, *The Custody of State Funds* (1925), pp. 52–56, 170–171.

[66]Council of State Governments, *Book of the States, 1943–1944*, Vol. V, p. 319.

[67]Council of State Governments, *Book of the States, 1943–1944*, Vol. V, pp. 423–424; J. M. Mathews, *Principles of State Administration* (1917), pp. 146–149.

[68]J. M. Mathews, op. cit. pp. 308–309; Council of State Governments, *Book of the States, 1943–1944*, Vol. V, pp. 465, 466.

the superintendent is elected by the people; in seven, appointed by the governor; and in eight, chosen by the State board of education. Since the duties are primarily administrative, requiring professional competence in the incumbent, the place ought to be appointive. The superintendent's duties are generally statistical and advisory, with only a slight administrative authority over the local school districts. However, in all but a few of the States he is assisted by a board of education.

OTHER STATE OFFICERS · The much more numerous executive heads and boards and commissions have been created by statute, one by one, mostly in the years since the Civil War, to discharge the new functions assumed by the States in response to the change from a rural to an urban civilization. Their members, for the most part, are appointed by the governor with the confirmation of the senate. They are reserved for consideration in connection with specific government functions and the plans for revamping the State administrative machines.

THE REORGANIZATION OF STATE ADMINISTRATION · This brief survey of the administrative system of the States is sufficient to show its inadequacy for the tasks imposed upon it, or for those which it might be expected to assume. Current complaints against Federal expansion into the field of local government would have much greater validity if the States had made more serious efforts to put their own houses in order. Designed for functions chiefly clerical, legal, and financial, their administrative machinery cannot easily be made adequate by patchwork changes for the intricate tasks of regulation or the operation of services.

THE DEFECTS · The faults of State administrative organization may be classed under five heads.[69] The first is over-decentralization. The services of the central government are apportioned among many agencies, largely independent of each other. This is the point at which a beginning in reorganization has been made. Administration is further delegated to and subdivided among a host of local governments, which are engaged in the administration of laws made by the State legislature, each according to its own whim and with little or no oversight or co-ordination from the capital. The most common example of such administrative looseness is the assumption by the sheriff of discretion as to what State regulatory laws to enforce and what to ignore. The second is the weak position of the governor, which draws a whole train of disorganizing influences along with it. Totally without legal power over most of the other central administrative officers and those of the counties, cities, townships, and other subdivisions, such administrative leadership as he exerts comes chiefly through the prestige of his position, his personality, and his influence in shaping administrative legislation. Thirdly, as a result the administration is headless and irresponsible. The numerous agencies are without a common head or even a clearinghouse of information. Not responsible to any ad-

[69] A. E. Buck, op. cit. pp. 14–28.

ministrative chief, in the theory of the law they are individually responsible to the people of the State as a whole. But the inadequacy of such a general responsibility is only too evident on the surface. If the law prescribes the duties in minute detail, their effectiveness as administrators is cut down because of the rigidity of the scheme. But if, as an alternative, their duties are outlined in only general terms, the lack of a common head to coordinate and supervise usually results in overlapping and clashes of authority. Fourthly, duties are not reasonably well distributed among the agencies according to a functional division of labor. The result is a duplication of offices and equipment handicapping the discharge of the particular function. Finally, the system as a whole is uneconomical in the dollars-and-cents meaning of the term. The taxpayer's dollar is in effect devalued because of poor organization, lack of supervision, and improper division of labor. Waste from antiquated financial procedure will be studied in another connection.

PROGRESS OF REORGANIZATION · The interest in better administrative organization first found conspicuous expression in the report of President Taft's Economy and Efficiency Commission in 1912. Although lightly passed over by Congress, it attracted attention in some of the States.[70] The New York constitutional convention in 1915 submitted a radically revamped constitution, which was defeated at the polls. Illinois, under the leadership of Governor Frank O. Lowden, in 1917 adopted the first comprehensive scheme of reorganization, and other States soon followed its example. By 1945 twenty-seven States, including all the larger or more highly industrialized ones, had adopted some scheme of reorganization. Sixteen adopted fairly complete schemes; but only three, New York, Massachusetts, and Virginia, made way for basic changes by constitutional amendments.

The obstacles in the way of reorganization were very great. There were the interests of the office-holders, who feared the loss of their independence or even their offices, and the difficulty in making the necessary constitutional amendments, not to mention the natural inertia to be overcome in altering laws and settled practices.

PRINCIPLES OF REORGANIZATION · The leading authority on the question of State administrative organization states six principles which should be the guide in carrying out an adequate reorganization.[71]

(1) The concentration of authority and responsibility. The conspicuous need for a change in this respect is shown by the following clause of the Ohio constitution, which is typical: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer of state, and an attorney general." The State's executive, in

[70]Ibid. pp. 6–9.

[71]Ibid. pp. 14–28; H. Walker, "Theory and Practice of State Administrative Reorganization," *National Municipal Review*, Vol. XIX (April, 1930), pp. 249–254.

reality, is plural. The officials, who should be the governor's administrative heads, like himself are chosen by the people. His legal adviser, the attorney-general, has an equal mandate from the people and might even be of the opposite political party. The purpose of the reorganization is to put the governor in a position where he can manage the administration.

(2) The abolition of the numerous independent offices, boards, and commissions, and their consolidation in a few departments, say from ten to twenty, on the basis of the function performed. (3) The use of single heads for purely administrative work. The argument is that multiple bodies, such as boards and commissions, are ineffective because of the delays and compromises due to differences among the members. (4) The co-ordination of the staff agencies, those relating to budgeting, accounting, purchasing, and the civil service, under the governor. Since a chief executive, whether mayor, governor, or president, is able to make his authority felt only through the heads of departments, he should be equipped with an adequate headquarters staff. (5) The provision of a governor's cabinet of department heads analogous to that of the President of the United States. This would afford a means for the discussion of administrative policy, the co-ordination of work, and the elimination of friction and duplications. (6) An independent audit by an officer detached from the tasks of checking accounts and passing on the legality of expenditures.

THE ILLINOIS REORGANIZATION · The Illinois reorganization is worthy of study, not only because it was the first to be made but because the conditions which it was meant to remedy were typical.[72] Year after year for half a century the administrative organization of the State had mushroomed; the assumption of a new function was the signal for the creation of a new office to administer it. By 1917 there were more than one hundred and twenty-five separate State agencies under the various names of "office," "board," "commission," "trustees," or "department." These were largely uncoördinated and unsupervised, and their duties were conflicting or overlapping. In some cases matters like labor, public health, and finance were made subject to half a dozen or more offices or commissions.

In 1917, under the leadership of Governor Lowden, a broad scheme of reorganization was adopted by the legislature in a law known as the Civil Administrative Code. Over one hundred offices, boards, and commissions were abolished outright and their functions distributed to nine departments, namely, agriculture, finance, labor, mines and minerals, public works and buildings, public welfare, public health, trade and commerce, and registration and education. Subsequent changes, involving the creation of two new departments, those of conservation and insurance, and the abolition of the department of trade and commerce, raised the total to ten departments.[73] The departments are organized into bureaus, whose heads

[72] A. E. Buck, op. cit. pp. 86–93.
[73] *Illinois Blue Book, 1939–1940*, pp. 75–80.

as well as the directors and assistant directors of the departments are appointed by the governor and the senate. The departments appoint their own employees, subject to the civil-service laws of the State. The commissions having mixed legislative and judicial powers were attached to the departments dealing respectively with the same functional services. The industrial commission, for instance, is in the department of labor. The chief shortcoming of the Illinois reform was its failure to make all the principal executive officers subject to the governor's direction, by taking away their election by the people and giving him their appointment. This, however, could not have been done without amending the constitution, the struggle for which might have endangered the whole scheme. The presence of these elective officers, largely independent of the governor's authority, has proved a permanent handicap to unified administration.

THE NEW YORK REORGANIZATION · The New York reorganization is worthy of notice both because it involved a State which in wealth and population is comparable with some of the stronger independent nations of the world, and because of what was accomplished.[74] Although the way had been laid out by others, much credit was due Alfred E. Smith, four times governor of the State, for his forceful leadership. A constitutional amendment of 1925, supplemented by two subsequent ones, laid the groundwork for the reorganization. Legislation to carry it into effect was based on the report of a commission of sixty persons, drawn from all parts of the State and headed by Charles Evans Hughes.

The plan of consolidation was relatively complete. The offices of secretary of State, treasurer, and engineer were removed from the elective list, and the one hundred and eighty offices, boards, and commissions were consolidated into twenty departments. The only offices left elective were those of attorney-general, heading the department of law, the comptroller, and the lieutenant governor. Some of the commissions of mixed powers were not abolished but attached to the proper departments. The governor was given direct charge of fifteen of the departments. To aid him in his work of general supervision, an "executive department" was created, with divisions dealing with the budget, military and naval affairs, standards and purchases, state police, state planning, and alcoholic-beverage control. The governor's term of office was increased to four years and his salary set at twenty-five thousand dollars annually. The general accounts of the state government were kept by the department of audit and control headed by the elective comptroller. Governor Smith, on his own initiative, instituted the holding of cabinet meetings, a custom generally followed by his successors.

SUMMARY · State administration, generally speaking, has undergone considerable improvement since the second decade of the century. However, in about half of the States the change has not been marked. The

[74]A. E. Buck, op. cit. pp. 169–184; State of New York, *The Reorganized State Government* (1926), pp. 8–24.

difficulties are deep-seated. Faced during the depression of the 1930's with the need for quick and drastic action, the States were unable to meet the emergency. The result was that considerable portions of their traditional functions were assumed by the Federal government, particularly in the field of poor relief. There were other handicaps than poor administrative organization, such as the rigid constitutional limitations on taxing and borrowing, and authority widely dispersed among many local units of government. While somewhat more than half of the States have carried through plans of organization, a considerable number of these look better as blueprints than they do in action. The retention of a number of elective administrative heads was a discouragement to the holding of cabinet meetings, while in others the officials continued an independent course seemingly unconscious of the intent of the new plan. However, the results in half a dozen or more States are evidence of the soundness of the program. Reorganization in New York gave the governor a position which enabled Smith, F. D. Roosevelt, Lehman, and Dewey to establish distinguished reputations as administrators.

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CHAPTER XXVIII

# *State Administrative Areas: County, Town, and Township*

STATE ADMINISTRATION · The United States as a political entity is federal in form: the powers of government are distributed between two governments, each supreme in its field. The individual State, on the contrary, is not federal but unitary. It may administer all its large powers through a bureaucracy centered at the State capital or it may disperse them among various geographical areas established for that purpose. Legislatively a relatively high degree of centralization has been maintained. The local areas of government in general administer laws made not by themselves but by the State legislature. The only considerable delegation of legislative power is to the municipalities. For administrative purposes all the States have been cut into numerous areas in some of which the residents have been given power to choose the officials, pass on some questions of policy, and levy taxes.[1] Although the pictures of their political geography vary greatly, there is general agreement in the existence of four classes of areas representing as many levels, or layers, of administration. First is the State itself; second, the counties; third, the townships, villages, and cities; fourth, the miscellaneous list of special districts. Some of the areas were established to perform a single function, such as those for libraries, drainage, or irrigation. Others are merely enforcement or inspection districts, such as those for enforcing workshop, steam-boiler, and fire regulations. Still others, such as the municipalities and counties, have a multiplicity of matters to administer, which may be increased or decreased in number at any session of the State legislature.

CHARACTER OF LOCAL GOVERNMENT · It is at the local level that government is most closely identified with the citizen's everyday life. Indeed, the local governments are in a true sense the immediate extension of the home. Whereas the provision of shelter, pure water, food, and sanitation, the education of the young, the protection of health, and the care of the poor, the aged, and the disabled were formerly undertaken entirely by the family, now they have been taken over in part or regulated by the city, county, or special district. The visage of the local government is less that of a policeman or publican than that of benefactor and guardian. It was consequently logical that democracy should first become effective in the local govern-

[1]For two excellent short treatises covering the question of local government cf. L. W. Lancaster, *Government in Rural America* (1937), and R. H. Wells, *American Local Government* (1939).

ments, the householders demanding a voice in the ordering of those functions which had been transferred from the home to government.[2] Local governments historically have displayed greater stability than national ones. Revolutions first affect the national governmental structure, whereas the local governments are apt to accommodate their pace of change to that of the family and the social life of the neighborhood.

LOCAL-GOVERNMENT SYSTEMS OF THE STATES · Few political institutions are more enduring than the areas used for purposes of local government. Perhaps this is largely due to their conformity with the folkways of the people who settle them. Nature provides the background of topography and contour, of arable, grazing, mineral, and timber lands, and of natural highways by land and water, which together go far to predetermine the size and location of neighborhoods and communities. A large-scale map of the United States shows its division for purposes of government into a large number of areas of many sizes and shapes. In the older States the design has changed remarkably little from that of colonial days; in the younger States, little since their admission to the Union. Since this design furnishes the physical pattern upon which the administrative machine works, an understanding of its origin and elements of stability is essential to the student.

The systems of local government in the forty-eight States fall into three easily discernible types.[3] These may be referred to as the town type, which exists in the six New England States; the county type, in twenty-five States of the Old South and the Far West; and the county-township type, in fourteen Middle Western and three seaboard States (New York, New Jersey, and Pennsylvania). Many of the existing areas are ill-adapted to the needs of present-day government and would be unthinkable if the map were to be drawn anew; but to abolish or alter them has been found difficult, if not impossible. All three systems are the result of a reshuffling of historic units and the addition of a few new ones. The chief elements which have gone into their making are (1) the units of local government in England during the seventeenth century, the century of American colonization; (2) the units established in the thirteen colonies, which were adaptations of the former; (3) the Federal land survey; and (4) various factors of topography, climate, race, transportation, and economic organization. The first three will be considered in their order; the last named, here and there.

[2]For discussion of the social and economic factors which influence local government cf. L. W. Lancaster, op. cit. chap. i; C. L. Fry, *American Villagers* (1926), chap. vii; E. S. Brunner, G. S. Hughes, and M. Patten, *American Agricultural Villages* (1927), chap. ix.

[3]K. H. Porter, *County and Township Government in the United States* (1922), chap. iv; R. H. Wells, op. cit. chap. iii.

## *ENGLISH UNITS OF LOCAL GOVERNMENT IN THE SEVENTEENTH CENTURY*

THE PARISH · The smallest of the political communities to which the English settlers were accustomed was known as the parish. This was an area irregular in size and shape, but typically about six miles in dimensions. It was, in fact, a neighborhood. Historians have traced the lineage of the parish through several different forms.[4] The original local community of the Anglo-Saxons was the *tun*, or *tunscipe*, which in some cases was doubtless the outgrowth of a settlement made by a warrior and his followers or of a clan. The tun had its own assembly, called the *tungemot*; a headman, or *gerefa* (reeve); and a beadle. In the tungemot was transacted all the important business of the community. When Norman feudalism dominated the English scene, the manor naturally absorbed the ancient tun. Here the lord held court and administered the public affairs of the community. The word *vill* also was applied to these political communities and was interchangeable with *town*, *township*, and *parish*. By the time of the settlement of America the word *parish* had become established as the chief designation of these neighborhood governments. It had a twofold aspect: ecclesiastical and political; for usually but not always the town or political parish coincided in territory with the ecclesiastical parish.

The parish government had a popular basis, the assembly of the parishioners, or townsmen, called the vestry or parish meeting. The assembly was convened by summons read in the church on Sunday, by proclamation in the market place, or by a "warning" from door to door by the beadle. Among its powers were the election of the parish officers and the levy of rates for the various local expenses, including the upkeep of the parish church. The parish was responsible for the repair of roads, the keeping of the peace, the relief of the poor, the care of prisoners and of injured soldiers, and the maintenance of the church. It was a district for the levy of soldiers and the collection of the royal taxes. There was a formidable array of officers. The churchwardens occupied a position bearing some resemblance to that of the board of trustees of the modern township. They were the trustees of church property and the overseers of the poor; they took the initiative in setting the poor rates and the church rates, and collected and disbursed the money. The vestry clerk kept the minutes of the vestry meetings and other records of the parish government. The constable was a person of dignity, the police officer who set a watch to see what suspicious persons "do walk in the night," took surety of the peace, and might cause "hue and cry" to be raised after an offender. The beadle executed the orders of the parish officers and did duty as a police officer. There were various other petty officers, varying from town to town, including im-

[4]G. E. Howard, *An Introduction to the Local Constitutional History of the United States* (1889), Vol. I, Johns Hopkins University Studies in Historical and Political Science, Vol. IV, pp. 31–49.

pounders of cattle, hedgewardens, waywardens, and sextons. The essential character of the parish was that of a neighborhood society having political, religious, economic, and cultural ties. As such, it was well adapted to the needs of the early colonists in New England.

THE COUNTY, OR SHIRE · The shire, or county, with its dimensions of thirty miles more or less, was the largest political subdivision of England at the time when America was colonized. The history of this unit goes back to Anglo-Saxon times and the unification of the country under one king.[5] Some of the old kingdoms remained as shires for purposes of local government; in the middle and northern regions such units were made artificially. Some of the shire names are indicative of their tribal folk, such as *Norfolk* for the "north folk." After the Norman conquest the word *county* tended to supplant *shire*, and *viscount* the word *sheriff*; but the old terms came back as the native majority reasserted itself. The Anglo-Saxon shire had its *shire-gemot*, or folk assembly, which exercised mixed judicial, legislative, and administrative powers, and two chief officers, the *shire reeve*, or sheriff, who was the king's agent, with fiscal, judicial, and administrative duties, and the *ealdorman*, who was at the head of the military forces and sat with the sheriff in the gemot. Norman centralization naturally enhanced the power of the sheriff as the king's local representative. By the time of the colonization of America the justices of the peace had succeeded to many of his powers; but he remained the chief officer of the court, the principal peace officer, and the returning officer for elections. The lord lieutenant, appointed under the commission of the king, was the chief military officer of the county; the coroner had certain police and judicial duties; the "clerk of the peace," like the American county clerk or clerk of the county court, had recording duties. The ancient shire court was supplanted in the reign of Edward III by the court of quarter sessions, made up of the justices of the peace. Within the county were the hundred, whose duties now had declined to matters of taxation and maintenance of the peace; the parish, which still possessed duties of importance in neighborhood affairs; and a steadily increasing number of boroughs. The English county, with its functions of peace, justice, and defense, was admirably fitted for transplanting to America.

THE HUNDRED · The hundred, whose origin is little understood (perhaps the area in which a hundred warriors were recruited), was only a weak institution by the seventeenth century.[6] It was a subordinate area, perhaps three or four in each county. The old Anglo-Saxon hundred had fiscal, military, and judicial functions. Its gemot shared in all these functions, acting as a court of first instance from which appeals could be taken to the shire court. Its officers included the ealdorman, the reeve, and later the bailiff and the "high constable." The name *hundred* was used for political units in Maine, Virginia, Delaware, and Maryland, but only in Maryland did the hundred have any strength as a local unit of government.

[5]G. E. Howard, op. cit. chap. vi.

[6]Ibid. pp. 264–286.

THE BOROUGH · The earliest trace of the English municipality was the *burh* of the Anglo-Saxons, which was only a more highly organized form of the rural tun, perhaps centering around the fortified house or courtyard of a chief or noble.[7] It had its *gerefa*, or reeve (in mercantile towns called the portreeve), and its *burh-gemot*. In the twelfth century the kings, by charter or special act, began the confirmation or recognition of those "liberties" of the boroughs which perhaps had long been claimed. Richard I raised funds for his expensive undertakings by selling such charters. With the growth of trade and commerce the urban communities attained a much greater importance, and the borough came to have certain distinctive marks. Besides its charter it had a court presided over by the sheriff or portreeve, a market, and in some cases a mercantile law peculiar to itself. Serfs residing within it a year and a day were free. Self-government in varying degrees was granted, and it was given the privilege of electing two members to the House of Commons. Gradually the boroughs achieved a corporate character, that is, the right to own and dispose of property, to have a seal, and to sue and be sued. William Penn's grant of a charter to Germantown as a borough in 1689 was the introduction of that unit into America. Philadelphia had been chartered as a city seven years earlier.

## *LOCAL GOVERNMENT UNITS OF THE THIRTEEN COLONIES*

THE NEW ENGLAND TOWN · The first colonists of Massachusetts landed where they could, and chose such land as they thought most convenient and promising. The conditions of pioneer life forced them to live in compact settlements, and a common religious interest and homogeneity of racial stock made it desirable to do so. Not long after the settlement of Salem new villages were established about the bay: Boston, Roxbury, Dorchester, Watertown, Newton, Medford, and Saugus. The older colony of Plymouth similarly had begun to throw out extensions.[8] The General Court of the colony assumed power to apportion the land and authorized new "plantations," which soon would be given the status of towns. An act of 1636 specifically authorized the founding of new towns and outlined their powers. Thereafter "town-planting" went steadily on, except for interruptions from the Indian wars, until all the available area of the present New England was covered. The tract of land was usually given to a company of would-be settlers, later to be laid out by the town government and apportioned for individual and common use. No such planned scheme was ever adopted for the settlement of the vast areas beyond the Alleghenies.

[7] J. E. A. Jolliffe, *The Constitutional History of Mediaeval England*, pp. 314–317; D. J. Medley, *A Student's Manual of English Constitutional History* (4th ed., 1907), pp. 423–428.

[8] J. F. Sly, *Town Government in Massachusetts*, chap. i.

THE FORM OF THE TOWN · It is to be noted that of the two names, interchangeable in the homeland, *parish* and *town*, the settlers chose the latter to designate their unit of government. Enclosing an area approximately six miles square, the boundary lines followed the topography of the country: ranges of hills, streams, swamps, or lake shores. Usually on a high spot near the center was located the common, or green, surrounding which were the church and town hall and the houses of the inhabitants.[9] Home lots of from two to five acres and plots of land in the outlying country for purposes of more extensive cultivation were apportioned. The town lands were classified according to their character as upland, meadow, corn land, woodland, or swamp. Large portions were kept as common lands, as sources of hay and wood and for the pasturing of the herds. The General Court of Massachusetts carefully controlled the colonization of people in these towns. An act of 1637 forbade any town to entertain a stranger longer than three weeks; no land could be allotted without the consent of the General Court or of the town officers acting as its agent.[10] An act of 1647 required that the boundaries of the towns be perambulated every three years and markers, consisting of stones and trenches, be repaired. Unlike the Middle Western township, the New England town made no legal differentiation between the entirely rural and the village parts of the area, persons living in the remote corners being as much a part of the town as those living at the center.

SOCIAL CHARACTERISTICS · The towns were the living cells which together made up the body of the commonwealth. They were economic, religious, and political units.[11] They produced and exchanged goods in a neighborhood economy; the minister and his church were supported by taxation; and the town performed those functions of government which today, in the rest of the United States, fall to the county, municipality, or township. Among these were the assessment of rates, the maintenance of the peace, the care of the poor, the education of the young, the maintenance of roads and bridges, the recording of lands titles, and the training of the militia. The vigor of their community life until the time of the Civil War is hard for the student of today to comprehend. While as early as 1643 the colony was divided into counties called shires, these were little more than groups of towns around which boundary lines had been thrown for the purpose of marking off judicial districts.[12] The New England town was doubtless the best unit for colonization which could have been devised considering the character of the settlers, the location, and the physical surroundings.

THE COUNTY IN VIRGINIA · The several factors of climate, soil, topography, people, and religion decreed a sharply different type of local gov-

[9]H. L. Osgood, *The American Colonies in the Seventeenth Century* (1904), Vol. I, chap. xi.
[10]G. E. Howard, op. cit. pp. 57, 58.
[11]Ibid. pp. 59–62.
[12]J. F. Sly, op. cit. p. 85; G. E. Howard, op. cit. pp. 319–322.

ernment for Virginia from that which developed in New England. Although the threat of Indian attacks forced the formation of a few compact settlements in the beginning, there was soon a dispersion of population. Land was granted in large tracts, often of more than a hundred thousand acres. Among the colonists were a considerable number of wealth and social standing in England, who naturally desired to establish large estates. The "plantations" were agricultural settlements established by individuals or groups under grants from the crown or the Virginia Company. Care usually was taken to see that the larger grants had river frontage so that the products might be loaded directly on boats for shipment to England. In 1619 the different settlements were variously known as corporations, cities, boroughs, plantations, hundreds, or parishes. A corporation might include several settlements. When in that year the first representative assembly in America was called together, it was made up of twenty-two burgesses returned from such subdivisions. Captain Warde's plantation was allowed two representatives, in spite of the fact that it had been founded without permission from the company.[13] In 1618 the governor and council were ordered to divide the colony into shires; but this was not done until 1634, when eight were established. The fact that they were given such names as James City, Henrico, Warwick, and Elizabeth City indicates that they were the outgrowth of the original settlements. Within a short time the term *county* superseded the more ancient one of *shire*. As the settlements steadily extended inland, the number of counties increased until it reached twenty in 1680, and seventy-four a century later.

CHARACTERISTICS · The Virginia county is an irregular area whose shape and dimensions were determined by the conditions of its original settlement and the factors of rivers, soil, and mountains.[14] The original counties were generally smaller than those established later. The typical area is in the neighborhood of three hundred and fifty square miles, with dimensions of from ten to thirty miles. Urban areas were few, and the location of the courthouse was determined chiefly by considerations of accessibility. The county seat was the social as well as the political center and a rallying point for the loyalty of the inhabitants, a distinction later to be held by the county in the Middle and Far West. A lieutenant, appointed by the governor, was in charge of the county militia.

GOVERNMENT · The greater part of the usual functions of local government were centered in the county.[15] The original governing body was the "court," made up of commissioners appointed by the governor from the leading gentry, upon recommendation of the existing members of the court. This body met six times a year and performed both judicial and administrative duties. It had jurisdiction in cases of law, equity, and

[13]H. L. Osgood, op. cit. (1907), Vol. I, pp. 81–92.
[14]G. E. Howard, op. cit. p. 390.
[15]Ibid. pp. 390–406.

probate, and heard appeals from the justices' courts. Its administrative field included highways and bridges, the clearing of rivers, and licensing and inspecting. In 1661 the title of the officer was changed from *commissioner* to *justice*. One member of the board was designated by the governor as sheriff. Besides acting as peace officer, he was in charge of elections, summoned the juries, and collected the quitrents and the county and parish levies. He was assisted by the constables, who were appointed by the county court.

COUNTY SUBDIVISIONS · There were political subdivisions of the Virginia county, none of which, however, were to grow in vigor owing to the overshadowing power of the county court. The precinct was the area for which were appointed the justices of the peace and the constable. The parish was a division of the county for religious purposes and the care of the poor. Its "vestry," made up of the church wardens and the minister, levied the church and poor rates.[16] The constable executed the game laws, searched for smuggled goods, took charge of runaways, and killed dogs in the Negro quarters if more than two were found there. The vestry every four years "processioned" the bounds of every person's lands and registered these with the parish clerk. This was the only method of recording land titles in Virginia down to the Revolution.

OTHER SOUTHERN COLONIES · The Carolinas were granted to eight Lords Proprietors, who undertook their colonization in 1663. At the beginning the term *county* was used to designate the entire province, and *precinct* its chief units of local government. In 1739 a change was made by which the fourteen precincts were styled counties.[17] The justices of the peace, sitting together, constituted a county court of common pleas and quarter sessions with both judicial and administrative powers, like those of the court of the Virginia county. There were the offices of clerk of court, recorder of deeds, coroner, and sheriff, known until 1738 as provost marshal. Counties were not organized in Georgia until after the Revolution, but the parish served some of the purposes of local government.

Maryland experimented with a medley of hundreds, manors, counties, and towns.[18] The first civil division was the hundred, from two to ten of which were included in each county. These served as districts for the election of members of the legislature, for the levy and collection of taxes, and for the organization of the military trainbands. Their officers generally were appointed by the governor and the council. Each had a "high constable," who acted as undersheriff, as keeper of the "watch and ward," and as guardian of the peace of the district. The first settlement, St. Mary's,

[16]G. E. Howard, op. cit. pp. 117–124.

[17]P. W. Wager, *County Government in North Carolina* (1928), pp. 3–5; G. E. Howard, op. cit. pp. 129–134.

[18]Ibid. pp. 404–405; L. W. Wilhelm, *Local Institutions of Maryland*, pp. 274–281.

was soon raised from the status of a hundred to that of a county. The second one, Anne Arundel, and the trading center Kent Island were made counties in 1642. Other counties were erected by the proprietary through his governor and council, although the growth of a strong settlement made such action inevitable. The county court, made up of commissioners appointed by the governor, was chiefly a judicial body. The chief officers, comprising sheriff, commissioners, justices, clerks, inspectors, coroners, and overseers of roads, indicate the usual range of county functions. The term *manor* was applied to the settlements on the large grants, which had carried with them the right to hold court for petty cases and local police jurisdiction. Traces of this medieval institution remained until the Revolution. Maryland, by legislative act of 1683, took the step, unusual for that day, of ordering the laying out of urban communities designated as *towns*. The sites were selected by the assembly, and the commissioners to lay them out and plan them were appointed by the governor and council. A tract of one hundred acres would be selected and divided into lots for houses and stores, and outlying parts would be set aside for the use of the town herds. These were to be market towns, in which commercial transactions and taxpaying were to be centered and through which exports and imports would pass. They were endowed, however, with no civil privileges, elected no officers, and possessed no independent civic life. Only a few of these government-planned towns prospered.

LOCAL GOVERNMENT IN PENNSYLVANIA · William Penn's charter from Charles II gave him authority to "divide the country into Townes, Hundreds, and Counties, and to erect and incorporate Townes into Boroughes, and Boroughes into Cities, and to make and constitute faires and markets therein, with all other convenient priviledges and munities."[19] The outcome was a system of local government unlike that of either New England or Virginia, the so-called "mixed" type, which rapidly took root in the new States of the Northwest Territory and of the upper Mississippi Valley. The essential feature of the system was the division of the land into counties, townships, boroughs, and cities, and the balancing of the powers of local government among them.

THE COUNTY · In the present Pennsylvania, at the time of its settlement in 1682, three counties were laid out upon which devolved the greater portion of the functions of local government:[20] Justices of the peace exercised petty jurisdiction in the precincts; and a county court, composed of all the justices of the peace sitting quarterly, had general trial jurisdiction, as well as the chief administrative authority of the county. It was in charge of the building and the repair of roads and bridges, the appointment and supervision of a numerous body of inspectors, viewers, and beadles, the

[19]W. P. Holcomb, *Pennsylvania Boroughs*, Johns Hopkins Studies in Historical and Political Science, No. IV (1886), p. 7.

[20]Ibid. p. 31.

settlement of controversies concerning indentured servants, and the supervision of taverns. In fiscal matters it levied the county rate and supervised the assessment and collection of taxes.

Several of the officials characteristic of American counties today appeared. By an act of 1724–1725 three "commissioners" and six "assessors" were created to perform the fiscal functions of the county court; also the office of "clerk" of the commissioners, now almost universally found and known as that of the county clerk.[21] There was a county treasurer, appointed by the commissioners and assessors. The offices of coroner, recorder of deeds, and sheriff already had appeared, but their incumbents were appointed by the governor. Late in the colonial period self-government developed to a remarkable degree. An annual assembly of taxpaying freemen chose the county's representatives for the colonial legislature, as well as the county commissioners and assessors, and nominated a panel from whom the governor named other county officers.

THE PENNSYLVANIA TOWNSHIP · As the territory of Pennsylvania was rapidly laid out into county areas, a smaller subdivision, the township, followed.[22] This was the rural political unit, approximately six miles square, which had appeared earlier in the Northern colonies. In each township were two overseers of the poor, appointed by the justices of the peace and associated with them in levying taxes for the relief of the poor. Later each township was authorized to choose two supervisors of highways, who could levy a road tax, and an inspector of elections, these together constituting the county board of elections. While the township performed some important local duties, it is seen that the county was the dominant unit.

THE PENNSYLVANIA BOROUGH · Since the township hardly was suited to a large degree of self-government, the incorporated town was authorized by Penn,[23] and was given the English name of *borough*. Eight boroughs were created by 1799. The charter, given by the governor, stated the powers of the borough, defined its boundaries, and established a set of officers. Typical were the common council, assessors, poundkeeper, high constable, and two burgesses, who were the magistrates responsible for the maintenance of the peace. These officers were elected by the freeholders, and there was provision for town meetings of the freeholders at which ordinances and by-laws could be passed. In some boroughs the term *town meeting* meant only the meeting of its officers. The chief burgess occupied a position comparable to that of the modern village mayor. A township, when seeking incorporation, might apply for the status of either a borough or a city; but generally the latter term was reserved for the larger municipalities. Philadelphia was made a city at the beginning, while its neighbor, Germantown, was made a borough.

[21] G. E. Howard, op. cit. pp. 373–387.
[22] Ibid. pp. 385–387.
[23] W. P. Holcomb, op. cit. pp. 7–51, 135–179.

THE NEW YORK TOWNSHIP-COUNTY SYSTEM · The original Dutch settlers of New York founded villages and manors. Heavy migrations from New England after the English conquest brought the town or township unit to the fore, and it soon became the most important center of local government.[24] There was a town meeting, which was authorized to levy taxes for the construction of public buildings, and a corps of township officers elected by the freeholders: a clerk, overseers of the poor, constables, pound masters, surveyors of highways, fence-viewers, assessors, collectors, and others. While the New England model was closely followed to this point, there was a sharp departure in the establishment of a county, which shared generously in the powers of local government. Twelve counties were established by the colony's first representative assembly in 1683. In each there was a court of "sessions," made up of the justices of the peace, and a court of "common pleas," appointed by the governor. The distinctive feature was a county board composed of supervisors, elected one from each township. This board was in charge of fiscal affairs, the levy and collection of the "county charge" and its apportionment among the various townships, and the appointment of a county treasurer. Civil administration was shared with the justices, who must approve the orders of highway overseers, grant licenses to the retailers of liquor, appoint various inspectors of produce, and determine the number of constables and overseers to be elected in the respective precincts. There were a sheriff and a coroner, appointed, like the clerk and justices, by the governor. The county was also a military unit with its lieutenant colonel, who was commissioned by the governor.

These two local government systems, consisting of the Pennsylvania, or county-township, system, with emphasis on county dominance, and the New York, or township-county, system, with emphasis on the township, furnished the models for the local government of all the States in the upper Mississippi Valley and west to the Rocky Mountains.

## *THE FEDERAL LAND-SURVEY SYSTEM*

PUBLIC DOMAIN · At the close of the Revolution the various States surrendered to the general government the greater part of their claims to the lands beyond the mountains.[25] After the extinguishment of the Indian title this vast area would be open for sale to private individuals. Two systems of land survey and disposal had existed in the various colonies. "Town-planting" was the name applied to that of New England by which a town was authorized by the proprietor or the legislature, the land carefully surveyed and plotted, and the tracts divided among the inhabitants of the town.

[24]G. E. Howard, op. cit. pp. 110–112, 353–364.

[25]P. J. Treat, *The National Land System* (1910), p. 23; T. Donaldson, *The Public Domain; Its History with Statistics* (1884).

The waste and common lands later were divided among the original purchasers. This system tended to avoid conflicting claims and gave accurate records of metes and bounds. The Southern system was known as "indiscriminate." Individuals staked out the lands which they discovered, irrespective of the surroundings, and employed the county surveyor to establish the lines. The result was a crazy quilt of irregular parcels of land, the leftovers being of such poor quality that they often were unfit for use as farms. Surveys often were made by incompetent surveyors who made inaccurate recordings. Because of the rapid infiltration of settlers into the Indian country, Congress was forced to take action to ensure an accurate survey and equitable distribution of the lands.

THE LAND ORDINANCE OF 1785 · This was the first systematic plan for the survey of a great domain of unoccupied lands ever employed by man.[26] Its importance lies in the establishment of a simple and understandable scheme for the identification of land which ever after tended to keep boundary disputes to a minimum and made the work of land registrars simple. Its political contribution was the design upon which were superimposed the township and county areas of government in thirty of the States. The Federal survey system was never applied to the thirteen original States; to Maine, Vermont, Kentucky, or Tennessee, all of which had been under the jurisdiction of one of the older States, and their lands largely disposed of; or to Texas, which had been an independent republic and as a State retained all its unsettled lands. The ordinance required that lands should be surveyed before they should be disposed of, and provided a rectangular system, the principal feature of which was the land township, an area six miles square.

THE SURVEY TOWNSHIP · The plan called for the establishment of guide lines by means of which the townships, of thirty-six square miles each, were laid out.[27] The north-south guide lines were known as the "principal meridians," which were laid out, at intervals of a hundred to several hundred miles, westward to the Pacific Ocean. The east-west guide lines were known as the "base line," and these "parallels" appeared at suitable intervals all the way from Mexico and the Gulf to Canada. Lines were run every six miles in between, thus covering the country with a checkerboard design. Since the townships in each successive tier north of the base line became narrower, because of the earth's curvature, "correction lines" were established, at intervals of thirty or thirty-six miles, upon which was drawn a new tier of townships with the exact width of six miles. The land township of the Federal survey at the outset had no political significance; it was simply a means of land identification and recording for the immediate purposes of the sale and disposal of land.

SUBDIVISIONS OF THE LAND TOWNSHIP · In some regions the Federal surveyors placed markers at each mile; in others, only at the township

[26]P. J. Treat, op. cit. pp. 36–38. [27]Ibid. chap. viii.

corners. County surveyors might be employed later to run the lines for the minor subdivisions. The Federal plan called for the numbering of the mile-square parcels of land, called "sections" (six hundred and forty acres), from 1 to 36, across consecutively from left to right and right to left. These were further subdivided into "quarter sections," of one hundred and sixty acres, designated respectively as northwest, northeast, southeast, and southwest quarters. Thus the owner of a Nebraska homestead would find its description on his deed of purchase as "the Southwest one-quarter of section 29, township 7 north of range 5 west (SW $\frac{1}{4}$, Sec. 29, Twp. 7 N., R 5 W)." The tiers running east and west were designated as "townships"; those north and south, as "ranges." The numbering of the townships extended north and south from the base line; that of the ranges, east and west from the principal meridian.

THE POLITICAL TOWNSHIP · In fourteen of the middle and upper Mississippi Valley States the survey township was seized upon as an area of local government, the political township. The Northwest Ordinance of 1787 authorized the governor to appoint civil officers in "townships" and "counties," which presumably would be of his own creation.[28] Commonly, in the newer States, either the legislature or the board of county commissioners was authorized to establish townships. With few exceptions the six-mile-square survey areas began to appear as civil townships under such names as the inhabitants chose; for example, Swan Creek, Portage, Milford. While there was no unit of the survey system corresponding in size to the county, the boundaries of the counties, with rare exceptions, were determined by township lines.

## *LOCAL GOVERNMENT UNITS TODAY*

COUNTIES · Every State of the Union is divided into counties (called parishes in Louisiana), but those of the small State of Rhode Island have no functions of local government.[29] The beginning of counties in all States other than the original thirteen was at the hands of the governor of the State or of the legislature and antedates admission to the Union. In some States the counties are designated in the Constitution; but generally the power to create new ones resides in the legislature, subject to the vote of the electors in the areas affected. Limitations usually exist, however, as to minimum size (typically four hundred square miles), or minimum population, or it is prescribed that the new boundary line shall not run closer than a designated number of miles from the old courthouse. The need for the services of a peace officer, a court, a marriage clerk, or a recording office for sales, as well as land claims and cattle brands, often forced the creation of a

[28]The Northwest Ordinance, July 13, 1787. H. S. Commager, *Documents of American History* (1940), p. 129.

[29]J. A. Fairlie, *Local Government in Counties, Towns and Villages* (1906), chap. iv.

new county; so also did isolated communities, such as mining camps and settlements located in mountain valleys or connected with irrigation projects. The rich silver strike at Tombstone, Arizona, led quickly to the establishment of a county in that desolate region; but when the silver ran out, the courthouse was abandoned in favor of a new one across the mountains at the new copper-mining camp at Bisbee. Many of Kentucky's one hundred and twenty-two counties were called into being because of the need for seats of justice in the inaccessible valleys of the Appalachians.

NUMBER AND SIZE · In 1940 there were in the United States 3053 counties which ranged in size from the 20,131 square miles of San Bernardino County, California, to the 25 square miles of Bristol County, Rhode Island.[30] The average for counties in Arizona is more than 8000 square miles, and for those of all the States in the semiarid mountain area it is several thousand square miles; whereas that for Kentucky's numerous brood is well under 300 square miles. The county of 954 square miles, with dimensions of about 30 by 30 miles, may be taken as typical for the United States. As to the number of counties, Texas with 254 and Rhode Island with 3 are at the extremes, while 65 is the average number for all States. The contrast is still sharper as respects population. In 1940 three fourths of the population of the nation was concentrated in somewhat fewer than 900 counties, and one half in fewer than 200 counties. More than two thirds of the counties should be classed as distinctly rural.[31] Cook County, Illinois (Chicago), with 4,063,342, was the most populous of all. Los Angeles County, California, with 2,785,643, came second; while 20,000 may be taken as the size of the typical county. Texas in 1940 had two counties of fewer than 1000 inhabitants, one of these having only 285. As the map is unrolled from east to west, the county names taken from historic persons, events, and places are mute evidence of the successive stages in the colonization of the country. James City and King and Queen in Virginia, and Plymouth and Suffolk in Massachusetts, record the early settlements. Alabama has its Monroe County; Tennessee, Sevier; Ohio, Washington and Wayne; Indiana, La Fayette and Harrison; Michigan, Cass; Kansas, Brown, Ulysses, and Grant; North Dakota, Sioux and Haakon; while Texas has its Jeff Davis, Stephens, and Deaf Smith. Arizona honored an Indian chief, Cochise; Colorado, Kit Carson; Utah, Garfield; Montana, Custer; Nevada, Pershing; Washington, Whitman; while Oregon counties on the waters of the Pacific bear the names of Lincoln and Douglas. Outside New England and possibly two or three of the middle Atlantic States the county shared with the city the distinction of standing the closest of all the political areas to the social life of the people. In the Old South and the newest sections of the West the dearth of cities and townships gave it a still greater pre-eminence. An emigrant to the West usually described the location of his old home by

[30] W. Anderson, *The Units of Government in the United States* (Rev. Ed., 1942), p. 2.
[31] Sixteenth Census of the United States (1940), *Population*, Vol. I, pp. 122, 294.

reference to the county. The steadily increasing urbanization of the past three decades, however, has relegated the county to second place in various regions of the East and the Pacific coast.

LEGAL STATUS · County administration is essentially only a decentralized feature of State administration. As Chief Justice Taney expressed it, "They [the counties] are the agents and instrumentalities which the State uses to perform its functions. All the powers with which they are entrusted are the powers of the State."[32] The functions of preserving the peace, collecting the revenue, administering justice, and recording land titles are samples of basic State functions. For this reason the county is not given a full corporate standing in the law, and is generally subjected to the close control of the State legislature, which, with little constitutional restriction, may confer or take away powers, make and unmake county offices. The Ohio Supreme Court in 1857 drew the distinction between the city as a municipal corporation and the county as a quasi-corporation in these words:[33]

> Municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them. . . . Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy.

GOVERNMENT · General statements about the governments of the counties are subject to many exceptions, since there are more than three thousand of them in forty-eight different States. It is to be remembered that among them are the distinct types of the New England county, which is of limited importance; the county of the Old South and that of the Far West, which occupy a place of prime importance; and the county of the Middle West in combination with the township, a combination which may be either of two types depending on whether the township is given a considerable importance or not. In every State except Rhode Island, where the county is unorganized, there is a county board, and alongside it a list of officers elected by the people. This is not a true commission type of government,

[32] *State of Maryland* v. *Baltimore and Ohio Railroad Company*, 3 Howard 534 (1845).
[33] *Commissioners of Hamilton County* v. *Mighels*, 7 Ohio St. 109 (1857).

for the elective administrative officials are in most respects independent of the county board. The lack of a head and of centralized control and responsibility is a common fault of counties throughout the land.

THE COUNTY BOARD · The county boards go under various names. "Commissioners" and "supervisors" occur the most frequently. The Louisiana parish has its "police jury"; New Jersey, its board of "chosen freeholders." In Kentucky, Tennessee, and Arkansas the court of quarter sessions, following English and colonial precedents, acts as a county board; and in Alabama the probate judge is chairman of the board.[34] In membership the boards have considerable variation. In New England and the "county-township" States of the Middle West, and in the Far West, the number is generally three, elected at large or by districts. In those States where the county board is a body representing the townships and cities, it is large. New York, Wisconsin, and Michigan, and New Jersey and Illinois for a part of their counties, have boards, most of which have from twenty-five to fifty members; that of Wayne County, Michigan, has one hundred. The boards in Kentucky, Arkansas, and Tennessee are relatively large, according to the number of justices of the peace elected in the county. The number of meetings of these boards varies with the amount of business to be transacted, which is generally dependent upon the size of the county's population. The large boards are likely to meet two or four times a year, much of their work being done by committees; the smaller ones, monthly or quarterly. The pay of the members is usually on a per diem basis.

FUNCTIONS OF THE COUNTY BOARD · The work of the county board is chiefly administrative in character, and consists largely in carrying out tasks imposed upon it by acts of the State legislature or by votes of the county electors. Business is transacted principally by the adoption of "resolutions" or "ordinances." Porter, in his study, found fifteen distinct classes of county functions.[35] While the county board generally has little authority over the other elective officers, the county institutions, such as the poor farm, infirmaries, and hospitals, and an occasional appointive officer such as the engineer, are subject to its supervision. It has the general management of county property and finance, which includes the powers to levy taxes and appropriate money, but strictly within the limits laid down by the State statutes or votes of the electors. In many States it acts as a board of tax review and equalization. It awards contracts, purchases land and equipment, and passes upon claims against the county. The opening of new highways and the erection of county buildings and other public works are under its management, although the decision to make such improvements generally rests with the voters. It has duties with respect to poor relief, health, licensing, and the supervision of elections which vary from

[34] J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), pp. 108–116.
[35] K. H. Porter, op. cit. chap. vii.

State to State. In a few the legislature may confer some local legislative powers on the county board; in three, California, Idaho, and Washington, this was done by the constitution, that of California reading: "to make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."[36]

PEACE AND JUSTICE · The maintenance of peace and the administration of justice were the chief functions of the ancient English shire. Likewise in America these were the motives which often led to the early establishment of the frontier counties. For instance, the settlers of the first colonies in Ohio, Marietta, and Losantiville (Cincinnati), before the arrival of duly constituted authorities, enacted laws of their own and elected a sheriff.[37] Governor St. Clair, soon after his arrival on July 26, 1789, established by proclamation Washington County, the first west of Pennsylvania, and soon afterward appointed a sheriff, a clerk, and judges for the court.

SHERIFF · This office, which dates back at least a thousand years, is found in all the American counties, and in all States except Rhode Island is elective.[38] The term varies from four to two years, and in more than a third of the States the sheriff may not succeed himself in office. The sheriff acts chiefly in two capacities. He is the chief conservator of peace in the county, the State's representative for that purpose, and the chief executive officer of the local court. As conservator of the peace he is assisted in the more sparsely settled counties by deputy sheriffs; in others, by county detectives and police. As stated by the United States Supreme Court,

> He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace and bind anyone in recognizance to keep it. He is bound *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers and commit them to jail for safe custody. For this purpose he may command the *posse comitatus*, or power of the county; and this summons every one over the age of fifteen years is bound to obey.

If a disorder is beyond his power to control, he may call upon the governor for the aid of the National Guard. As executive of the county or district court the sheriff maintains order in the courtroom, serves all the writs and orders of the court, including summonses, subpoenas, and writs of attachment, and carries into execution the judgment of the court. He is in charge of the county jail and, as custodian of the prisoners, preserves them from mob violence. Before central State machinery was provided, he carried out the death penalty imposed by the courts. Following the ancient English law, in most States he long proclaimed forthcoming elec-

[36] *Constitution of the State of California*, Art. XI, sect. 11.
[37] G. E. Howard, op. cit. pp. 411–414.
[38] J. A. Fairlie and C. M. Kneier, op. cit. pp. 135–142; K. H. Porter, op. cit. pp. 162–176.

tions, and it was his special care to preserve order at the polls. The ancient fiscal, judicial, and military duties of the office have now mostly passed away.

PROSECUTING ATTORNEY · Like the sheriff, the prosecuting attorney is primarily a State officer. Known as county attorney, district attorney, prosecuting attorney, or attorney for the commonwealth, he is elected by the people in all but a few States, and in about one fourth of the States he serves for a district larger than one county. In most States his term is two or four years.[39] In a majority he is paid a fixed salary; in others his compensation is from fees. The name *State's attorney* describes the major part of his work. It is his task to bring criminal prosecutions in the name of the State; and, while the duty of a detective is not imposed upon him, he is under obligation to use "due diligence" to discover infractions of the criminal laws. In most States prosecutions for crime, except in petty cases, are upon the indictment of a grand jury, but the prosecutor summons the grand jury and prepares the evidence upon which it bases its finding. In those States where the grand jury may be dispensed with, prosecution is begun by the filing of an "information" by the prosecutor. The discretion and power thus given him are large. His true county functions are acting as the legal adviser for its officers and representing it in civil suits. In some States these extend to the school, park, library, and other special districts lying within the county. His legal advice to the county commissioners in the matter of contracts and county property and to the treasurer and assessor with respect to tax collections is an important factor in efficient county administration. Assisting the prosecuting attorney is the coroner, whose task it is to investigate sudden deaths where violence is suspected. Earlier the office of coroner was universal in the American colonies and was elective; but today its inadequacy is generally recognized, and the office of medical examiner, responsible directly to the prosecuting attorney, has been substituted in a growing number of States.

COUNTY COURT · It has been shown that originally the court was the distinguishing part of the county government. Gradually this has changed. The county may be no more than a judicial district for a court of the State system.[40] In Ohio every county has a court of common pleas, but these are recognized as State and not county instrumentalities. The county court may be a specialized body, such as one for probate purposes; or it may be a court of general jurisdiction, but limited in civil cases by the amount at stake, and in criminal cases by the character of the offense. Generally the county is an electoral district for the judges who sit in the courts within its boundaries, if the judges are elective. In most of the sparsely settled States the county is a unit of a judicial district or circuit, the court holding semiannual or quarterly sessions in each county seat.

[39]Chap. XXXIX; J. A. Fairlie and C. M. Kneier, op. cit. pp. 142–148.
[40]Ibid. pp. 131–133.

FINANCE OFFICERS: THE TREASURER[41] · In all except a few States there is a county officer called a treasurer, and in all except a half dozen or so he is elected by the people, for a term of two or four years. His salary, set by law or by the commissioners, is supplemented in some States by various fees. His chief duties are the receipt, custody, and disbursement of tax funds. In various States he performs this function for all the political subdivisions included in the county, except, as a rule, for a number of special excise taxes. A few States provide special county tax collectors, but in most the treasurer performs this function. To cover the possible loss of funds in his custody, he is placed under heavy bond.

THE AUDITOR · The office of county auditor exists in about a third of the States, in most of which it is elective. The auditor's main duties are to examine and approve bills for payments from the county treasury, in the course of which he passes on such questions as whether funds exist for the purpose, whether the appropriation has been made, and whether the claim is legal. Secondly, he has the duty, within limits, of auditing the books of other county officers. That responsibility, however, has passed in an increasing degree to field representatives of the State auditor.

THE ASSESSORS · The office of assessor, or "commissioner of revenue," is found in most of the States having the strong-county form of government, that is, those of the Old South and the Far West.[42] Popular election for two or four years is common, although in exceptional cases the assessors are appointed by the governor or the state tax commission. In most of the States which have a combination of county and township government, the assessing is done by township officers, with much resulting incompetence. The function of the assessor is to list and make a valuation of the real property existing in the unit and of the personal property owned by its residents. To do so accurately is one of the most difficult tasks falling upon local officers, a more general recognition of which has led to increased supervision by central authorities.

CLERICAL AND RECORDING OFFICERS: THE CLERK[43] · The office of clerk, with considerable variations in the extent of his duties, exists in about one half of the States. He is the secretary of the county board, keeping a full record of their official actions; but since the board only rarely is in session and its members are often not available at the county offices, he becomes in effect its executive officer. He receives and examines bills against the county and fills out warrants for their payment, and is the chief channel of communication between the public and the county as a corporate being. If the county board has duties as a board of tax review or assessment or in the matter of elections or licensing, his duties are correspondingly great.

[41]Ibid. pp. 163–168; P. W. Wager, op. cit. pp. 140–142.
[42]K. H. Porter, op. cit. pp. 229–238; J. A. Fairlie and C. M. Kneier, op. cit. pp. 159–163.
[43]K. H. Porter, op. cit. pp. 140–156.

CLERK OF COURT[44] · The clerical and recording work connected with the district court is considerable. In some States this is performed by the county clerk, but in most of the States by a "clerk of court." He is elected by the people in forty-four States, in most cases for a two-year term. In three States, Connecticut, New Hampshire, and Vermont, he is appointed by the court; in Rhode Island he is elected by the legislature. His first functions are to docket all cases entered in his court and keep a record of the proceedings and judgments. He files all papers, sends out notices to the people involved, makes out subpoenas and summonses, and prepares all documents and orders. Since the clerk is a purely ministerial officer, it would seem that appointment by the court would serve better than popular election to secure properly qualified incumbents.

COUNTY RECORDER · A separate officer, known variously as "register of deeds," "recorder of deeds," or "recorder," exists in somewhat more than half of the States; in the rest his functions are vested in some other officer, ex officio.[45] In three New England States, Connecticut, Rhode Island, and Vermont, the recording of deeds still remains in the towns, where it was generally placed at the time of their founding. The chief function of the office is the recording of land titles. Along with the deed are recorded all the instruments which affect the title to the land: mortgages, easements, and notices of liens. Of course the record of the original grant of each parcel of land in the public-land States was made in the United States land office. By "searching the records," usually a very tedious task, the history of the passage of a parcel of land from the original grant through several generations can be traced. Other fields of recording sometimes given to this office include certificates of incorporation, brands of livestock, trade-marks, and vital statistics.

OTHER COUNTY OFFICERS · There are various other county officers, some of whom are dealt with in the chapters to follow, in considering the administration of the functions of government. Of these the superintendent of public instruction and the county engineer or surveyor are usually elected by the people. Others, like the overseers of the poor, health officers, and the heads of county hospitals and poor farms, in almost all cases are appointive.

SUMMARY · It has been seen that the county performs, as its primary task, functions which are of concern chiefly to the State as a whole. It is the most conspicuous agency of that decentralized administration which characterizes the States in general. In spite of the character of its work, nearly all the officers who head its services are elected by the people of the county; this procedure results in an uneven enforcement of the State's criminal laws, which often amounts to a virtual regional suspension of the operation of such laws as those prohibiting or regulating liquor sales or race-track gambling. On the other side of the ledger are the advantages

[44] K. H. Porter, op. cit. pp. 156–158. [45] Ibid. pp. 158–161.

to be gained from a constant marshaling of the voters in the operations of self-government: the choice of officials, the handling of petitions, the passing of judgment on questions in referenda, and a scrutiny of the performance of public officials. A chief criticism relates to the form of the county government: its lack of a single responsible head or other means of co-ordination, and the plethora of elective officials. Another points to the great number and small average size of counties, which were originally based on the slow methods of travel at the time of their founding. Particularly does this apply to the tier of States in the semiarid region of the one hundredth meridian, running from North Dakota to Texas, where the thirty-mile-dimensioned county contains only a small population. It has been pointed out that in twenty years of occasional agitation only two cases of county consolidation took place in the whole United States. An examination of some proposals for the reform of county government is left to the section dealing with problems of metropolitan government.

## *THE TOWN AND THE TOWNSHIP*

THE NEW ENGLAND TOWN · The town is common to all six of the New England States. It is unique among the units of American local government in two respects: that its policy-making body is a mass meeting of all qualified voters, and that its duties comprise many that are characteristic of townships, cities, and counties elsewhere.[46] The town's legal status is that of a quasi-corporation, although its powers are more nearly those of the typical municipal corporation. As an example of pure democracy, and of maximum popular participation in and control of local public affairs, it has had great acclaim. But it was essentially an adaptation to the needs of farm and village life, and so its heyday was over by 1850. The extent of its authority over its inhabitants was once so great that it was common for towns to claim that they might exert all powers of government not specifically forbidden to them by State laws, a rule quite opposite to that obtaining for local governments outside New England.

THE TOWN MEETING · The town meeting, or mass meeting of the voters, is the characteristic feature of the system.[47] The meeting is called pursuant to a warrant drawn up by the selectmen and directed to the constable. Citizens in the earlier days were "warned" from house to house; now they are notified by posting the warrant on the town-hall door or by publication. The warrant names the day, hour, and place of meeting, and contains a list of the items which alone can be considered; but upon the petition of

[46]A Massachusetts Supreme Court opinion of 1918 distinguishes between the town and the municipality in that "in the former, all the qualified inhabitants meet together to deliberate and vote as individuals, each in his own rights, while in the latter, all municipal functions are performed by deputies. The one is direct, the other representative." *Opinion of the Justices to the Senate*, 229 Mass. 609. Quoted by John F. Sly in his *Town Government in Massachusetts*, p. 105.

[47]Ibid. chap. vi.

10 per cent or more of the voters the selectmen must include a stated item in the warrant. The business of the meeting falls into two classes: the election of the town officers and the consideration of motions relating to the ordinary public business. Towns may follow their own procedure for the election or may adopt the ballot and forms prescribed by the laws of the State. At the beginning a moderator is chosen, and then the balloting proceeds for the election of the various town officers. A ballot box is set up in the front of the room, and the voting continues throughout the forenoon or the entire day. Minor officers may be elected from the floor. There are reports of town officers and committees, after which the routine business is taken up. Advisory committees previously appointed or committees chosen by the meeting present prepared appropriation schedules. The tax rate is voted, and authorization for the construction or upkeep of highways, buildings, and other public works, and the maintenance of the ordinary services. Sly, in his careful study of the town meeting, found the speaking confined chiefly to town officers, leading citizens, "and the consistent member who desires to talk on every question," devoid of theoretical expressions of democratic philosophies, and appallingly objective.[48]

THE SELECTMEN · Lacking a mayor or other chief administrative officer, the town has three to five selectmen, chosen by the town meeting for one year, who act as a board or committee to carry out the public work between town meetings. Their duties, imposed both by State law and the town meeting, are numerous and of course differ from place to place. They act as the legal representatives of the town and are in charge of its property. While they oversee the making of expenditures, they may not levy taxes. Like the Western county commissioners, they adjust claims against the public treasury and order payments by the treasurer. They appoint minor officers, as authorized by the town meeting, and fill vacancies in the chief offices; issue licenses and permits for peddlers, lodginghouses, and amusements; have charge of the police; and supervise the laying out of roads and streets and the making of other improvements. In some towns they act as overseers of the poor, collectors of taxes, and the chief election officials. They call and conduct special hearings on new or emergency questions which may be disturbing the citizens.

THE TOWN CLERK · An officer of great importance is the town clerk. His position in the little community is in some respects like that of the *maire* of the French commune.[49] To him for counsel and aid goes the citizen at a time of crisis. His prestige is all the greater because of the tradition of long tenure: from ten to forty years are not uncommon, and there are instances in which the office has been in the same family for several generations. He is the clerk of the town meeting and is in charge of the town archives. He has clerical and recording duties common to county officers in other regions: the issuing of marriage licenses, the registration of physicians, the

[48]John F. Sly, op. cit. pp. 147, 148, 150. [49]Ibid. pp. 157–159.

keeping of vital statistics, and the recording of deeds, mortgages, and bills of sale. He advises the town officers on their routine duties and petty matters of law, and is in active charge of the business of elections.

THE CONSTABLE · In the earlier days of the town the constable too was a person of importance, but the growth of State and urban police has served to eclipse him. Like the sheriff outside New England, he is nominally the chief peace officer of the community.[50] He serves writs and warrants for the justices of the peace and other town officers, "warns" the citizens of the impending town meeting, and in small towns may act as a collector of taxes.

OTHER OFFICERS · The early New England town was noted for its imposing list of petty officials. Though the number has decreased, it is still large.[51] Those dealing with finance are the treasurer, collector, and assessors. The assessors may be separate officers, or the duties may be vested in other officers ex officio. They value the property in the town and apportion the tax among the residents. The collector then takes the tax list, makes collections, and turns the proceeds over to the treasurer. The latter officer has custody of the public funds, pays the town bills upon the order of the selectmen, and forwards the county and State taxes, for which the town has served as a collector, to their respective treasurers. The finance officers are chosen by the town meeting or appointed by the selectmen. In most of the towns there are overseers of the poor, park commissioners, library trustees, boards of health, and fire brigades. All of them have school boards; for in no New England State does the county have authority over the schools. Highway officers are elected in three of the States. Other officers which date far back are the fence-viewers, poundkeepers, field drivers, sealers of weights and measures, fish wardens, and weighers and surveyors of commodities such as leather, beef, coal, lime, lumber, grain, and oil. Most of these officers receive little if any compensation, and that only from fees.

CRITICISMS: THE LIMITED TOWN MEETING · The industrialization of New England, changes in its racial elements, and the improved means of communication combined to make the town a less fit instrument of local government than formerly. The increased density of population is at the bottom of those defects which the times have made most conspicuous. The decisions of the few hundred (out of a potential several thousand) who attend the town meeting are often not representative; the people do not have a sufficient knowledge of the facts concerning public affairs to enable them to vote intelligently; and deliberative action would be impossible, even if all the voters could be brought together in one hall. Applying to small as well as to urban towns are the lack of a single responsible head and the overlapping and conflicting duties of the numerous officers and committees.

[50]Ibid. pp. 161, 162.

[51]J. Bacon, *Town Officers' Guide* (1825); J. F. Sly, op. cit. pp. 159–162.

The way out for the urbanized town is incorporation as a city; but there is always a considerable lag between the time when this is done and the time when it should have been done. Boston, the first of the list, did not give up its town government until 1822.

LIMITED TOWN GOVERNMENT · A compromise between the town and city forms of government was authorized by the legislature in 1915 for Brookline, a suburb of Boston with a population of thirty-three thousand; within a few years, for several other towns; and by constitutional amendment in 1926 for all other towns with a population of six thousand or more.[52] By 1930 fifteen out of the sixty-nine eligible Massachusetts towns had adopted the limited town meeting. Similar action by Newport, Rhode Island, had antedated that of Massachusetts by ten years. The law authorized Brookline to divide itself into from eight to twelve precincts, from each of which the voters should choose twenty-seven "town-meeting" members who, together with certain officers designated as "town-meeting members at large," constituted the town meeting. Ordinary citizens are entitled to attend the meeting and speak, but may not vote. The proceedings and powers are much like those in the old mass meeting; but the right to a popular referendum on the more important legislation is reserved to the people. The law left the administrative offices largely untouched. The new plan seems to have worked with fair success, but to anyone except a native of New England it looks like an ordinary representative council or legislature.

THE TOWNSHIP · The township is the chief civil subdivision of the county in thirteen States of the Middle West and in New York, New Jersey, and Pennsylvania of the Atlantic seaboard.[53] In the three last named it is an irregular area of approximately thirty-six square miles; in the remaining States it is ordinarily the six-mile-square survey township. Areas under the name exist in six Southern and three Far Western States, but are used only as districts for purposes of taxation or justice-of-the-peace jurisdiction and have no township government. In Illinois, Nebraska, Missouri, and Oklahoma only a portion of the counties have organized townships. Generally the township was created in the new States by action of county boards upon petition of the local residents, and may be dissolved or combined with another in the same manner. It differs from the New England town in several important respects. The extent of its powers is much less, the county exercising many more. The form of its government is much simpler, corresponding to its slender powers. The relation between rural and urban areas is different. A community with a few houses and a store within its bounds, subject to the limits of State law, may organize as a municipality under some such title as "village," "city," or "city of the fourth class." Thereafter, in some States, no legal connection exists between the

[52] J. F. Sly, op. cit. chap. vii.

[53] K. H. Porter, op. cit. pp. 60–63; J. A. Fairlie, op. cit. chap. ix; J. A. Fairlie and C. M. Kneier, op. cit. pp. 450–454.

village and the parent township, and in others only a slight connection, which is one reason why the township has never been able to develop a vigorous government. If located near a large city, the township is successively carved up and finally entirely absorbed.

TOWNSHIP MEETINGS · The New England precedent was responsible for the provision of township meetings in nine States, including New York, New Jersey, and the more northerly of those having townships.[54] In the Middle West, however, the idea of a popular mass meeting to deliberate on the political affairs of the community never took root. Such meetings have never been able to attract more than a handful of people, except upon rare occasions. With differences from State to State, the meeting may choose township officers, levy taxes, pass certain by-laws of a police nature, authorize public works and the issuance of bonds, order the institution of lawsuits, and provide in general for the execution of the functions conferred upon the townships by law.

THE TOWNSHIP BOARD · All townships have boards, usually known as trustees or supervisors; and in about half of the States with townships there is a chief administrative officer called the supervisor, trustee, or chairman, who may serve also as the township's representative on the county board.[55] In Kansas the members of the board are the trustee, the clerk, and the treasurer, the first-named of which is designated as the executive officer. The duties of the board naturally vary much from State to State. The board is the legal representative of the township and has charge of its property. Its fiscal duties are to make the annual tax levy, pass on claims against the township, and audit the accounts of the other officers. Other duties include the establishment of road and sewer districts, the oversight of the poor, the registration of cattle brands, the licensing of peddlers, and the conduct of elections.

OTHER TOWNSHIP OFFICERS · The offices of treasurer and clerk are found as a rule, and their incumbents may or may not be members of the township board. The assessment of property may be made by officers chosen for that special purpose or by others ex officio. The office of overseer of the poor appears in the townships of Pennsylvania, New York, and New Jersey; that of highway commissioner, in New York and Illinois. Justices of the peace and constables are generally elected in the township, but their jurisdiction usually extends to all parts of the county.

SUMMARY · The hard-surfaced highway has contributed much to the decline of the township as a unit of local government. The township's duties in matters of relief, highway construction, licensing, health, and justice all might now be done better and almost as conveniently by the county. As a strictly administrative unit for county purposes, however, it may continue for some time to serve a useful purpose.

[54]J. A. Fairlie, op. cit. pp. 168–174; J. A. Fairlie and C. M. Kneier, op. cit. pp. 458–461.
[55]Ibid. pp. 461–466.

## *MISCELLANEOUS AREAS OF GOVERNMENT*

NUMBER AND VARIETY · It has been seen that whenever the State takes on a new function of local consequence, it has three options in providing for its discharge. The duties may be saddled upon the existing officers of the traditional units, the county, town, township, or municipality; they may be given to new officers created in those units; or they may be given to officers of an entirely new administrative area established for that one particular function. These special districts and the powers exercised within them are the result of legislative act and fall into two classes, the mandatory and the permissive. Examples of the first are school and health districts, which must be extended over the entire area of the State; of the second, drainage, conservancy, and park districts, which the inhabitants of designated areas may bring into being by petition and other legal formalities. The number of districts set up for governmental purposes in the United States is very large. William Anderson's study, published in 1941, placed the number of such units as in excess of 165,049, his count being confined to those which had a continuing governmental organization (a board, council, or single officer) and which year after year provided some governmental service.[56] This left out the thousands of electoral, judicial, relief, police, highway, and inspection districts, whose significance was chiefly as areas of convenience for the discharge of functions related to the State, county, or city.

KINDS OF DISTRICTS · The school districts comprise about 94 per cent of all those classed as units of government. In those States in which the county and the township have become the areas of school administration, the total of special districts is small. Illinois, having the school-district system, leads all States, with 17,336 special districts. The range of functions so performed is wide, relating typically to roads, irrigation, flood prevention, levees, the drainage of swamps, regional water storage, mosquito and noxious-weed abatement, health and sanitation, and metropolitan parks. There are a few districts of exceptional importance, such as the New York Port Authority, the Illinois Sanitary District, and the Metropolitan Police District of Boston. That the number of such districts is too large, that their powers overlap those of other local units, that they escape adequate supervision, and that they are unreasonably expensive are the criticisms most frequently hurled at them. In defense it must be said that the special district often comes into being to meet the peculiar needs of a region which the deeply rooted, unyielding traditional units of local government have failed to meet.

[56] W. Anderson, op. cit. pp. 2, 7–10.

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CHAPTER XXIX

# *State Administrative Areas: The Municipality*

GROWTH OF CITIES · By 1940 the traditional cartoonist conception of Uncle Sam as a tall, spare countryman with chin whiskers had become an anachronism. By the census of that year 74,423,702, or 56.5 per cent, of our population dwelt in urban communities of 2500 or more, leaving only 57,245,573, or 43.5 per cent, with any claim to a rural character.[1] The problems of government peculiar to people living in compact aggregations now bulked larger than the typical problems of town, township, and county. The 56 per cent urban portion of our citizens lived in 3464 cities of 2500 population or greater; while 16,752 smaller cities and villages went to make up the total of 20,216 incorporated civil subdivisions of the states. Unlike county boundary lines, those of the municipalities have tended to shift rapidly. Townships or other county districts are eaten away and dissolved by the rapidly spreading city populations.

NATURE OF THE MUNICIPALITY · The early English *burh*, or borough, was distinguished from other communities of the country by its peculiar "liberties," such as a certain measure of self-government, the possession of a market, and the special privileges of its inhabitants. New boroughs were created from time to time by charter from the king. The chartered American municipality is also a recognition by government that the city has passed beyond the stage of a mere subdivision of the State and has a unity and problems of its own. The practice consequently is to make it a corporation, or legal person, in order that it may manage its affairs with efficiency and a large degree of independence. The application of science to the ways of everyday life has still further increased the interdependence of urban life and consequently the unity of its government. The city, as an extension of the home, provides water, light, gas, housing, and facilities for transportation and recreation, or regulates such privately owned utilities. A large degree of self-government for the municipality is inevitable. The difference in character between the typical county and municipal functions can be shown in this way: should a State decide to centralize its administration by making all county officers appointive through and responsible to State departments of justice, the treasury, highways, auditing, and institutional relief, it would not be plain that the principle of popular self-government had been grossly violated; but such a disposition of city officers and their functions would be thought intolerable.

[1] *Statistical Abstract of the United States* (1942), p. 6.

GRANTING OF THE MUNICIPAL CHARTER · That the State is supreme over all the land and people within its border, save only for the Federal powers, is a maxim of American government. Municipalities, as political units, therefore are dependent upon the State for their birth, powers, and continued existence.[2] It is the function of the State constitution and laws to say how municipalities may be created. The first municipal charters in the English colonies, those of New York and Albany in 1686, were granted by the royal governor; and this continued to be the method until after the Revolution, after which the power went to the legislature.[3] Grants by "special charter" continued until well toward the middle of the last century. An urban community petitioned the legislature for incorporation, and a charter was granted by a special act. Thus each city might have an organization of government and an amount of power peculiar to itself. The system engendered intrigue for special favors and led to meddling of the legislature with local affairs. Clauses began to appear in State constitutions forbidding the granting of charters by special laws. Then general municipal codes were adopted under which any community with more than a stated minimum of population could assume the status of a municipality by petitioning the county commissioners or secretary of state and certifying the necessary facts. The disadvantage was that large and small cities were required to have the same organization of government, and the peculiar needs of the respective communities were ignored. As a remedy, States began to classify urban communities for purposes of legislation, providing a government adapted to each class. New York in 1894 adopted this idea, grouping cities in three classes: first class, those over 175,000; second class, those from 50,000 to 175,000; and third class, all under 50,000. A demand for still further flexibility led to the adoption by some States of the "optional charter" plan. In Massachusetts in 1915 the legislature placed four different types of charter on the statute books, including the mayor-and-council, commission, and city-manager forms of government. The voters of the cities may select any one of these styles.

THE HOME-RULE PRINCIPLE · The fourth method of granting charters to cities is known as *home rule*.[4] This gives the municipality the privilege of writing its own charter, adopting whatever form of government it deems best. A necessary prerequisite to the plan is a definition of the powers granted to the cities, after which the charter commission may frame such a plan of government as it pleases to exercise those powers. When charters are granted to cities by the legislature, either individually or by general law, they contain both the powers which the city may exert and the form

[2]A. F. MacDonald, *American City Government and Administration* (1941), chap. v.

[3]W. B. Munro, *The Government of American Cities* (1926), pp. 21–25; E. S. Griffith, *History of American City Government* (2 vols., 1938).

[4]Ibid. chap. vi; J. D. McGoldrick, *The Law and Practice of Municipal Home Rule, 1916–1930* (1933).

and organization of government. Under the home-rule plan only the powers are specified. The charter commission of "freeholders" is usually elected by the voters of the city at large. For sizable cities its membership is ordinarily from twelve to fifteen, in some instances as high as twenty-one. Often it engages experts to aid in drafting the charter. The requirement for adoption is usually a majority of those voting on the question, except in a few cases where a larger proportion is needed. In California the further approval of the legislature is necessary; in Arizona, Michigan, and Oklahoma, the approval of the governor. *Legislative home rule* is the term applied in those States where the legislature has the power to give this privilege to the cities; but it is a much less satisfactory form, for by any subsequent act the general privilege may be revoked or existing charters interfered with. In constitutional home rule the power of the city to write its own charter proceeds directly from the constitution, and the legislature has no agency in the matter except to pass enabling legislation. Seventeen States now permit some degree of municipal home rule.

HOME RULE IN OHIO · Home rule in Ohio illustrates the organization of such a system in one of the larger urbanized States. The constitution provides that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and . . . similar regulations as are not in conflict with general laws."[5] This definition of the field of municipal government applies to all municipalities, whether they exercise the privilege of home rule or operate under a charter provided by the State legislature. Further sections provide that "any municipality may frame a charter for its government," and give directions for the election of a charter commission of fifteen members and, without any action by the State legislature, the submission of its work directly to the people.[6] A great difficulty is to draw a line between the field of the city, defined as "all the powers of local self-government," and that of the State. Obviously no clear line can be drawn, and much must be left to experimentation and judicial decisions. In spite of the grant, the State has subsequently established health districts which cover the cities, regulated the disposal of city sewage, established tax limitations, and controlled all elections; but the cities have been upheld in a variety of police regulations, including the establishment of systems of zoning.

MERITS AND DEFECTS · One of the principal arguments for home rule (indeed, the direct occasion for its adoption) is that it enables a community to fashion a government to fit its peculiar needs while at the same time freeing it from the unintelligent or prejudiced interference of the State legislature.[7] Cities are social units, each possessing marked characteristics in

[5]*Constitution of the State of Ohio*, Art. XVIII, sect. 3.

[6]Ibid. Art. VIII, sect. 7.

[7]H. Zink, *Government of Cities in the United States* (1939), pp. 125–128; A. F. MacDonald, op. cit. pp. 82–87.

culture, economic traits, and racial complexion. It has been seen that the essential thing in home rule is not the extent of the power which the city may exert (for they are all placed on a level in that respect) but the way in which the specified powers shall be exercised: the kind of legislature, the organization of the administration, the methods to be used in municipal housekeeping. In the next place, home rule makes the city an effective school in self-government for the citizens. Assured of a large immunity from legislative interference, the citizens must assume the responsibility not only for the successful operation of routine civic affairs but for the choice of a plan of government under which to operate. Popular good-government organizations often scrutinize the operation of the charter and carry on studies looking to improvement. Finally, home rule makes the cities serve as laboratories for trying out various devices of government, a fact which has been one of the important factors in the rapid improvement in municipal administration during the past three decades.

A main argument against home rule for cities has already been referred to: the difficulty in drawing a line between city powers and State powers, resulting in frequent, expensive, and confusing litigation. A more serious one is that government becomes unstable because of a too frequent tampering with its form. Experience has shown that the general public's interest in, and its knowledge of, the forms of municipal government are relatively small, but that charter elections turn chiefly on personalities and usually are occasioned by a desire to oust one set of men and install another. Both these criticisms have considerable validity, but it would be an error to assume that the defects of the system completely cancel the advantages which have resulted from home rule. Wherever available, home rule remains a resource for those cities which feel a need for it, while others may still operate under the general code of the State. It is a reasonable assumption, for the larger cities at least, that the city has a leadership, ability, and knowledge more suited for drafting its fundamental law than a distant legislature drawn from all over the State. The experience of many cities confirms that view; for example, that of St. Louis, Los Angeles, Cleveland, Cincinnati, and, more recently, New York.

THE CONTENT OF THE CHARTER · The city's charter resembles a constitution in its form and content, but is unlike one in that the powers which it embodies come not directly from its people but from a superior governmental body.[8] In this respect it resembles the ordinary corporation charter, which likewise is a recognition of the corporate existence of certain persons. The charter of Kansas City, Missouri, for instance, begins as follows: "The municipal corporation known as 'Kansas City,' comprising the inhabitants of all that district of country embraced within the limits prescribed in Section ——, shall continue a body politic and corporate by the name and style of Kansas City."[9] Typically it goes on to confer the usual privileges

[8]W. B. Munro, op. cit. chap. v. [9]*Charter of Kansas City, Missouri*, Art. I, sect. 1 (1925).

of a corporation: to have "perpetual succession, . . . a corporate seal, . . . sue and be sued, implead and be impleaded, defend and be defended in any court of law and in any action whatsoever." The typical charter defines the city's boundaries and establishes the frame of government by naming the chief officers and defining their duties and their relations to each other. It states the general scope of the city's powers and the specific powers of individual officers. It may give in detail the procedure to be used in performing such functions as the letting of contracts, the opening of new streets, or the custody or the paying out of public funds; or these may be stated only in general terms. The means of popular control are established, such as the election and recall of the legislative and the administrative officers and the use of the initiative and the referendum. A considerable number of miscellaneous matters make up the rest of the charter.

THE POWERS OF THE CITY · In the constitutional home-rule States it has been shown that there is a conferring of power on the cities in general terms; in the others this is done by general or special act, if the constitution so permits. There is always a saving clause that these provisions shall not be in conflict with the general laws of the State. The charter referred to above contains sixty-five numbered clauses conferring powers, including one to enact all ordinances "needful," "necessary," or "convenient" to the carrying out of those which have been enumerated.[10] These cover a pretty broad field. Included are those authorizing the establishment and maintenance of the ordinary services, relating to police, fire, health, relief, streets, parks, and sewers; and the regulation or operation of such utilities as water, gas, electricity, and transportation. There are several relating to the maintenance of the peace, such as the prevention of "any riot, rout, noise, disturbance or disorderly conduct or assemblage"; others extending the police power over intoxicating liquors, gambling, obscene publications, smoke, offensive trades and occupations, and habit-forming drugs; provisions for the licensing and regulation of businesses and callings, and the making of housing and zoning laws; and the authorization to co-operate with any other city or State or with the Federal government in the performance of necessary functions of government. Many charters enumerate the city's powers in considerably less detail; for, after all, the chief gauge of their extent is not the charter but the constitution or the laws of the State.

TYPES OF CITY GOVERNMENT · Many words have been spent in city-charter campaigns concerning the potentiality of the form of government. Overenthusiastic reformers have too often promised magic from the adoption of a given type of charter; extremists of the other side quote ponderously Pope's couplet

> For forms of government let fools contest,
> That which is best administered is best

[10]Ibid. Art. I.

as proof that a striving after new forms is futility. Forty years of active municipal experimentation have demonstrated conclusively the error of both extremes. The case can more accurately be stated in this way: that just as in industry the output is dependent upon the two factors of the *man* and the *tools* with which he works, so in government there are the two variables of the *electorate* and the *instrumentalities of government*. An indolent and uninformed electorate would seldom have good government with the best of charters; on the other hand, an alert, informed, and experienced electorate will not achieve the best results with an archaic form of government. The maximum of good government can be obtained from an excellent electorate working with an excellent form and organization of government. In almost all European countries there is a remarkable uniformity in the form of government employed for all sizes of cities; in the United States there is a bewildering variety. Each of the States is competent to create its own forms of city government or it may delegate that privilege to each of its own cities. Out of the mass of differing forms four types have emerged. These are known as the weak-mayor and council form, the strong-mayor and council, or "federal," form, the commission form, and the city-manager form.[11]

THE WEAK-MAYOR AND COUNCIL FORM · The cities of colonial days followed the municipal plan of the mother country in confiding the powers to a council composed of aldermen and common councilors, which in turn chose one of its members as mayor and the legal and ceremonial head of the city, and a series of committees to administer the various services.[12] After 1789, however, the popularity of the national constitution quickly led to an imitation of its general features. A separation of powers was effected, including a separately elective mayor and council, and, later, an elective judiciary. In the Jacksonian period other head administrative officers were made elective. Thus was developed the weak form, which still has a place, although a minor one, among our cities. One of its features is the two-house legislature, which now has all but completely disappeared. Another is the limited power of the mayor. Many of the administrative departments, as well as single members of boards, were elected by the people, and the mayor's appointing powers were correspondingly small. His veto might be overridden by the council. Like the governor of a State, he might order action by an administrative officer; but his order would amount only to a recommendation because of his inability to discharge or punish. The council made the budget and chose the civil-service commission.[13] In a time of increasing governmental functions little can be said in favor of this form of government, although its apologists cite as a virtue the democratic denial of autocratic power to

[11]W. B. Munro, op. cit. chap. xiv.
[12]E. S. Griffith, op. cit. Vol. I, chap. vii.
[13]W. B. Munro, op. cit. pp. 257–259.

the chief executive. Providence, Rhode Island, is one of the larger cities retaining it.

THE STRONG-MAYOR AND COUNCIL FORM · This more nearly approximates the Federal plan than the other.[14] The nation's largest city, New York, and Boston, Cleveland, and Detroit are numbered among its adherents. The council is unicameral and characteristically small. The mayor is the head of the administrative services in theory and in fact. He appoints the heads of departments and may remove them at his pleasure. None is elective except possibly the auditor. Under the mayor's supervision the budget is prepared. The plan has the advantage of efficiency, for the mayor may co-ordinate the work of all departments and give general supervision; and it is a scheme of responsible government, for no mayor can escape popular censure for administrative failures or fail to receive popular acclaim for success. It is well suited to the very large cities, where the office of mayor, like that of the President of the United States and State governor, is chiefly of a political character in that the chief executive himself cannot attend to the work of administration, his task comprising political leadership, policy-making, maintaining contact with public sentiment, general supervision and co-ordination, and acting as a spokesman on public questions.

THE COMMISSION PLAN · Although previously there had been isolated instances of city government by committee or commission, it remained for a tidal wave to add it to the stock list of the forms of American city government.[15] In September, 1900, a tidal wave demolished the city of Galveston, Texas, destroying many lives and great amounts of property. The previously weak government showed its ineptitude in the crisis and went out of existence. An organization of citizens took over much of the work of reconstruction and appointed a committee to draft a charter, which was sent to the legislature and there promptly approved. Its essential feature was a commission of five members in which were lodged the supreme legislative and executive powers. As soon as the commission was elected, one of its members was named "Mayor-President"; he served, however, only as the titular head of the city and as presiding officer of the commission. Administrative officers and the civil service were subject to the commission. The plan worked phenomenally well, perhaps chiefly because the occasion and need were urgent and the commission was made up of picked men. Finances were placed on a sound basis, and the work of reconstruction went on apace. Other cities soon adopted the plan, including several in Texas; but Des Moines, Iowa, by adding several new features, gave it its name and vogue. Among these features were the nomination of the commissioners by petitions and a nonpartisan primary, the use of the initiative and the referendum, and the adoption of the merit

[14] A. F. Macdonald, op. cit. pp. 152–158.
[15] W. B. Munro, op. cit. chap. xvi.

system for the civil service. A considerable number of States include the commission as an optional plan, and of course it is available to any city in the home-rule States. By 1917 it was in use in over five hundred municipalities, but after that time it slowly lost ground. Its most striking principle is the complete repudiation of the revered separation-of-powers idea. Furthermore, it provides a plural instead of a single head for the government.

MERITS AND DEFECTS · One argument strongly urged in favor of the commission plan was that it centralized responsibility by ending the bickering between the executive and legislative branches.[16] Another was that it simplified government for the voter by abolishing a maze of officers, boards, and commissions and fastening attention on the single commission. A third was that it recognized the primarily administrative character of city government and consequently abolished the large discussion chamber of the city council, substituting therefor the small commission after the plan of organization followed in the business world. An argument much used but soon disproved by experience was that it would attract to office men of a higher type, namely, business executives instead of mere politicians. The argument was unsound, to begin with, in its assumptions and proved erroneous in practice. New forms of government always attract candidates of unusual caliber in their beginning years, but at length the normal supply reasserts itself. The defects of the plan as found in practice follow pretty closely those which might have been expected in theory. The multiple head is incapable of speedy decision and action, and the situation is aggravated if there are sharp partisan divisions or personal antagonisms in the commission. The lack of a single executive, furthermore, deprives the government of an effective political spokesman, or leader. Then there is the uncertainty as to whether the commissioner in charge of a department is to act as a nominal and political head or as an administrative chief. If the city is small he may attempt both. The plan limits, sometimes arbitrarily, the number of departments which the city can have, as there can be but one to each commissioner. Irrespective of theory, it has worked well in many cities of small size, say up to one hundred thousand population. The cities of Newark, New Jersey, and New Orleans have used it with a fair degree of success, but its natural locale is in the class of three to fifty thousand.

THE MANAGER FORM OF GOVERNMENT · The manager form of government has borrowed essential features from several of the others.[17] From the commission plan it has taken the idea of the small council or commission and the abandonment of the separation-of-powers theory; from the

[16]A. F. Macdonald, op. cit. chap. xiii; H. Zink, op. cit. chap. xvii; E. S. Bradford, *Commission Government in American Cities* (1911).

[17]A. F. Macdonald, op. cit. chap. xiv; H. Zink, op. cit. chap. xviii; T. H. Reed, *Municipal Government in the United States* (1934), chap. xiv; H. A. Stone, and others, *City Manager Government in the United States: A Review after 25 Years* (1940).

strong-mayor plan, the idea of an executive in which are concentrated the administrative powers and the responsibility for their proper discharge; and from the colonial boroughs, the device of legislative supremacy exemplified in an executive chosen by and directly responsible to the council. From the modern business corporation it has borrowed the idea of a general manager hired by a board to carry out its program. Combined as one mechanism, the manager plan contains the elements of a small council, preferably elected at large or by proportional representation; a manager, chosen by the council for an indefinite term of office, who is in full charge of the administration, makes the budget, and appoints all heads of departments; and a civil-service system based on merit. Staunton, Virginia, as early as 1908 had experimented with such a plan. The first adoption of the full-blown plan, however, was by Dayton, Ohio, in August, 1913, as the aftermath of its great losses from a flood of the previous year. Its seeming success there gave great impetus to the scheme. By the early part of 1941 four hundred and sixty-eight cities had fallen into line. Those of the earlier years were mostly small, but in the 1920's sizable cities such as Cleveland, Cincinnati, Kansas City (Missouri), Rochester, Toledo, and Dallas adopted it. In 1931, after eight years of use, Cleveland abandoned it in favor of the strong-mayor plan.

MANAGER AND COUNCIL. · The council is the only elective part of the manager scheme of government.[18] It represents the people directly in its policy-forming and ordinance-making functions. It employs the manager, sets his salary, may discharge him at any time, and holds him generally responsible for the entire conduct of the city administration. In most cases he need not be a citizen of the municipality at the time of his choice; this encourages the growth of a city-manager profession, in which men may seek promotion from smaller to larger and more responsible positions. In the theory of the office the manager is a technician in full charge of the city administration, but not a policy-making official, and should abstain from dabbling in those matters which belong to the council. Since he does not stand for election by the people, he need not be schooled in the arts of the politician. Naturally he cannot avoid suggesting policies and ordinances to the council; for the charters provide for his attendance there, and give him the right to speak but not to debate. He appoints all heads of departments and, if there is no merit system, the lower officials. In the small municipalities he is directly in charge of one or more departments, usually that of streets and engineering. The job of spokesman for the city government is supposed to rest somewhere in the city council. Usually the person designated is the mayor, who is chosen by the city council from among its own members. He presides at their meetings, and is recognized as the head of the government for legal purposes and as its official spokesman.

[18] C. P. Taft, *City Management: The Cincinnati Experiment* (1933); C. E. Ridley and O. F. Nolting, *The City-Manager Profession* (1934); L. D. White, *The City Manager* (1927).

MERITS AND DEFECTS · Many students of government believe that the manager-council plan embodies more sound principles of government than any other form now in use. Democracy is served by the popularly elected representative legislative body, which is supreme in matters of policy. Efficiency has its inning with a single executive in whom is concentrated the control of the entire administrative services. The principle of responsibility is guaranteed in the power of the council to discharge the manager at a moment's notice. A proper synchronization between legislative and executive functions, so deficient in the Federal and State and mayor-council governments, is secured by concentrating policy-making and law-making in a single body, which is supreme over the executive. Furthermore, the spirit and the form of the plan assume the employment of a trained administrator for the position of manager, and an inclusive merit system for the civil service. There are many instances of a manager's promotion from a small to a larger city. One person held the position of manager in eight different cities; by 1944 there were ninety managers who had served in two or more cities.[19] The use of trained men has naturally led to more businesslike and scientific methods in administration.

A major defect of the plan both in theory and in practice is the failure to make adequate provision for political leadership. This function traditionally has been fulfilled by the mayor, as it has been by the President and governor. It is a chief executive's bounden duty to bring forward a program involving legislation, whereas it is a basic assumption of the manager-council plan that the manager should remain quietly in the background, faithfully carrying out the policies formulated and made by the council. The theory of most manager charters is that political leadership will come from the nominal mayor, or president of the council. In practice no such separation of policy-planning and policy-executing is feasible. In some fortunate cases adequate leadership has come forward in the council. Throughout Cleveland's eight years under the plan, in the absence of such leadership from the council, the manager became spokesman for the government. Other defects have appeared, such as the tendency to employ a local politician as manager rather than to look abroad for a trained administrator, and the ease with which the party machine is able to manipulate the government in old-time style, as in Kansas City, Missouri. Small places, with strictly limited funds, sometimes employ full-time managers of small caliber when a resident of better ability acting as mayor on part time would give more satisfactory service. In spite of these weaknesses, the manager plan has been responsible for the betterment of government in several hundred American cities and may be regarded as having found a permanent place in the category of political forms.

CHARACTER OF MUNICIPAL ADMINISTRATION · Several things distinguish the administration of city affairs from State and national administration.

[19] A. F. Macdonald, op. cit. p. 207.

One is its intimate connection with the routine affairs of the household. If there is a delay in rubbish collection, a series of neighborhood burglaries, or an overdose of phenol in the water, the city departments are flooded with telephone calls or visits of irate citizens. Another is its personal touch: the employees are local people, known to many individuals throughout the city. Again, it partakes in a high degree of the nature of ordinary business and trade, involving such activities as the management of water, light, and transportation utilities, the directing of financial and engineering enterprises, and the construction of streets and buildings.[20] However, contrary to the rule in most business enterprises, municipal administration is a business of increasing costs: the larger the city the greater the cost per person. The rule seems to extend straight through from no cost of government for the "tribeless, godless" solitary individual (if one existed) to that of $93.52 per person in New York City:[21] Congregate living is an expensive matter.

THE PLAN OF MUNICIPAL ADMINISTRATION · American cities in the weak-mayor stage were characterized by a variety of boards, commissions, and officials variously chosen and, to a large extent, uncoördinated and unintegrated in their work.[22] The tendency today is decidedly toward a centralized administration under the direction of a single official or agency. The administrative functions are grouped together into departments on the basis of function, and the departments are further organized into operating sections called "divisions." At the head of each department is a person often known as "director," who usually takes office upon the advent of a new mayor or manager. The director's qualifications are generally both technical and political. Naturally the size and organization of the department depend upon the size of the city and the extent of the services which it attempts. In small places it is little more than a skeleton, and the director is a part-time official.

THE NUMBER OF DEPARTMENTS · Departments may be established and their functions outlined by the charter, or more commonly the charter may establish a few departments and confer upon the council the power to create others.[23] In general the minimum number consistent with a grouping of similar services under one head is the better plan, for then the mayor may more easily keep in touch with all heads and perform the

[20]S. A. MacCorkle, *Municipal Administration* (1942), chap. iii; W. B. Munro, *Principles and Methods of Municipal Administration* (1916), chap. i; J. M. Pfiffner, *Municipal Administration* (1940), chap. i.

[21]The per capita cost payments for city government in 1938 for the ninety-four largest cities of the United States ran from $23.24 for Memphis, Tennessee, the thirty-second city in size, to $93.52 for New York City, the first. While there are notable exceptions, the general rule is one of increasing costs. United States Department of Commerce, *Financial Statistics of Cities, 1938*, pp. 99, 105, 106.

[22]J. M. Pfiffner, op. cit. chap. ii.

[23]A. F. Macdonald, op. cit. pp. 323–327.

task of co-ordinating. On the other hand, the grouping of an unwieldly number of services of unlike character under one head may lead to the neglect of some of them. The commission-governed city, characteristically small, is likely to divide its administration among the five commissioners as follows: finance, public safety, streets, parks and public property, and public affairs. Boston's chief administrative divisions number forty; those of Cleveland, a city of comparable size, only eight. New York and Chicago have approximately thirty apiece.

THE MAYOR · The chief executive in the great majority of American cities is still the mayor.[24] Although the office differs sharply from place to place by reason of size, region, and form of government, a generalized picture is possible. The mayor is everywhere the most conspicuous officer of the city and is everywhere elected by the people. His term in the few largest cities is usually four years; in the middle-sized and small, usually two years. He is the spokesman of the city; and if it is a metropolis, his duties take on a political and social character analogous to those of the State governor or the President of the United States. Mayors' salaries run downward from the twenty-five thousand dollars of New York City to nominal sums or nothing in the villages; in the latter the salary may consist of fees derived from the mayor's duties as a magistrate. The newer charters usually specify that he shall be elected on a nonpartisan ticket, a rule which may be kept in the letter but usually is broken in the spirit, as the office is of too great political might to be ignored in the struggles of the national political parties.

POWERS OF THE MAYOR · As the office gained strength the mayor acquired the power to appoint the heads of the administrative offices and the commissions, and the right to remove them. In the strong-mayor cities his appointments do not need the confirmation of the council. His legislative powers include the right to recommend ordinances to the council, to lead in the formulation of a legislative program, and to veto measures of which he disapproves. In the later charters he is likely to be given the power to veto items. From a two-thirds to a three-fourths vote is necessary to override his veto, but in Boston his veto is absolute. As head of the administration it is his duty to co-ordinate the work of the departments and to give general supervision to their work. When the city's affairs begin to approximate those of a State in importance, the mayor's duty of supervision becomes chiefly political and nontechnical; the routine supervision is left to the heads of departments. It is his duty to see that the laws of the State and the ordinances of the city are faithfully executed. If a city becomes notorious for leniency toward gambling, acts of violence, and vice, the mayor cannot escape the responsibility for such a state of affairs. In his hands in the newer charters is the onerous duty of preparing the annual

[24]Ibid. chap. xi; H. Zink, op. cit. chap. xv; Tom L. Johnson, *My Story* (1913); D. W. Hoan, *City Government* (1936).

budget. Although it is the council's function to pass the necessary finance ordinances, the responsibility for budget-balancing devolves upon the mayor. Sometimes he must choose between forcing extraordinary retrenchments and campaigning before the electorate for an increased tax rate. A vestige of his ancient judicial standing remains in his status as a magistrate. In the larger cities it may mean no more than the occasional performance of the marriage ceremony for celebrities as an advertising stunt; in the villages it is a matter of consequence.

POLITICAL PRESTIGE · The most deeply rutted path to high political preferment does not run through the mayor's office.[25] Perhaps the issues of municipal politics are sufficient neither to stir his ambitions for wider statesmanship nor to commend him to a wider electorate. Other factors are that the mayor is often the choice of a political boss and machine and has a reputation beyond the city's borders even lower than at home, and that the natural jealousies of rival cities and the country people's distrust of city politicians make him a poor candidate. Notable exceptions which help to prove the rule were Grover Cleveland, who picked up the White House trail as mayor of Buffalo, and Calvin Coolidge, as mayor of Northampton, Massachusetts. The number of mayors who have advanced to the offices of State governor and of United States Senator or other high Federal office is remarkably small. One cannot think of many mayors since 1925 of large cities such as New York, Chicago, Philadelphia, and San Francisco who would approach availability as Presidential or Senatorial candidates. The election of Couzens, mayor of Detroit, and Harold H. Burton, mayor of Cleveland, to the Senate may be indicative of a new trend.

MANAGER AND COMMISSION · The administrative position of the manager is almost identical with that of the strong mayor. Naturally his master, the council, is in a position to take much more summary action against him than the electorate may against the mayor. The manager does not have the mayor's conspicuous position, his policy-making and legislative powers, or any judicial powers. In the commission plan the commission as a unit has complete administrative power. It makes appointments and removals, prepares the budget, and supervises the administration. Individually its members head the respective departments.

PROBLEMS OF MUNICIPAL ADMINISTRATION: SINGLE OR PLURAL HEADS · Single heads, known as director, secretary, or commissioner, and plural bodies known as boards, commissions, or commissioners, are used in varying degrees in the various cities to head the departments.[26] In late years, conforming to the principle of the strong-executive plan, the single-headed agency has forged into the lead. Plausible arguments are advanced to support the merits of each plan. The most generally accepted rule for

[25] W. B. Munro, *The Government of American Cities*, pp. 281–284.
[26] J. M. Pfiffner, op. cit. pp. 28–32.

determining which is the better for a given department is this: where policy and deliberation are essential, use the board type; where action and efficiency count most, the single head. Thus for education, taxation and assessment, health, or zoning, the multiple head is preferable; for police, utilities, streets, or fire administration, the single head. Cities do not follow any such logical line: Los Angeles, for instance, uses boards for almost all its services, while nearly all the large cities use them beyond the theoretical limit.

LINE AND STAFF AGENCIES · Following the terminology of the army, a distinction is now frequently drawn in municipal organization between "line" and "staff" agencies.[27] The former term refers to those units which perform the respective services, such as the departments of police, health, streets, and parks. The test of the soundness of their organization is the efficiency, dispatch, and economy with which they perform the service delegated to them. The "staff" agencies, on the other hand, are auxiliary to those of the line. They plan and advise, furnish materials and services, but give no orders in the execution of the laws. Among such agencies are planning and zoning boards, the purchasing office, various statistical bureaus, the civil-service commission, and the finance, legal, and engineering departments. Originally much of such auxiliary work was performed within each department, resulting in much duplication; but the newer charters generally adopt the separately organized auxiliary bureau.

THE CIVIL SERVICE · General problems of the civil service have been discussed in another connection,[28] but their appearance in municipal administration may well be noted here. The size of the administrative personnel in the cities in general has grown steadily since 1920. As of January 1, 1944, the nonschool permanent full-time employees of cities, towns, and villages numbered 684,000, with a monthly pay roll of $121,500,000, or $1,458,000,000 for the year.[29] New York in 1943 had 99,255; Chicago, 27,514; and Los Angeles, 10,373.[30] Such cities have all the problems of personnel which a private employer must meet, and certain others besides, relating to recruitment, promotions, salary scales, discharge, compensation for injuries, and pensions.[31] While the city is not often faced with the problem of strikes, it has an analogous one in the ability of its employees as voters to form pressure groups. Demands for higher wages, shorter hours, or changed conditions of labor may be made the more compelling by political organization and the use of the ballot. Civil-service reform instituted to provide more economical and efficient services for the public may be sidetracked and used primarily to protect the jobs of the office-holders. On the other hand, the activities of the strong partisan machines,

[27]S. A. MacCorkle, op. cit. pp. 72, 73.
[28]Chap. XXVI.
[29]Bureau of the Census, *Government Employment*, Vol. 5, No. 1, First Quarter (1944), pp. 4–6.
[30]*Municipal Year Book, 1943*, p. 211.
[31]S. A. MacCorkle, op. cit. chap. vii; J. M. Pfiffner, op. cit. chap. vii.

typical of the city, make the municipal merit systems peculiarly susceptible to manipulation and debasement. The merit system has made substantial gains, but still has much ground to gain. Early in 1938 the total of all cities, large and small, operating under the merit system, in whole or in part, was 698, which included 80 per cent of those of one hundred thousand population or more.

STATE SUPERVISION · State control of municipal administration is chiefly legislative: upon the city officials falls a large share of the responsibility for the execution of State laws. Nevertheless, State administrative control is on the increase.[32] While no State has yet attempted a program of general supervision over service activities of the cities, Pennsylvania has established a Bureau of Municipalities in its Department of Internal Affairs; New Jersey, a Department of Local Government, headed by a commissioner whose chief duties are to see that the State requirements for budgeting and borrowing are followed. In all States there is some measure of State supervision over the city's administration of highways, utilities, and health. Control of State civil-service commissions over local personnel systems exist in seven States. Local finance comes in for an increasingly large amount of central supervision, commonly in the form of an audit. Ten States by 1935 had given State officials authority to pass on municipal debt issues, and North Carolina in 1931 established a local government commission to administer the affairs of bankrupt municipalities.[33] Indiana has taken advanced steps in the same direction. A State Board of Accounts not only examines the accounts of new improvements but compares them with the specifications in the contracts and, if deficiencies are found, recommends the withholding of further payments until all are made good. In the same State ten or more taxpayers may appeal to the State board of tax commissioners on the ground that a tax levy, an item in the budget, or a proposed bond issue is excessive; and, after a hearing, the board may reduce the amount. In one year the tax levies in one hundred and thirteen taxing units were reviewed and reduced in this way. All emergency appropriations outside of the regular budget likewise must be submitted to the board for review.

THE SCOPE OF MUNICIPAL ADMINISTRATION · Since the middle of the last century the services performed by the city have steadily increased. The compactness of the urban community makes a multiplicity of public services both desirable and feasible. Lent D. Upson estimated that in 1824 the Detroit city government performed twenty-three distinct services and that by 1930 these had increased to three hundred and six.[34] The city's functions began with certain protective measures, including the maintenance of peace and order. Then came the care and regulation of the streets, and in time, either directly or through the licensing of private companies, the provision

[32] S. A. MacCorkle, op. cit. pp. 87, 88.

[33] P. W. Wager, *County Government in North Carolina* (1928), pp. 150–153,170–173; J. M. Pfiffner, op. cit. pp. 123–127.

[34] L. D. Upson, *The Growth of a City Government* (1931), pp. 13–32.

of water, sewage disposal, light, and transportation. More recently there have developed with great speed a wide variety of cultural, recreational, and welfare services to which there is no discernible limit. These relate to education, health and sanitation, recreation, art museums, welfare activities, relief for the needy, and the like. By 1944 two thirds of all water-supply systems, over one half of all electric-light plants, and nearly all sewerage systems were publicly owned. In 1943 street railways were city-owned and operated in only eleven cities, but these included New York, Detroit, Cleveland, San Francisco, and Seattle; and there were upwards of six hundred city-owned airports.[35] Some cities conduct employment bureaus, and over one third of those of thirty thousand or over maintain markets. Cooperation with the New Deal program has led the cities into such unwonted fields as public housing and many kinds of relief work projects.

CITY-PLANNING · City-planning has as its immediate goal the orderly and economical development of the city's physical aspects. Its final objective is the social welfare. This it attempts to further by reserving given areas of the city each for a designated purpose; for instance, manufacturing, retail and wholesale business, shipping, single and multiple residences, public buildings, schools, parks, amusements, and cultural institutions.[36] To attain such an end, the master plan may call for a gradual remaking of certain parts of the city, as well as the reservation of unimproved areas for specified purposes. Planning in its broad sense is directed to various community objectives: rapidity and ease of transportation, through proper street and transit-line design; safety, through reducing the hazards of fire and traffic; convenience, through rendering accessible the places of public assembly; health, through the adequacy of sunshine and pure air; morality and obedience to law, through the prevention of slums; and the conservation of residential property, through the exclusion of depreciating factors.

Forty-three States have legislated to authorize city-planning commissions, and over twelve hundred and fifty city zoning codes are in force. While the general principle of zoning now stands on firm ground, thanks to the *Euclid Village* v. *Ambler Realty* case,[37] specific applications often run afoul of the courts. Particularly have ordinances regulating building construction from the standpoints of health and welfare encountered legal obstacles. Not until the Boston Common case of 1935 did a court uphold a city ordinance on aesthetic grounds alone.[38]

Planning is usually in the hands of a commission appointed by the mayor, composed of citizens who serve without pay and of one or more

[35] *Municipal Year Book, 1943*, pp. 136–174.

[36] The standard work on this subject is T. Adams, *Outline of Town and City Planning* (1935). Cf. also H. G. Hodges, *City Management* (1939), pp. 226–240; A. F. Macdonald, *American City Government and Planning* (1941), pp. 407–424; J. M. Pfiffner, op. cit., chap. xvii.

[37] 272 U. S. 365 (1926).

[38] *General Outdoor Advertising Company Incorporated, et al.* v. *Department of Public Works, et al.*, 289 Mass. 149 (1935).

city officials serving ex officio. The success of city-planning depends much upon proper co-operation between the planning body and the council, which must establish the plan by law, and between the planning body and certain administrative branches which lay out the streets and issue licenses for building. Legislation involving the physical plan of the city is normally first referred to the commission for recommendations; but usually the council may proceed with the ordinance even if it is in violation of the adopted city plan.

ORGANIZATION OF THE ADMINISTRATIVE SERVICES · The organization schemes for the city services differ considerably from place to place, but depend much upon the size of the place and the form of government. Their chief principles can best be grasped by examining a few specific cases.

1. *Chicago.* This city of more than three and a third million population has its administration organized in about thirty offices and boards responsible directly to the mayor, and a lesser number of semi-independent boards and commissions.[39] Among the agencies are the departments of police, fire, public works, weights and measures, streets and electricity, public service and law, and the boards of zoning appeals, examiners of plumbers, local improvements, and health. Among the commissions are those for the civil service, the Chicago Plan, art, recreation, and license, and the "Keep Chicago Safe" commission. The semi-independent commissions include those for the various pension funds, the library, and the tuberculosis sanitarium. The city clerk and the city treasurer are chosen directly by the people.

2. *Kansas City, Missouri.* The charter of this manager-governed city (399, 178) establishes nine departments: for law, public works, fire, health, welfare, water, park, finance, and personnel.[40] The council is empowered to establish other departments and to distribute the work of each among divisions. The park department is under a board of three members; all others, under a single director. The duties of each department are about as indicated by the titles. That of public works, besides having charge of all municipal buildings, is in charge of the collection of garbage, the inspection of private buildings, building permits, and the city powers relative to public utilities. The welfare department, besides care of the penal institutions and of welfare work, is in charge of the city market buildings and recreational facilities, and makes recommendations to the mayor for parole of persons convicted in the municipal court. Under the director of finance is a central purchasing office. Outside the authority of the manager are a planning commission and a board of zoning appeals, a municipal art commission, and a board of trustees of city trusts.

[39]T. H. Reed, *Municipal Management* (1941), p. 80; H. Zink, op. cit. p. 261.
[40]*Charter of Kansas City, Missouri* (1925), Arts. III–V.

3. *San Diego, California.* The charter of this city affords an interesting example of the administrative setup of a manager-form city in the 200,000 population class.[41] The services under the manager's direction are grouped in twelve departments: treasury, public works, water, social welfare, inspection, park, police, fire, public health, and library, all with single heads, and the harbor department and that of playgrounds and recreation, headed by commissions of three and five respectively. In the treasury department is the auditor-comptroller, who is actually the chief finance officer, the treasurer being only the custodian of the funds. Assisting the manager are three staff agencies: those of the budget officer, the purchasing agent, and the city engineer.

The mayor was given a position of importance unusual in manager charters, doubtless with the purpose of supplying political and legislative leadership. Instead of being chosen by the council in the usual way, he is elected by the people. His appointing power extends to the funds commission, which has control of all city trust and pension funds, the civil-service commission, the city-planning commission, and the unpaid citizens' commissions advisory to the various departments. As in other manager cities, he presides in the council and is the ceremonial and legal head of the city. The city clerk is chosen by the council; the city attorney and the auditor and comptroller are popularly elected.

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CHAPTER XXX

# *Intergovernmental Relations and Metropolitan Government*

GROWTH OF URBAN COMMUNITIES · Thirty-four entirely new States have been added to the original thirteen, and another by the secession of West Virginia from Virginia; but otherwise State areas and boundaries have remained fixed. The counties too, once a State has been colonized, have yielded little to the various pressures for boundary changes. But with the municipalities the story is much different. Alterations in their areas are necessarily frequent: new ones come into being, and the boundaries of others are extended. The growth of the urban communities not only complicates internal administration but also breeds new problems of intercity, city-county, and other interunit adjustment. These are occasioned by the need for joint action in the establishment and management of those services which by their nature must extend beyond the borders of one city or district. These services relate to water supply, through streets, transportation, utilities, parks, policing, health, sewage disposal, and the like. They involve the extramural ownership and operation of city property, contractual relations between the various political units, sometimes the transfer of functions from one unit to another, and new techniques for dealing administratively with large masses of population. The fact that 56.5 per cent of our population in 1940 was urban does not tell enough.[1] The true picture begins to emerge when it is shown that one fourth of the nation's people lived in twenty-seven counties, and three fourths of them in 862 counties. The number of incorporated places rose from 7906 in 1890 to 16,752 in 1940.

THE METROPOLITAN COMMUNITY · The official statistics of city population in the United States give a false picture of its urban communities. What is listed is the population of the city within the boundaries established by law. Left out of account are its contiguous or near-by satellite cities and villages. Where an airplane view might show one great natural city, the statutes may indicate a dozen to fifty or more independent political cities. The census of 1930 for the first time attempted to list these natural metropolitan communities. A metropolitan district was defined as an area containing one or more central cities of fifty thousand population or more and additional surrounding population bringing the total to at least one hundred thousand. No adjacent unit of government was considered a part

[1] *Statistical Abstract of the United States, 1943*, p. 11.

of the metropolitan area unless the density of its population was at least one hundred and fifty persons per square mile. On this basis one hundred and forty metropolitan areas were identified whose total population was 62,965,773, with 42,796,170 in the central cities and 20,169,603 outside. The disparity which may exist between the legal and the natural city is shown by these few cases. In 1940 Pittsburgh had 671,659 people, but metropolitan Pittsburgh had 1,994,060; Boston 770,816 and its metropolitan area 2,350,514; Los Angeles 1,504,277 and its metropolitan district 2,904,596; Cleveland 878,336 and its metropolitan district 1,214,943.[2] These districts sprawl across county lines and sometimes across State lines. Greater New York occupies all or parts of twenty-two New York and New Jersey counties. The metropolitan populations of Philadelphia, Providence, St. Louis, Kansas City, Cincinnati, and Omaha spill over into a second State. Civil units within the districts constitute a maze of jurisdictions, including cities, villages, townships, and school, library, park, health, and other districts. Twenty counties or parts of counties and 284 incorporated places are counted within the New York metropolitan district; 6 counties or parts of counties and 264 incorporated places within the Chicago district; 6 counties or parts of counties and 136 incorporated places within the Pittsburgh district; and 3 counties or parts of counties and 55 incorporated places within the Los Angeles district.[3]

PLANS FOR REFORM · Lack of administrative co-ordination, overlapping powers, conflicts of authority, inefficiency, below-standard services, and unwarranted expense are terms applicable in whole or in part to the governments of these areas.[4] Various expedients have been proposed or used to remedy the more conspicuous evils, such as outright annexation of adjoining municipalities and the disbandment of township and district governments; federation as one large metropolitan government; the use of extraterritorial jurisdiction and of intermunicipal working agreements; the creation of special superauthorities of broad territorial scope; and the partial or complete union of city and county.

ANNEXATION AND CONSOLIDATION · The enlargement of the city's area by the annexation of the civil units within its orbit is one method of approach to the problem of metropolitan government. In early days annexation usually was accomplished by a special legislative act arbitrarily ex-

[2]*Sixteenth Census of the United States* (1940), *Population*, Vol. I, pp. 58–65.

[3]Ibid. pp. 129–130, 316–318, 728–732, 937–939; V. Jones, *Metropolitan Government* (1942), p. 17.

[4]Two general treatises on the problem of metropolitan government are those by the Committee on Metropolitan Government of the National Municipal League, hereafter cited under Paul Studenski (editor), *The Government of Metropolitan Areas in the United States* (1930), and V. Jones, *Metropolitan Government* (1942). The volume by John A. Rush, *The City-County Consolidated* (1941), covers one aspect of the problem. The National Municipal League pamphlet *City Growing Pains* (1941) contains seventeen articles by Thomas H. Reed, Doris Darmstader, R. A. Atkins, Albert Lepawsky, C. L. Larsen, and others dealing with the governmental problems of various metropolitan centers.

tending the bounds of the city in question. Then a procedure was established by general law, available to any city, which usually called for a referendum of the voters in each municipality concerned. Unincorporated land in most cases might be annexed without its consent, although in some States (Ohio for example), the county commissioners must pass on the question. In those where the matter is governed by general law, the requirement of an affirmative vote of the electors of both cities on referendum is usual. The extension of the bounds of a metropolis by the method of free consent, however, is slow, uncertain, and, as the home-rule principle becomes better rooted, seldom available. The present cities of New York, Philadelphia, Chicago, Baltimore, and St. Louis were enlarged chiefly by legislative fiat.[5] A favorable decision in the referendum to annex Allegheny, Pennsylvania, to Pittsburgh was obtained by balancing the sum of the affirmative votes against the sum of the negative votes in the two, which was a sufficient offset to the two-to-one unfavorable vote in the former.[6] Until recent times annexation has been the chief means for extending the territory of the city. Chicago, starting out with .4 of a square mile, by 1926 had carried through forty-three annexations, including one city, two towns, twelve villages, and several townships, to enlarge its area to 205 square miles. By 1930 Los Angeles had increased its original area from 28 to 441.65 square miles. The enlargement of cities in those States providing for the consent of both parties has now almost ceased. The ten central cities of the seventeen largest metropolitan districts in 1940 had annexed no territory since 1890.

Obstacles to Annexation · In most cases arguments for annexation would seem to a third, or neutral, party to be conclusive.[7] By annexation the political city is stretched to cover the natural city, thus providing one jurisdiction competent to cover all community problems. A more representative and competent electorate is created, and all persons who are employed in the city or are otherwise economically dependent upon it are able to participate in the directing of its affairs. Since often there is a disproportion of the low-income groups in the city and of the higher-income groups in the suburbs, annexation creates one electorate, with a more normal distribution of all classes. Furthermore, annexation brings a more equitable distribution of tax burdens, since the city usually provides the capital for large facilities such as parks, libraries, swimming pools, and water and electric-light plants. On the other hand, the suburbanites might argue that annexation would bring among them the corrupt influence of the city ring, lead to a diversion of their tax funds for application to other parts of the metropolis, remove the personal touch with the officers of government which is possible in a small community, cause de-

[5] P. Studenski, op. cit. pp. 67–69.
[6] Ibid. p. 72.
[7] V. Jones, op. cit. pp. 122–129.

terioration in such services as the collection of refuse and the care of streets, make suburban taxpayers responsible for a portion of the city's debt, place the high-class schools of the suburb under the control of a mediocre city-school administration, and lead to a breakdown of the zoning regulations and consequently to a depreciation of real-estate values. Sometimes class and racial cleavages between the newer immigrant groups of the city and the older or wealthier stock of the suburb are a factor.

EXTRATERRITORIAL POWERS OF THE CITY · Another means by which an entire urban community may obtain a unified exercise of powers in the common interest is to confer extraterritorial authority on the central city.[8] Such authority is derived from either general State law or special legislative grant. It may relate either to the regulation of affairs or to the carrying on of services outside the city's boundaries. Examples of the former are the prohibition of slaughterhouses, livestock farms, cemeteries, and places of vice and immorality or other nuisances within a stated number of miles of the city, and the inspection of food and milk far beyond the city boundaries. Some cities have the supervision of the platting of land and the location of streets in the surrounding rural territory. Indiana cities have jurisdiction over watercourses for ten miles beyond their limits. The impounding of water in distant streams or lakes is a common extramural activity. Such institutions as hospitals, workhouses, cemeteries, recreation fields, parks, and through highways frequently are located and operated outside the city limits.

INTERMUNICIPAL CO-OPERATION · Arrangements for joint action among municipalities and other units of government are on the increase.[9] Some are based on enabling statutes; others, on informal gentlemen's agreements. These arrangements apply to the interchange of police information (especially by broadcasting), regional planning, traffic regulation, the suppression of disease and epidemics, fire-fighting, water supply, and the building and use of sewers and sewer outlets. The central cities of twenty-three out of thirty metropolitan communities surveyed were found to be sending police broadcasts to near-by municipalities; Chicago, Cleveland, and Cincinnati broadcast to more than fifty neighboring police jurisdictions each. Examples of other forms of police co-operation are less numerous. Los Angeles County and Chicago make the facilities of their police laboratories available to the smaller places; for instance, for handwriting and fingerprinting analysis and records and for tests of specimens. Indianapolis furnishes complete police protection to one of its suburbs for an annual lump sum. Co-operation in fire-fighting is much more widespread, as indicated by its authorization by eighteen out of twenty States studied. It

[8] V. Jones, op. cit. pp. 88–91; A. F. MacDonald, *American City Government and Administration* (1941), pp. 121–124.

[9] P. Studenski, op. cit. chap. iv.

is usually placed on a contractual basis, with a charge of so much per hour for each piece of equipment used. Six States, however, authorize the joint ownership and operation of fire departments. Atlanta, Georgia, and Fulton County are partners in such an arrangement. Boston and twenty-six other cities have connected their fire-alarm systems so that each knows when another needs aid. Fire apparatus is automatically shifted to adjacent municipalities in accordance with prearranged plans. Three fourths of the States now authorize interunit co-operation with respect to airports. The form of the co-operation may be defined in rigid contracts or left to informal agreement. Usually the management of the joint enterprise is subject to the concurrent legislation of the councils of the co-operating units; but when two North Carolina counties and the municipalities of Raleigh and Durham combined to build an airport, its operation was confided to a joint airport authority made up of one representative from each of the four units. Water supply furnishes another occasion for much interunit co-operation. Usually the central city of a metropolitan community furnishes water for some of its satellites, sometimes for all of them. New York, Baltimore, Detroit, Cleveland, and Cincinnati are among those which perform such a service for many smaller municipalities. Usually the water is delivered at the city boundary, where it is metered, and then taken up and delivered to the consumers by the suburban mains. Prices charged to the suburbanites are usually from 10 to 100 per cent higher than those to the city dwellers.

CREATION OF SUPERAUTHORITIES · A special authority, with jurisdiction over a region embracing various cities, villages, townships, and even counties, and devoted to a single function or a few functions, is another method by which unified control has been secured.[10] These superauthorities usually are created by legislative act, occasionally by constitutional amendment. Functions which have been placed under such authorities include water supply, sewerage, port administration, parks, transit operation, tunnels, interstate bridges, and regional planning. The powers of these authorities cover the planning and building of projects and their administration and operation. They are variously known as "commissions," "authorities," or "boards," with a membership of three to seven members; and they are variously filled by appointment by the governor or the courts, by popular election, or by other officers acting ex officiis. The authority may be a direct agency of the State, it may represent the constituent local governments, or it may be a distinct local government itself.

THE MASSACHUSETTS METROPOLITAN DISTRICT · Here a commission of five members, appointed by the governor, has charge of the administration of parks, sewerage, and water supply in the Boston metropolitan area.[11] Nearly forty municipalities, situated in four counties, are included in the

[10]P. Studenski, op. cit. chap. xiv.

[11]Ibid. pp. 274–277; Commonwealth of Massachusetts, *Annual Report of the Metropolitan District Commission* (1937).

district. Associated with the commission is a Metropolitan Planning Commission, and there is an overlapping Metropolitan Transit District Commission with jurisdiction over fourteen municipalities. Expenses of the district are met by annual State appropriations, but these are recouped from assessments levied on the various municipalities in the district. One half of the cost of the upkeep of the boulevards is borne by the State itself. Adequate and well-planned park, water, and sewerage systems have resulted from the arrangement, although the commission has no independent powers as to policy, acting solely as the agent of the legislature. While the plea that it is undemocratic has been made against the system, it has satisfied the suburbs because they are protected against the political dominance of Boston, and it has removed some of the chief reasons for annexation agitation.

PORT OF NEW YORK AUTHORITY · The port of greater New York extends far along the shores of Manhattan, Long Island, and New Jersey.[12] Conflicts between the two States, and the palpable need for a unified control in order to ensure a proper development of the port and its efficient administration, were the chief incentives for the appointment of a joint commission of the two States in 1917 to study the question.[12] In 1921 a compact between the two States was signed in New York City and promptly ratified by Congress. Nearly two hundred municipalities are included within the jurisdiction of the authority. The original act constituted six commissioners, three from each State; but after the merger in 1930 with the New York and New Jersey Bridge and Tunnel Commission the number was raised to twelve. One of the duties of the Authority is to prepare plans for the development of the harbor for submission to the legislatures of the two States; and it may petition any of the municipalities to make improvements which are deemed of value to the port. It constructs interstate bridges and tunnels upon order from the two States and is in charge of their operation. To date, its plans include a series of nine freight terminal stations, of which one has been completed; the acquisition or construction of belt-line freight railroads, none of which has been carried through; and the consolidation, under one management, of railroad lighterage services. Co-operation has been extended to the transit commissions of the various suburbs in the projection of rapid-transit facilities. The Authority has no powers of taxation but secures its funds from State appropriations and from loans, with its properties as security. An inherent difficulty in the management of a two-State agency was shown by the attempt of New Jersey in 1927 to give its governor a veto power over the acts of the commission. When Governor Smith pointed out that this was a violation of the compact and would lead to retaliation, the New Jersey legislature repealed the act.

[12]P. Studenski, op. cit. pp. 272–274, 323–327; The Port of New York Authority, *Twenty-second Annual Report* (1942); V. Jones, op. cit., passim; E. Bard, *Port of New York Authority* (1942), Columbia University Studies in Economics, History, and Political Science, and Public Law, No. 468; Port of New York Authority, *Port of New York Authority* (1941).

THE CHICAGO SANITARY DISTRICT · The Chicago Sanitary District was authorized under a legislative act of 1889, and its operations cover about forty municipalities, all within Cook County.[13] The governing authority is a commission of nine men elected by the voters of the district. Occupation of the lake front by a few large municipalities, and the flat, low-lying character of the topography, made necessary an agency with power to act for the whole area in the construction and maintenance of facilities for sewage disposal. The most spectacular work of the commission was the deepening of the beds of the Chicago River and its tributary and the construction of a canal so that the water of Lake Michigan, laden with the refuse of Chicago, flows outward to the Illinois and eventually to the Mississippi River. Since the court decree forbidding the taking of an increased amount of water out of the lake,[14] the commission has been engaged in the construction of sewage-disposal plants. It has a limited power of taxation and borrowing, and these activities are strictly defined by the State legislature. Besides the general power to provide for the main drainage of the district and the construction of sewage-disposal plants, it may build docks adjacent to its navigable channels and construct electric-power plants where there is sufficient fall. Popular election has given the commission at times a poor personnel, and its work has not been noted for vision or efficiency.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA · The function of this most conspicuous superauthority is nothing less than the bringing of the waters of the Colorado River across the Coast Range to the semiarid plains of the Los Angeles region.[15] The project as a whole is a triumph of modern engineering skill and technique. The water is pumped from the Colorado River near the southeastern corner of the State, where it is impounded at Parker Dam at an elevation of 450 feet above sea level. By five stages at successive points it is lifted a total of 1617 feet and finally reaches an elevation of 1807 feet. About four hundred thousand horse power of electrical energy, furnished by Boulder Dam, is required to operate the pumps; the captive Colorado River thus furnishes the energy to pump a portion of itself across the mountains. The 242-mile waterway is composed of open cement-lined canals, aqueducts, siphons, and tunnels.

The complexity of the legal and constitutional aspects of the project corresponds to that of the engineering. An interstate compact, with seven States and the United States as parties, was signed at Santa Fe, New Mexico, November 24, 1922; but it was subject to ratification by the legislative bodies, which that of Arizona consistently refused. The next step was the passage by Congress, December 21, 1928, of the Swing-Johnson bill, which

[13] C. E. Merriam, S. D. Parratt, and A. Lepawsky, *The Government of the Metropolitan District of Chicago* (1933), pp. 53–58; P. Studenski, op. cit. pp. 318–319 et passim.

[14] *Sanitary District of Chicago* v. *United States*, 266 U. S. 405 (1927).

[15] The Metropolitan Water District of Southern California, *History and First Annual Report* (1939).

authorized the Secretary of the Interior to construct a dam and power plant at Boulder Canyon, and which was to be operative when six States had ratified the interstate compact. This was accomplished by the end of 1925. Meanwhile the California legislature, in 1927, had enacted a statute authorizing the creation of metropolitan water districts through the cooperation of two or more municipalities. The Metropolitan Water District of Southern California, organized late in 1928, is governed by a board of nineteen directors appointed by the chief executive and confirmed by the legislative body of each of the constituent municipalities. Each municipality is entitled to at least one representative; Los Angeles has six, and each of twelve other municipalities one. Each director is entitled to cast one vote for every ten million dollars of assessed valuation of taxable property within his city, which gives Los Angeles two thirds of the votes.

The State of Arizona, which had refused to ratify the original interstate compact through fear that it would not receive its just share of the water and electrical energy, subsequently opposed the project in the United States Supreme Court in five different cases, but without avail; for the right of the United States to authorize dams and other improvements on navigable rivers was consistently upheld.[16]

The interstate compact of 1922 had made an allocation of the Colorado River water between the upper and lower river States, but no allocations to individual States. In March, 1930, the United States allocated 18 per cent of the power energy of Boulder Dam to Arizona, 18 per cent to Nevada, and 64 per cent to California, one half of which was for the Metropolitan Water District. The pumps at the Colorado River started in January, 1939, and the entire project is now nearing completion. The total cost was estimated at more than $275,000,000. Assuring abundant water for irrigation and domestic purposes for a great area, the project is one of man's great achievements.

CITY-COUNTY CONSOLIDATION · The American States, with one exception, have left their incorporated cities as integral parts of the counties in which they are located. Virginia, in 1722, incorporated its first city, Williamsburg, and set it aside from the county. This policy it consistently followed, so that today its twenty-four cities with a population in excess of ten thousand are politically independent of the counties in which they are situated and themselves have the status of counties.[17] The common policy of city subjection to the county has both its strong and its weak points from the standpoint of the building of an integrated urban government.

If the metropolitan area is larger than the county, the government of the latter is an obstacle to unification; for it adds to the already too complex governmental machinery. But if the various urban units are all contained within the county, the latter might become the basis of a metropoli-

[16] *Arizona* v. *California*, 292 U. S. 341 (1934).

[17] W. Kilpatrick, *Problems in Contemporary County Government* (*Virginia*) (1930), chap. xii.

tan government by acquiring from the constituent units the necessary functions of a regional character. Among the difficulties, however, in making such a use of the county is its inherent character as an agency performing chiefly functions which are of vital concern to the State as a whole. To hand these over to a city government whose policies are necessarily dictated by considerations of local politics is a strain on State unity. Other difficulties are chiefly legal. All but an occasional State constitution place the county government in a straightjacket. County-city consolidation or co-operation therefore usually requires both constitutional amendment and action by the legislature.[18] Some of the outstanding examples of such action in urban areas are considered below.

BALTIMORE · Baltimore and its surrounding county, as in the Virginia system, never had been closely connected.[19] The constitution of 1851, without a formal declaration, recognized the city as separate from the county by allowing it a corps of officers for the performance of county duties. Its status is that of a municipality which also performs county functions. The people choose a "State's attorney" as criminal prosecutor in addition to the city solicitor appointed by the mayor. There are a full complement of courts common to the counties, a sheriff in addition to the police commissioners, and a collector of State taxes appointed by the mayor. Land records are kept by the clerk of the city's superior court. The city operates large water and sewerage facilities in the surrounding county on the basis of a sale of services. Two large annexations of county territory were made by legislative act in 1888 and 1918.

PHILADELPHIA · An act of the Pennsylvania legislature in 1854 merged the functions of the city and the county of Philadelphia while declaring at the same time that both remained as legal entities.[20] The county offices were abolished and their functions distributed among the city officers. To the city council went the duties of the county commissioners; to the city treasurer, the duties of the county treasurer; to the city controller, those of the county auditor. The judicial offices of the county were continued as city offices. The fiction of the existence of the county was harmless until a new State constitution in 1874 seemed to require that all counties should have a designated list of officials. By judicial interpretation the city council retained its power to levy taxes and appropriate money for both city and county purposes, and the city treasurer and the controller were permitted to continue in both capacities. Nevertheless, a series of county officers are elected who, while spending funds appropriated by the city council, are largely free from the control of the mayor and not bound by the city merit

[18]J. A. Rush, *The City-County Consolidated* (1941), chap viii; P. Studenski, op. cit. chap. x; V. Jones, op. cit. pp. 130–137.

[19]J. A. Rush, op. cit. chap. xiv; P. Studenski, op. cit. pp. 173, 174, 245–247; *Charter and Public Local Laws of Baltimore City* (1938).

[20]J. A. Rush, op. cit. chap. xv; P. Studenski, op. cit. pp. 193–197.

system. Various attempts to undo the ill effects of this feature of the constitution of 1874 so far have failed.

SAN FRANCISCO · "The City and County of San Francisco" was the official name given that community when in 1856 it was separated by legislative act from the county of San Mateo.[21] In the constitution of 1879 its charter was confirmed and additional powers were granted. In this instance also there was no complete merger of city and county officers and functions. The board of supervisors, now increased to fifteen members, succeeded the city council. The offices of treasurer, assessor, attorney, recorder, collector, and surveyor were merged, but the county offices of sheriff, district attorney, prosecuting attorney, public defender, and assessor were retained and remained elective. At the head of the administration is an elective mayor, who possesses a wide appointive power. A "chief administrative officer," appointed by the mayor, is in direct charge of several departments and such other work as may be given him, and is responsible to the mayor and supervisors. The charter of 1935 reduced the number of elective officials other than members of the board of supervisors from fifteen to seven. The San Francisco consolidation accomplished something in the way of eliminating overlapping county and city offices, but fell far short of covering the metropolitan area. The adjoining county of San Mateo, which has become largely urban in character, and the large cities across the bay are entirely outside the scheme. They are, however, linked together in the East Bay Municipal Utility District, which is empowered to provide facilities for water, light, power, heat, transportation, and sewage disposal.

ST. LOUIS · St. Louis's population of 816,048 comprises only about two thirds of a metropolitan district which lies on both sides of the Mississippi River.[22] An amendment to the constitution of Missouri in 1876 authorized the city to separate from the county and conferred home rule. At the same time it authorized annexations of county territory to the extent of forty-three square miles, which was sufficient, it was thought, to take care of the city's growth for all time. So far as the wording of the law is concerned, St. Louis is simply a city lying outside any county. The courts, however, have held that for some purposes it is a county. State statutes referring generally to counties are held to apply to it. The city sheriff, coroner, constable, and clerks of court are held to be county officers, and their selection and compensation to be governed by general State law rather than by the city charter. Strangely enough, another constitutional amendment for the benefit of St. Louis was adopted in 1924, permitting city and county to resume their ancient alliance and consolidating their

[21]J. A. Rush, op. cit. chap. xvi; P. Studenski, op. cit. pp. 174–175; *Charter of the City and County of San Francisco* (1925); California Commission on County Home Rule, *County Government in California* (1931); A. F. Smith, "San Francisco: A Pioneer in the Consolidation Movement," National Municipal League, op. cit. pp. 95–99.

[22]J. A. Rush, op. cit. chap. xvii; P. Studenski, op. cit. chap. x.

governments into one. The rapid growth of the suburban population, and the need for zoning, new roads and streets, and other city facilities, make such a scheme highly desirable. A charter submitted in 1926 to absorb the entire county territory and abolishing the county government was defeated. The legislative powers are vested in a board of aldermen of twenty-eight members, elected by wards, and a president of the board, elected at large. The mayor and comptroller are chosen for four-year terms. The mayor's extensive appointing power places him in the strong-mayor category, although the annual budget is in the hands of a board of estimate and apportionment composed of the mayor as chairman, the comptroller, and the president of the board of aldermen.

DENVER · Denver's urge for a separation from Arapahoe County arose from the need, not to achieve a stronger metropolitan government, but to be rid of a wasteful county government. An amendment to the State constitution in 1902 set somewhat more than three hundred square miles of territory apart under the name of "the City and County of Denver," gave it the power to annex more contiguous territory in the future, irrespective of the desires of the county in which such territory might lie, and granted it the privilege of municipal home rule.[23] City and county powers were merged in one government, and the charter which was soon adopted provided for one set of officers to administer them. In 1905 a hostile State supreme court held the amendment unconstitutional to the extent that it abolished the county officers; whereupon a new set of officers was established, which continued in existence with little work to do until a new supreme court in 1914 reversed the opinion. The government is of the commission form, with five commissioners elected by the people at large for terms of four years, one of them being chosen by the commission as mayor. While Denver furnishes a good example of the economy to be obtained by merging city and county offices, it does not solve the metropolitan problem; for it includes only a small portion of the county of which it originally was a part, and a population of 42,000 out of the urban community of 330,761 is outside the city and county.

CHICAGO · The second-largest metropolitan district in the United States, that of Chicago, is considered here not because of what it has done to establish a unified government but for the opposite reason. Its principal county, Cook, has not been given many extra powers; in fifty years the city of Chicago has added only forty-two square miles to its territory; and, except for the Sanitary District, no metropolitan authorities have been established to perform functions for the major portions of the area. In a study by Charles E. Merriam and his associates, of The University of Chicago, the metropolitan area was reckoned as extending in a fifty-mile

[23] J. A. Rush, op. cit. chap. xviii; V. Jones, op. cit. pp. 162, 163; *Charter of the City and County of Denver* (1914); M. Fesler, "Denver Consolidation a Shining Light," National Municipal League, op. cit., pp. 44–48.

radius from a point in the downtown Loop.[24] This area in 1930 contained a population of 4,860,750 and overlapped the States of Indiana and Wisconsin. Within the area are 204 cities, 15 counties, 165 townships, and many districts (978 school, 70 park, 4 forest-preserve, 11 sanitary, 190 drainage, 4 mosquito-abatement, and 1 health district), making a total of 1642 units, of which 1487 are in Illinois. Each one of these units has the power to incur and assume indebtedness, and a body of officials responsible for certain services within the area. Over 30 per cent of the population live outside the central city. With such a maze of governments the opportunity for a considered and unified treatment of the problems affecting the whole district in common is small. Self-government for the fragments, through the election of a host of petty officials, has effectively blocked self-government for the larger questions of the whole. Even within the city of Chicago there exist twenty-seven independent taxing bodies, including nineteen park boards, three of which cover large areas of the city. All are completely independent of the city in the raising and spending of their funds. Three hundred and fifty independent police systems, 343 health agencies, and 167 public water systems administer their respective functions with only casual co-operation. There is a total of more than 85,000 public employees serving under many masters, with no settled means by which they may consider together the common problems of law, finance, personnel, engineering, and planning. The various plans which have been proposed for the alleviation of the situation include the merging of city and county functions in Cook County, an increase in the powers of the county alone, a federation of cities, and a consolidation of functions among several strong regional authorities. Merriam and his associates advanced strong arguments to show that the setting aside of the Chicago region as an independent State of the Union would offer short cuts to the solution of the major problems of the community.

COUNTY HOME RULE · Home rule for cities inspired the idea of home rule for counties.[25] The central idea is the right of the voters to frame and adopt a charter establishing a form of government. The chief argument is about the same for city and county: by this means a government can be built to fit the peculiar needs of each locality. If the home-rule privilege extends to the transfer of power from city to county, the way is opened for the central administration of functions in which the various cities, villages, and townships of the community have a common interest. With rare exceptions State constitutions must be amended before the State legislature may confer home rule on the county. Naturally, if an urban area lies across county lines, home rule can be of little aid in solving the problem of metropolitan government.

[24] C. E. Merriam, S. D. Parratt, and A. Lepawsky, op. cit., passim; P. Studenski, op. cit., passim.

[25] A. W. Bromage, *American County Government* (1933), pp. 101–114.

SPREAD OF COUNTY HOME RULE · In the twentieth century nine States by constitutional amendments extended the privilege of home rule to counties.[26] These were California, Virginia, Maryland, Montana, Ohio, Texas, New York, Louisiana, and Pennsylvania. Such proposals were rejected in Michigan and North Dakota, while the general language of the constitutions of North Carolina and Georgia put the extension of home rule within the discretion of the legislature. California, in 1911, was the first in order with a general county-home-rule clause; but as early as 1894 it had adopted an amendment giving general authorization for such a merging of city and county governments as many years before had been given to San Francisco individually. Now it provided that a city in its charter might turn over to the county the discharge of any of its functions. New York in 1919 authorized its legislature to provide special charters for the counties of Nassau and Westchester, subject to the approval of their electors, and in 1922 followed this up with a constitutional amendment giving home rule to the counties in general. Montana's constitutional amendment of 1920 empowered the legislature to merge county governments with city or town governments or to provide plans or forms of government for any of them; but each change is subject to a favorable vote of the electors in the territory affected. Georgia's amendment gave its legislature the power to consolidate county and city governments for cities with 52,900 population or over; but the consent of the electors in the city and in the county outside the city is necessary.

VIRGINIA · A constitutional amendment of 1928 permitted the legislature to provide special forms of government for counties other than that embodied in the constitution and the general statutes.[27] Three years later two types of charters, the county-executive and county-manager forms, were authorized, either of which may be adopted by a majority of those voting in an election. In both forms the board of supervisors of the county is the legislative, or policy-making, body and chooses the chief executive officer. In both the county clerk and the attorney for the commonwealth are elected by the people; but in the former the appointing power otherwise is left in the hands of the board, and in the latter it is given to the manager. The administrative work is concentrated in six departments which are under the direct supervision of the chief executive. Three counties, Henrico, Albemarle, and Arlington, have adopted home-rule charters, with favorable results in efficiency and economy. County home rule in Virginia, however, has only a limited bearing on the question

[26]J. A. Fairlie and C. M. Kneier, *County Government and Administration* (1930), pp. 74–76; J. A. Rush, op. cit. pp. 373–392.

[27]W. Kilpatrick, op. cit. pp. 557–568; Virginia Commission on County Government, *A Further Report on Progress in County Government and County Consolidation* (1936), pp. 7–12; G. W. Spicer, "Virginia's Progress in County Government," *American Political Science Review*, Vol. XXVIII (December, 1934), pp. 1074–1078; J. A. Rush, op. cit. pp. 193–206; E. Overman, *Manager Government in Albemarle County, Virginia* (1940).

of metropolitan government, since the cities are politically separate from the counties.

NEW YORK · A constitutional amendment adopted in 1921 authorized the New York State legislature to give the counties of Westchester and Nassau special charters, which might include powers transferred from the towns; but these were to become effective only upon subsequent approval by the respective electorates.[28] To counties in general the legislature might give such further legislative and administrative powers as it might "deem expedient." Another amendment, effective in 1935, applicable to counties in general, allowed sweeping changes: the abolition of old county offices and the creation of new ones, and the transfer of powers from all sorts of political subdivisions to the county. Charters drawn by commissions must be passed by the legislature and must receive the following popular majorities: in the county as a whole; in every city containing 25 per cent of the county's population, and in that part of the county outside such city or cities. The counties of Nassau and Westchester, of the New York City area, adopted home-rule charters in 1936 and 1937 respectively. Both retain the board of supervisors, but both have the elective county executive. Neither one quite abolishes all the old offices, but the administration is organized into departments responsible to the county executive.

OHIO · Ohio's constitutional amendment of 1933 permits the drawing up of a charter altering the county's statutory form of government, and permits by mutual agreement the transfer of city powers to the county and, finally, the complete union of city and county as one political entity.[29] The legislature may establish optional forms of county government, according to the Virginia idea, which a county may adopt by majority vote. Ohio offers a promising opportunity for experimentation in the union of city and county functions; for there are a dozen or more counties with sizable cities, and its urban districts of metropolitan proportions are mostly contained within the bounds of a single county. In 1934 four counties, whose principal cities are Cleveland, Cincinnati, Toledo, and Youngstown, elected charter commissions and submitted charters to the voters.[30] Only in Cuyahoga County was a majority vote obtained, and in that instance the charter failed to go into operation because of a hostile court decision.[31] Since a complete city-county merger requires a favorable vote

[28]P. M. Cuncannon, "The Proposed Charters for Westchester County," *American Political Science Review*, Vol. XXII, pp. 130–138; R. H. Wells, *American Local Government*, pp. 120–122.

[29]*Constitution of the State of Ohio* (1936), Art. X.

[30]V. Jones, op. cit. pp. 181, 182, 245–247; Governor's Commission on County Government in Ohio (R. C. Atkinson, Director), *The Reorganization of County Government in Ohio* (1934).

[31]*State ex rel. Howland* v. *Krause et al., Board of Elections of Cuyahoga County*, 130 Ohio St. 455 (1936); S. G. Lowrie, "Interpretation of the County Home Rule Amendment by the Ohio Supreme Court," *University of Connecticut Law Review*, Vol. X (November, 1936), pp. 454–466; E. L. Shoup, "Judicial Abrogation of County Home Rule in Ohio," *American Political Science Review*, Vol. XXX, pp. 540–546.

in a majority of the county's cities, villages, and townships, which are traditionally jealous of their rights, no such charter has yet been submitted.

CALIFORNIA. LOS ANGELES COUNTY · Seven California counties, including Los Angeles, have adopted charters, and a few others have drafted charters which were rejected at the polls. The development of metropolitan or regional government for the Los Angeles area is as notable as its lack for Chicago. The metropolitan district of Los Angeles, by the census of 1940, contained 2,904,596 people, of whom 1,504,277 were in the central city and all but 139,027 within the county, with its forty-five incorporated cities and extensive unincorporated areas.[32] At the basis of its unified government are the enlightened provisions of the California constitution: those authorizing county home rule, the consolidation of city and county governments, and the transfer of city powers to the county.[33] In 1913 Los Angeles County adopted a home-rule charter, and step by step various cities have individually transferred powers until its government has a distinctly urban cast.[34] Its health department performs services not only for unincorporated portions of the county but for thirty-nine of the forty-five municipalities. Charity and welfare administration are entirely in county hands, as are chiefly the duties of the sealer of weights and measures and the registrar of voters, as well as juvenile probation. Library service is given to the unincorporated parts and to twenty-five municipalities. The assessment and collection of taxes are performed for some cities, including Los Angeles. The elective township constables were abolished, and an appointive constabulary under the control of the sheriff was established. A county regional-planning commission has developed plans for the entire county, including a land-use survey, and acts as a zoning agency for the unincorporated parts. The flood-control district, while not legally a county agency, is under the control of the board of supervisors and is served by other county officers. For the nearly forty unincorporated urban places the county government performs many of the ordinary functions of a city government. The annual budget of about eighty million dollars is larger than that of the city of Los Angeles. County administration is organized into more than fifty departments or agencies, with nearly sixteen thousand employees. Late in 1939 the board of supervisors created the office of Chief Administrative Officer, to whom they delegated such of their duties as were necessary to give him general management of the administration. Such was the success of the move that in 1940 a charter amendment was adopted giving the county a manager in name.

SUMMARY · The use of the county as a vehicle for metropolitan or regional functions has not been widespread. The most conspicuous and successful example is that of Los Angeles, where geographical factors, population

[32] *Sixteenth Census of the United States* (1940), *Population*, Vol. I, p. 129.
[33] *Constitution of the State of California*, Art. XI, sects. 7, 7½.
[34] *Los Angeles Year Book* (1941).

groupings, and the county's constitutional powers are most favorable. Attempts to merge completely the powers of the county and those of the city have been only partially successful. The county refuses to die. One of the most ancient of Anglo-American institutions, it is deeply imbedded in our customs and the body and traditions of the common law. Such mergers, including county home-rule charters, often meet hostility in the courts, because of politics, prejudice, or ignorance. Such was the experience of Philadelphia, Denver, Omaha, Cleveland, and, in a smaller degree, of San Francisco.

THE FEDERATED-CITY, OR BOROUGH, PLAN · A few attempts have been made in the United States to establish metropolitan governments by means of a federation of cities and villages, but so far no such venture has succeeded.[35] The principle of the scheme is that employed in our national polity: a central government possessing those powers of a general nature which are of first importance to the whole area, and local governments administering those affairs which concern chiefly themselves. Arguments run about the same as for a federal state. The principle of local self-rule is preserved; the red tape and slow action of a huge, unwieldy machine are avoided; local needs may receive a sympathetic hearing; and an administration can be devised to suit peculiar local conditions. A consideration not to be ignored is that such a proposition is bound to meet less opposition from the local units than one for outright consolidation or absorption.

LONDON · London is an example of this scheme of government.[36] The legal City of London embraces only the ancient area of a little more than a square mile and a population of thirteen thousand; metropolitan London includes one hundred and seventeen square miles and a population of over six million. The central government is known to the law as the County of London. It is governed by the London County Council, of 144 members, of whom 120 are chosen from sixty parliamentary constituencies (two from each), and 4 from the City of London, these four together choosing 20 aldermen. There is no mayor, but the administrative work is carried on by permanent officials subject to the oversight of eighteen council committees. The chairman of the County Council is merely a presiding officer. The local governments are twenty-eight metropolitan boroughs, which for the greater part follow old parish and borough boundary lines. Each borough has a local government including mayor, alderman, and councilors, all of whom sit together as one council. The councilors are popularly elected, but the mayor and the aldermen are chosen by the councilors.

DIVISION OF POWERS · There is necessarily a division of powers between the central and local governments of this federation. The powers of the

[35] P. Studenski, op. cit. p. 367.

[36] F. G. Brewer, *A Century of London Government: The Creation of the Boroughs* (1934); V. Jones, op. cit. pp. 25–30.

London County Council are such as are primarily metropolitan in character. These concern main streets, sewers and sewage-disposal plants, tunnels, the larger city parks, bridges, fire protection, public health, recreation, education, the construction and operation of transit lines, the institutions for the poor, and the larger part of the licensing and inspection. The powers of the boroughs are necessarily less than those of a typical American city. Among them are the building and maintenance of local streets and sewers; the enforcement of health regulations; the erection of workmen's houses; the operation of the public bath and washhouses; the maintenance of public libraries and cemeteries; and, so far as may seem desirable, the ownership and operation of electric-light plants. Policing is in the hands of an entirely separate authority, the metropolitan police district, which covers an area considerably larger than London County. At its head is a police commissioner appointed by the crown and directly responsible to the Minister for Home Affairs, who is aided by three assistant police commissioners. While the whole system appears to the outsider intricate and difficult, it has worked fairly well in practice. London has been saved from such a complete consolidation as would have abolished most of its local self-government.

NEW YORK CITY · External appearances have classed New York in the popular mind as a borough-plan, or federated, city.[37] Subdivisions called boroughs it does have for purposes of local administration, but its organization is not that of a federation. The government of the metropolis has many features which make it worthy of attention from the general student of American government. In the first place, it is more than the government of a city: it is the government of a large portion of a metropolitan region. It exemplifies one type of adjustment of the county to the city government. While containing the shadow of a federation, it represents a high concentration of power in a few individuals. England and France, probably from reasons of prudence, both kept their metropolises subdivided and directly subject to the national government. New York City's political connection, however, is only with the government of the State of which it is a part. An act of the State legislature of 1897 merged what was then the metropolitan area into a greater New York City. Fifteen cities and towns, including the great city of Brooklyn, and eleven villages were within this area. The borough features of the charter of 1898, suggested by the London government, were retained by the present charter, which was adopted in 1936.

The government is of the strong-mayor form.[38] The main features of the central government are a mayor, chosen for a term of four years, who is in general charge of the administration, who has wide powers in the

[37]P. Studenski, op. cit. chap. xvii.

[38]L. A. Tanzer, "The Proposed New York City Charter," *National Municipal Review*, Vol. XXV, pp. 535–538.

appointment of department heads, commissions, and boards, and who is enjoined by the charter "to be vigilant and active in causing all provisions of law to be executed and enforced." He has a salary of twenty-five thousand dollars, and may be suspended or removed by the governor. Associated with the mayor is a board of estimate, which is in general control of the city's financial policy. Its eight members are made up of the mayor, comptroller, president of the council, and the presidents of the five boroughs, and it creates or abolishes all offices and fixes their salaries. Five bureaus, which include such affairs as engineering, franchises, and retirement and pensions, operate directly under the board. The comptroller, elected by the people for a four-year term, is the principal financial officer of the city; his duties include the auditing and disbursement of funds and the sale of city bonds. The mayor is assisted by a deputy mayor, whom he appoints for an indefinite term, and four staff agencies. The deputy mayor's duties are such as may be delegated to him. The bureau of the budget, the civil-service commission, and a department of investigation are attached to the mayor's office. The chief legislative body is the council, whose size is dependent upon the number of votes cast in the election. Members are chosen from the boroughs for two-year terms by proportional representation, each borough receiving one councilman for every seventy-five thousand votes cast. The first council, elected in 1937, had twenty-seven members; the one elected in 1943, twenty-one. The president of the council is elected from the city at large for a four-year term. The mayor has the veto, and bills on certain questions must receive the approval of the board of estimate.

The boroughs are what give the appearance of federation. There are five of these, Manhattan, Bronx, Brooklyn, Queens, and Richmond, corresponding to the five counties. The voters of each elect a borough president, who is a member of the city board of estimate and is the general administrative officer for the borough. He is a member of every local improvement board in the borough and has a considerable appointing power, including that of a commissioner of borough works. Such matters as the construction and repair of streets, bridges, and public sewers, the issuing of permits to builders to use the streets, and the filling of vacant sunken lots are under his control. It is clear that the borough is not a self-governing unit with legislative power but merely a subdivision of the city for purposes of administration and the election of councilmen. Expenditures and revenues are controlled by the central city government. Most, but not all, of the county functions have been consolidated with those of the city. In each county are elected a sheriff, a district attorney, judges of the county courts, and a register of deeds (except in one); and in each a county clerk is appointed or elected. The complete abolition of the counties and the transfer of their powers to the city would contribute to the efficiency and economy of the metropolitan government.

PITTSBURGH · The attempt to give the Pittsburgh region a federated city charter failed; but its near success, as well as the technical features of the scheme, makes it a matter well worthy of the student's interest.[39] Pittsburgh's rank in the census is the outstanding example of inadvertent misrepresentation. In the city proper (1940) there were 671,659 people; but in the county, which approximately conforms to the metropolitan district, there were 1,953,668. The metropolitan district contains 122 units: cities, boroughs, and townships. The urban areas stretch out through the valleys, giving the whole the appearance of an octopus. The charter called for the merging of the county with the consolidated city. The chief governing body was to be a board of seven commissioners, whose president was to be at the head of the administration, and with the consent of the commission to appoint all department heads and boards and commissions. Members of the board were to be elected at large within several districts, and the president was to be elected by the voters of the consolidated city. The federal character of the plan was shown in the provision guaranteeing the continued existence of the cities, boroughs, and townships under their existing names, forms of government, and boundaries, except that the old city of Pittsburgh might be cut into two or more divisions. The charter then allocated the powers between the central and local units of government. The latter retained their local fire and police departments, the powers of taxation and borrowing, and the performance of all other functions of primary interest to the local inhabitants. Through streets and bridges, tunnels, trunk-line sewers, and power and water services went to the central government. In addition to the old powers of Allegheny County, the original charter enumerated sixteen powers for the central government; but these were considerably reduced by the legislature before the charter was submitted to the voters. The chief powers concerned the construction, maintenance, and regulation of through streets, the making and enforcement of health regulations, the ownership and operation of waterworks, the construction and operation of transportation systems, the creation of special taxing districts for the purpose of supplying a service or utility needed in a locality, the regulation of smoke, and concurrent but not exclusive power to assess property for taxation. While the charter was pending before the legislature, an amendment was agreed to that a vote of a majority in two thirds of the civil units was necessary to give it legal effect; but when the measure had become law, it was discovered that this had somehow been altered to read a two-thirds vote in a majority of the units. At the election in June, 1929, the charter, surprisingly enough, received a majority in more than two thirds of the subdivisions, but a two-thirds vote in only forty-nine, falling thirteen short of the number required for adoption. By so narrow a margin were the people of Pittsburgh deprived of the advantages which would

[39] *Proposed Charter for the Consolidated City of Pittsburgh;* P. Studenski, op. cit. pp. 376–387.

doubtless have come from a federation of the local units of greater Pittsburgh and their union with the county. The plan followed in broad outline that of greater London, but provided a stronger central executive.

SUMMARY · Most of the existing units of American local government were laid out when the country was dominantly rural, and their areas and functions were fashioned to meet rural conditions. Rapid urbanization has greatly increased the demand for government services, and the old units have been found in many respects unfit to supply them. Custom, sentiment, and vested interests have combined to offer great resistance to change. Hostile court decisions have often barred the way to reform after reluctant legislatures and electorates had decided to act. Very seldom are counties or townships abolished or merged. Consequently a new function is often given over to a district formed for one purpose, with a consequent overlapping of authorities, or to a new officer, whose duties are not integrated with the existing administration.

Various adaptations of the old units to meet new needs are employed. The doctrine and the legal privilege of municipal home rule have greatly decreased the possibilities of annexation. The provision of means for intergovernmental co-operation and the exertion of extraterritorial powers have yielded good results. The creation of superauthorities, exemplified in the Metropolitan Water Authority of Southern California, affords a satisfactory means of solving special regional problems, but such devices usually call for State constitutional amendments and sometimes Federal legislation. The consolidation of city and county functions, either completely or in part, in about a dozen of the larger cities, has simplified community government and made it more effective. Home rule for counties, now authorized in nine States, offers an opportunity for an adaptation of their form of government to individual needs and also for the transfer of municipal powers to the larger unit. Only in Virginia, New York, and California have county home-rule charters been adopted, and only in Los Angeles have extensive powers of a large city been transferred to the county.

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CHAPTER XXXI

# *The Government of the Dependencies*

THE AMERICAN DEPENDENCIES · Only the people of the forty-eight States may vote for members of the House of Representatives and Senate and for the electors who choose the President of the United States. Since all Federal political power flows from these two agencies, the people of all the other United States territories are excluded from participation in the formation of national policies. In the year 1940 there were 18,951,956 people in these dependent areas of 711,606 square miles.[1] In addition, the nearly half a million residents of the District of Columbia were political dependents exerting only indirectly, if at all, an influence upon the political decisions of the country. The dependencies in the Pacific Ocean area consist of the Philippine and Hawaiian archipelagos, Guam, Samoa, the Aleutian Islands (off the Alaska coast), and a number of other small and mostly uninhabited islands in mid-ocean. Alaska, at the northwest corner of North America, and the Panama Canal Zone are the only continental noncontiguous territories. In the Atlantic area are Puerto Rico, the Virgin Islands, and leased naval and air bases on the south coast of Cuba and the British islands of Jamaica, the Bahamas, and Newfoundland. Within continental United States, besides the District of Columbia, there are various forts, arsenals, and Federal buildings and Indian reservations from which State authority has been excluded in whole or in part. The greater portion of the dependencies was acquired in the Spanish-American War of 1898; the others, in various ways and at widely separated intervals.

MOTIVES IN THE ACQUISITION OF DEPENDENCIES · A glance at a political map of the world will show that backward areas have been placed under the flags of the great military or commercial powers. Africa is divided among England, France, Italy, Belgium, and Portugal, leaving only the tiny republic of Liberia nominally independent. Asia has larger independent areas, but Russia, Great Britain, Japan, and France all have sovereignty over vast territories. All the islands of the Pacific are within the bounds of various empires, particularly of Holland, Great Britain, Japan, and France. Of the partially settled and developed areas only South America remains, except for small corners, independent of imperial control. The motives which have been chiefly responsible for these extensions of national sovereignty seem to be five in number.

(1) The economic motive has been strong in all periods of human history (for example in the Phoenician, Greek, and Roman empires), but the ma-

[1] *Statistical Abstract of the United States, 1942*, p. 2.

chine age has served to intensify it. Nations desire a dependable supply of raw materials for their factories, and markets for their manufactured goods. These they hope to find in the more primitive regions of the world. (2) Then there is the motive of defense. Always an important one, modern methods of warfare make it still more vital. The airplane, the tank, and the heavily armored ship have rendered all except a few areas of the world powerless to defend themselves. Islands and other outposts, within a wide radius, which might be used as air or naval bases must be held by a nation which is to preserve its integrity. (3) Next is the motive of colonization, the acquisition of more of the earth's surface as living space for the overflow population of the homeland. In the present state of the world's population this can be done only by the dispossession of numerous people who perhaps have long held the desired territory. (4) The motive of prestige is not inconsiderable. A mere kingdom cannot be raised to the grade of an empire without the conquest of distant peoples and lands to be held subject to its will. The human desire for power and prestige quite apart from economic considerations has often been an important element in wars of aggression. (5) The evangelical urge to spread the good things of a nation's culture, whether of religion, political institutions and ideals, or of language, literature, music, and general culture, has often counted for much in the drive for imperial dominion. Rudyard Kipling's challenge to the United States after the Spanish-American War to "take up the white man's burden" was in this vein, and not inconsiderable sections of the American public at the time were idealistically inclined to help to spread the benefits of American free institutions to the oppressed peoples of the Spanish colonies. The doctrines of superior races, chosen peoples, and manifest destiny go to support such imperialistic drives. Hitler's "new order" for Europe and Africa, and Japan's "co-prosperity sphere" for eastern Asia and the East Indies both partake of all five of these motives.

## *ACQUISITION OF THE AMERICAN DEPENDENCIES*

THE MINOR PACIFIC ISLANDS · Our territorial expansion outside the continent began in the Pacific. Whalers and traders of the sailing-ship era laid claim by virtue of discovery to some of the small islands which dot that ocean. Congress in 1856 passed an act to protect the interests of American sailors who had discovered and were working the deposits of guano fertilizer. Any such island "not within the lawful jurisdiction of any other government" and "not occupied by the citizens of any other government" might be declared by the President as "appertaining to the United States"; and a record of the island's discovery, occupation, and location should be recorded with the Secretary of State.[2] For many years little interest existed in the islands thus claimed. There was some thought that they might be

[2]Act of August 18, 1856, 11 Stat. 119.

useful as coaling stations, and later it was realized that they might serve for cable landings. Not until the coming of air navigation gave them value as landing fields and weather-reporting stations did the various nations begin vigorously to reassert their claims to these uninhabited rocks. The United States has an undisputed claim to about twelve of them.[3] None lie in the twenty-five-hundred-mile stretch between the American coast and Honolulu; but they connect Hawaii with Manila, in the Philippines, at intervals of 1200 to 1700 miles. To the southwest, 1850 miles from Hawaii, lie Canton and Enderbury islands (claimed also by Great Britain), convenient stopping places for air lines to New Caledonia, New Zealand, and Australia. Six other islets lie along this general route: Howland, Baker, Kingman, Palmyra, Jarvis, and Swain. Nearly all these American-claimed islands had no aboriginal inhabitants. After 1908 Midway held a staff for the transoceanic cable; and in 1930 airfields, airdromes, or seaplane bases were built at Midway, Wake, and Guam. On Wake island are a seaplane base and a modern hotel. Swain's island, annexed in 1925, is the only one of these islets with a native population. It is one square mile in area, twenty feet high, and has a population of about one hundred and fifty Polynesians. Baker, Howland, and Jarvis islands are used as stations from which to send out weather reports, and all offer valuable sites for seaplane bases.

THE MAJOR PACIFIC ISLANDS · Although our claims to these specks on the ocean blue may have been the oldest, the late nineteenth century saw our occupation of land areas of greater size and population. By conquest and by purchase the Philippine archipelago of more than 7000 islands, 1095 of which are inhabited, was acquired from Spain in 1898. Geographically these constitute a section of the chain of islands, including Japan, which ring the coast of Asia. Sixty-one miles to the north is the first of the Japanese chain; 43 miles to the south are the first of the Dutch islands; Hong Kong and the China coast are only 631 miles away; French Indo-China, 800 miles.[4] Fifteen hundred miles directly east on the route to the United States is another possession, the island of Guam, also ceded by Spain in 1898. This was the chief island of the Mariana group, which had long been a part of the Spanish empire. At the time of the cession of Guam the remainder of the group, all of them very small islands, were ceded to Germany, and during the First World War these were conquered by Japan and held as a mandate under the League of Nations. Guam has an area of 76 square miles and a population of 22,290.[5] It has a good harbor and was being fortified when captured by Japan. After its recapture from the Japanese, in 1944, it was made the main advance base for the American Pacific fleet.

[3]W. H. Haas, *The American Empire* (1940), pp. 295–305; F. M. Keesing, *Modern Samoa* (1934), chap. iii; Foreign Policy Association, *Overseas America* (1942).
[4]W. C. Forbes, *The Philippine Islands* (2 vols.), Vol. I (1929), p. 4.
[5]*Statistical Abstract of the United States, 1942*, p. 2.

The Hawaiian Islands, lying 2500 miles southwest of Los Angeles, are the eastern terminus and anchor post of our insular possessions in the Pacific, corresponding to the Philippines in the west. There are eight sizable islands in the group, all inhabited, ranging from the 4210 square miles of Hawaii to the 63 square miles of Kahoolawe, with a total population in 1940 of 423,330. Strangely enough, they long remained independent of political control by other nations.[6] In 1795 a tribal chief, Kamehameha, had united the archipelago into one political unit. During the succeeding century there was an infiltration of American and European nationals. In 1893 a revolution was carried out chiefly at their instigation, the native monarchy was overthrown, and a republic dominated by Americans was proclaimed. The United States minister caused troops to be landed from an American warship to maintain order, the American flag was raised, and a temporary protectorate was proclaimed. Grover Cleveland, upon accession to office, repudiated the whole movement and hauled down the American flag, advised the restoration of Queen Lilioukalani to the throne, and withdrew from the Senate the treaty of annexation which President Harrison had negotiated. In 1894 the provisional government was ended and the republic of Hawaii proclaimed. Three years later the McKinley administration again sent an annexation treaty to the Senate; but because no action was taken on it a joint resolution annexing the islands was introduced in Congress the following year and speedily passed.

In 1899 the United States acquired Tutuila and five smaller islands of the Samoan group by treaty with Great Britain and Germany, with whom we had shared the political control of the entire group, and the consent of the native chiefs.[7] The area of the American islands is 76 square miles, and the population is 10,055, which amounts to a doubling of the numbers since the annexation. These islands lie a short distance south of the equator, about 1900 miles southwest of Hawaii, on the direct air route to New Zealand. In 1878 the United States made an agreement with the native government by which the harbor of Pago Pago, on the island of Tutuila, was ceded as a naval and coaling station. Under a treaty of 1890 Great Britain, Germany, and the United States assumed a joint protectorate of the islands; but frequent revolutions caused friction, and the division of the group was agreed to in the treaty of 1899. Great Britain subsequently withdrew, leaving Germany and the United States in possession; but during the First World War Australian forces recovered possession of the German portion for the British Empire.

ALASKA · Alaska, a great area of 586,400 square miles occupying the northwest corner of the North American continent, was purchased from Russia in 1867 for the sum of $7,200,000. Its population in 1940 was

[6] R. Kuykendall, *A History of Hawaii* (1926), passim; R. M. C. Littler, *The Governance of Hawaii* (1929), chap. ii.

[7] F. M. Keesing, op. cit. chap ii.

72,524, almost half of which was white.[8] The Aleutians, a string of islands stretching out far to the west, approach to within four hundred miles of the nearest Japanese land; and, farther to the north, American and Russian islands are but three miles apart at one point. Air and naval bases at Kodiak and Dutch Harbor on these islands have great strategic value in the defense of the northern Pacific area.

THE CARIBBEAN DEPENDENCIES · The Spanish-American War was the occasion for the beginnings of our territorial expansion on the Atlantic side of the continent. At its close Puerto Rico, the easternmost in the chain of the Greater Antilles, which enclose the Caribbean sea on the north, was ceded to the United States, and Cuba was given its freedom under the tutelage of the United States. Puerto Rico, with an area of 3435 square miles, had a population of 1,885,115 (1940), about three fourths of which is of the white race, chiefly Spanish.[9] Spain relinquished sovereignty over Cuba in 1899, but did not cede it to the United States. By a subsequent treaty Cuba leased to the United States the port of Guantánamo, on its southern coast, as a naval base.

In June, 1902, Congress authorized the President of the United States to purchase the rights and property of the French Panama Canal Company on the Isthmus of Panama.[10] On February 26, 1904, there was ratified a treaty with the new republic of Panama which gave the United States the "perpetual use, occupation, and control" of a strip of land ten miles wide across the Isthmus, to be measured from the thread of the canal, and several islands in the Bay of Panama. For this concession the sum of ten million dollars was to be paid and an annuity of two hundred and fifty thousand dollars. While the word *cede* was not used, the United States acquired full political sovereignty over the zone. On January 25, 1917, a treaty was proclaimed under which the United States received from Denmark the three islands of St. Thomas, St. John, and St. Croix, together with "the adjacent islands and rocks," for which we paid the sum of twenty-five million dollars.[11] These, shortly renamed the Virgin Islands, are located due east of Puerto Rico and are the beginning of the chain of the Lesser Antilles, which bend to the southeast to enclose the Caribbean Sea in that sector. A half century before, a treaty had been negotiated with Denmark and ratified by that country for the acquisition of the islands, and the king had even issued a proclamation to the people announcing the transfer; but the United States Senate failed to ratify the treaty. In 1902 the United States Senate ratified a treaty for their purchase for between four and

[8] *Statistical Abstract of the United States, 1942*, p. 2.

[9] Ibid. p. 2.

[10] W. O. Blanchard, "The Panama Canal Zone," in W. H. Haas (Ed.), *The American Empire*, pp. 123–150.

[11] W. Westergaard, *The Danish West Indies* (1917), pp. 257–262; L. K. Zabriski, *The Virgin Islands of the United States* (1918), pp. 238–317; E. B. Shaw, "The Virgin Islands of the United States," in W. H. Haas, op. cit. pp. 91–122.

five million dollars, but the Danish Rigsdag rejected this. St. Thomas has a good harbor at Charlotte Amalie, which is of strategic importance in the defense of the Panama Canal. The area of the islands is 166 square miles, and there is a population of 24,889, of which about 94 per cent are colored.

In the summer of 1940 an extension of American authority was made by an executive agreement between the United States and Great Britain by which Britain leased to the United States naval and air bases on the islands of the Bahamas, Jamaica, Bermuda, and Newfoundland. No political jurisdiction was included in the agreement.

## *CONSTITUTIONAL PROBLEMS OF THE DEPENDENCIES*

Down to the acquisition of the Spanish territories the American people had never really been confronted with the problem of ruling dependent peoples of a civilized character, perhaps against their will. The home continental lands extending to the Pacific had been successively added and colonized and incorporated into the Union. Alaska, physically detached from the States, was almost entirely uninhabited except for Indians and Eskimos, and long years of practice had broken down all scruples against governing such peoples as dependents. The islets of the Pacific, which we sometimes claimed, were nearly or entirely uninhabited. When the treaty with Spain delivered over to us several million people of Spanish civilization, the people of the United States were mentally unprepared to assume the role of governing which events had imposed upon them. That popular support for the war was based upon a desire to free the Cubans from the oppression of Spain was evidenced by a resolution adopted by Congress that "the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island [Cuba] except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the islands to its people."[12] Americans, nurtured in the stories of their own Revolution, were generally averse to the imposition of authority over a distant people contrary to their will. The words *colony*, *dependency*, and *empire* were outside their vocabulary. The Democratic candidate for the Presidency in 1900, William Jennings Bryan, declared that anti-imperialism was the paramount issue of the campaign. Nevertheless, there was general acquiescence when the islands were surrendered, since they could not well be left with Spain nor handed over to any other nation. The pious McKinley shared the American aversion to imperialistic government; but after wrestling with the problem, particularly as concerned the Philippines, he finally concluded "that there was nothing left to us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them, and by God's

[12]Joint Resolution No. 24, April 20, 1898, 55th Cong., 2d Sess., 30 Stat. 739.

grace do the very best we could by them, as our fellow-men for whom Christ also died."[13]

THE CONSTITUTION AND THE DEPENDENCIES · There is in the Constitution no mention of the right of the United States to acquire territory by conquest, purchase, or other means. Jefferson at first professed to believe that the acquisition of Louisiana must be validated later by constitutional amendment, but he failed to press the matter. Later annexations of territory occasioned few serious objections on the ground of constitutionality, the courts and statesmen pointing out their justification in the powers to make war and to negotiate treaties. A more difficult question was the character of the government which Congress and the President were bound to give territories so acquired. Were these territories entitled to all the benefits of due process of law, equal protection of the law, freedom of the press, speech, assembly, and religion? Must persons be brought to trial only upon a presentment or indictment of a grand jury and be tried by a petit jury? In short, does the Constitution necessarily follow the flag wherever it goes? If this question were answered in the affirmative, the United States would be incapacitated for governing the greater part of the territories which it had acquired; for Anglo-American laws and procedures were not suited either to the civilized portion of their people, accustomed to the Roman law which the Spaniards had used, or to the half-civilized portions, among whom head-hunting still survived as a social custom. The truth of the matter was that the Fathers had never visualized a situation in which the Republic would be called upon to rule distant lands. Here was a hiatus in the Constitution which the Congress and President must fill by law and practice and the courts rationalize as legal issues arose. Before long, some conclusions as to the basic relations between the States and the dependencies were established.

1. *Domains acquired by treaty or conquest from other countries cease to be foreign.* Soon after the cession of Puerto Rico to the United States, but before Congress had enacted any legislation regarding it, Di Lima, a merchant, shipped a cargo of fruit to New York and was charged the regular rates established by the Dingley Tariff Act of 1897 by Bidwell, the collector of the port.[14] Di Lima then brought suit to recover the amount which he had paid, on the ground that, since the tariff applies only to foreign countries, it could not be levied upon products from Puerto Rico. The Court upheld him, saying that Puerto Rico had ceased to be foreign.

2. *The dependencies are not a part of the United States proper until Congress acts to make them so.* Downes shipped a cargo of oranges from Puerto Rico to New York, where they paid a tariff levied by act of Congress. He sued to recover the amount paid, on the ground that the tariff act violated the constitutional

[13] C. S. Olcott, *The Life of William McKinley* (1916), Vol. II, p. 111.
[14] *Di Lima* v. *Bidwell*, 182 U. S. 1 (1901).

provision that "all duties, imposts and excises shall be uniform throughout the United States."[15] The Court in this and subsequent cases held that the term *United States* had two meanings: the first, and narrower one, included the forty-eight States and the District of Columbia; the second included the "American Empire," or the entire land areas and people under our flag. The Constitution's requirement of uniform taxes had application only to the former and such other territories as Congress might wish to include. Puerto Rico, while not a foreign country, was not a part of the United States in the first sense of the word but only a "territory appurtenant and belonging to the United States."

3. *The distinction between incorporated and unincorporated territories.* The Constitution follows the flag only when, where, and to the extent that Congress wills. "Incorporated" territories are those to which Congress has extended all applicable parts of the Constitution or which Congress otherwise has shown its intention to make a permanent and integral part of the United States. Thus, in the case of *Rasmussen* v. *United States* (1905) the Supreme Court ruled that Alaska had been incorporated into the United States and that consequently its law denying the right of trial by jury was invalid.[16] Although the Court has hinted that Congress may be bound by certain natural and fundamental rights in legislating for the unincorporated territories, it seems plain that the actual restrictions are those which good faith, morals, or expediency may dictate; and this has been the policy of Congress. Alaska and Hawaii are the only incorporated territories, but American citizenship has been extended to the people of Puerto Rico and the Virgin Islands. With respect to all the others governments have been set up and privileges and immunities of the people established as seemed fitting in each case.

NATIONAL LEGISLATIVE CONTROL · It has been pointed out that Congress has supreme legislative power over all the dependencies, whether these are incorporated or not. It might conceivably deprive one of all local legislative freedom, acting itself in the legislative capacity, or it might provide a legislative body locally elected, with whatever degree of power it chose. Such basic laws or constitutions as the various dependencies have are in the form of acts of Congress and at its discretion may be changed or entirely revoked. When Congress fails to legislate, the President of the United States may use his ordinance power, as commander in chief of the army and navy, to provide necessary laws or may authorize the commander stationed in the dependency to do so in his name. In this way the Philippines from 1898 to 1901 and Guam, Tutuila, the Canal Zone, and the Virgin Islands for years were ruled without act of Congress.[17]

[15] *Downes* v. *Bidwell*, 182 U. S. 244 (1901).

[16] 197 U. S. 516 (1905).

[17] *Cross* v. *Harrison*, 16 Howard, 164 (1853); *Dooley* v. *United States*, 183 U. S. 151 (1901); W. H. Taft, *Our Chief Magistrate and His Powers* (1916), pp. 96, 97.

EXECUTIVE CONTROL · The President of the United States is the supreme executive throughout the dependencies subject to the Constitution and to acts of Congress. It might have been expected that a separate department for colonial administrative control of the possessions would be set up. The failure to do so was a reflection at once of the popular aversion to a permanent imperial system and of the hope that some day the occasion for such an agency would cease to exist. For many years national administrative supervision of the dependencies was scattered among agencies in the departments of War, the Navy, and the Interior. Ultimately a Bureau of Insular Affairs, created in the War Department in 1902, was given charge of the Philippines, Puerto Rico, and the Canal Zone;[18] to the Department of the Interior went Alaska, Hawaii, and the Virgin Islands; and to the Department of the Navy, various other small islands. Finally, by executive order of May 29, 1934, there was created in the Department of the Interior the Division of Territories and Island Possessions, to which were transferred the functions of the Bureau of Insular Affairs.[19] Two years later, Alaska, Hawaii, and the Virgin Islands came within its authority, and in 1939 the islets of Jarvis, Baker, Howland, Canton, and Enderbury were added.[20] Immediately in charge of this division is an Assistant Secretary of the Interior, to whom the governors of the dependencies are directly responsible. A field representative of the department in Honolulu administers the Pacific islets. Thus something approaching the form of a department of the colonies has taken shape.

JUDICIAL CONTROL · The wording of Article III of the Constitution is undoubtedly broad enough to make the Supreme Court a supreme judicial tribunal for all lands under the jurisdiction of the United States. Congress, however, has legislated to specify in what cases and under what circumstances appeals may be taken to it from the territorial courts.

## *THE GOVERNMENT OF ALASKA*[21]

LEGISLATURE · From 1867 to 1912 Alaska had the status of an unorganized territory, subject only to laws passed by Congress and administered by a governor appointed by the President. In the latter year a comprehensive act of Congress established a legislative body of two houses. The senate is composed of eight members, two elected from each of the four judicial districts; the house of representatives, of sixteen members, four chosen from each of the same districts. The legislature is given general lawmaking power not inconsistent with the Constitution and laws of the

[18] 32 Stat. 712.

[19] Executive Order No. 6726.

[20] Reorganization Plan No. II, effective July 1, 1939, 4 Fed. Reg. 2731.

[21] The paragraphs on Alaska follow closely *The United States Code* (1940 ed.), Title 48, chap. ii, and G. W. Spicer, *The Constitutional Status and Government of Alaska* (1927).

United States and subject to such important exceptions as the United States customs, internal-tax, postal, fish and game laws, and a long list of others closely paralleling the limitations on legislatures found in State constitutions. Congress at any time may legislate on matters covered by territorial legislation, and its acts are supreme. The territorial governor has the veto, subject to the right of the legislature to override it by a two-thirds vote. All sessions laws are transmitted by the governor to the President of the United States and the Secretary of State, and then are laid before Congress for its approval or disapproval.

EXECUTIVE · Administration is divided between Federal and territorial authorities. At the head of the latter is a governor, appointed by the President and Senate for a four-year term, who is charged with the interests of the United States government in the territory and whose duties in general much resemble those of the governor of a State. He is at the head of the militia, and may call it out when necessary to execute the laws. He may grant reprieves subject to confirmation by the President and is required to make an annual report to the President.

FEDERAL ADMINISTRATION · Administration of governmental affairs is chiefly in the hands of subordinates of the departments at Washington. All ten have a part in it, which accounts for the lack of unity. For instance, the Department of Agriculture operates through five of its bureaus, having charge of such matters as forests, game, public roads, and weather reports. The Alaska Game Commission acts as its agent in promulgating and enforcing game laws. The Bureau of Biological Survey administers the laws for the protection of migratory birds and game reservations. The States Relations Service is in charge of agricultural experiment stations. The Department of Commerce, through its proper bureaus, administers the fisheries regulations, coast and geodetic survey, navigation rules, and so on. Road-building and maintenance are in the charge of the Engineer and Signal corps and the Alaska Road Commission of the War Department. The Department of the Interior, through its General Land Office, administers the survey, sale, leasing, and care of public lands. Subject to the Division of Territories and Island Possessions is the Alaska Railroad, which operates the government-constructed line of four hundred and seventy miles running from the sea at Seward to the interior town of Fairbanks. The Navy, Treasury, Labor, Post Office, and Justice departments, respectively, carry on activities similar to those which they carry on in the States.

EDUCATION · The governor of the territory, ex officio, is superintendent of public instruction, but the actual administration is in the hands of a Territorial Board of Education, of which the Commissioner of Education is the executive officer. Schools in incorporated towns are under the control of an elective board of three members; outside these towns districts may be established upon petition to the district court, and local boards may be elected. The district schools are financed from the territorial treasury and

a school fund supplied from certain Federal taxes. An agricultural college and school of mines is supported by territorial and Federal funds. The Bureau of Education of the Department of the Interior operates schools for the Eskimos and Indians, for which purpose the country is divided into four districts, each in charge of a superintendent. Formal education is supplemented by welfare work, such as medical supervision (including hospitalization and sanitation), industrial training, and the relief of destitution. The reindeer herds which this bureau introduced for the benefit of the natives are still under the oversight of the schoolteachers and administrators.

JUDICIARY · For many years after its acquisition there was little law and justice in Alaska except what was self-administered. In 1884 the first court was established in the district. There is now a district court of four judges, who sit separately in four divisions of the territory. Appeals may be taken to the United States Circuit Court for the Ninth District and, on constitutional questions, to the United States Supreme Court. Attached to each division are a district attorney, a marshal, and a commissioner, who, in addition to discharging the usual duties of that office, acts as a probate judge, justice of the peace, and notary public. The greatest lack now in the scheme of justice (other than enough people to make up a jury in some districts) is law-enforcing officers. The deputy sheriffs, and the forest rangers, game, fur, and fish wardens, and liquor agents responsible to the various departments at Washington, are not a satisfactory substitute for a territorial police.

LOCAL GOVERNMENT · Because of the sparse population and the great extent of Federal administration few units of local government have been established. There are no counties, townships, or special districts, but municipalities are provided for under territorial law.

CIVIL LIBERTY · The treaty with Russia provided that all the inhabitants of the territory except the "uncivilized tribes" should be "admitted to enjoyment of all the rights, advantages and immunities of the citizens of the United States, and shall be maintained and protected in the full enjoyment of their liberty, property and religion."[22] As pointed out above, Alaska is an incorporated territory, which means that its residents are entitled to the civil liberties guaranteed in the United States Constitution. The act of 1912 specifically extended the Constitution, and all the laws of the United States which were not locally inapplicable, over it. The questions of citizenship and political rights, however, are left to the will of Congress. The treaty and subsequent legislation had recognized the citizenship of the civilized inhabitants, but Congress remained neglectful of the desire of the more advanced Indians and Eskimos to become citizens. The territorial legislature, under the organic act of 1912, passed in 1915 a law providing for a scheme of native naturalization. Applications must be made to the teacher of a school, who investigates the applicant's capacity for an intelligent exercise of the suffrage; the indorsement of five citizens is obtained; and the applica-

[22] G. W. Spicer, op. cit. p. 37.

tion and supporting papers are sent to the United States district court, where, upon a hearing, the certificate of citizenship may be issued. By this means a person may pass over the line from an uncivilized to a civilized and citizenship status. The right to vote, of course, is dependent upon the will of Congress. The present qualifications are citizenship, residence in the voting district, and the ability to read and write English. The people of the territory are represented in the United States House of Representatives by a delegate elected by the people for a term of two years.

## *THE GOVERNMENT OF HAWAII*[23]

LEGISLATURE · The main features of the government of Hawaii are set forth in the organic act of 1900. The legislature is composed of a senate of fifteen, elected for four-year terms from four districts returning two, three, four, and six members respectively; and a house of representatives of thirty, elected for two-year terms from six districts with four or six members each. The act specifies the legislative procedure and limits the scope of legislation much as does the typical State constitution. No law "inconsistent with the Constitution and laws of the United States, locally applicable," may be passed. The governor has the veto power on the same terms as the President of the United States, and in addition an item veto for appropriation bills.

EXECUTIVE · The large degree of home rule granted Hawaii made unnecessary the installation of any such array of Federal administrative services as characterizes Alaska. The supreme executive power is vested in a governor, appointed by the President and the Senate for a term of four years, who must be a citizen of the islands and have been three years a resident at the time of his appointment. He is responsible for the "faithful execution of the laws" and possesses other powers similar to those of a State governor. He has the power of pardon and reprieve for offenses against territorial laws and may grant reprieves for Federal offenses, subject to the decision of the President. He is commander in chief of the militia, and may place the islands temporarily under martial law. In addition to a ten-thousand-dollar salary, he is furnished an executive residence, an allowance for its upkeep, and an entertainment fund.

ADMINISTRATIVE ORGANIZATION · The strength of the central administration of Hawaii is an offset to the weakness of the local government. This central administration includes twenty-eight departments and fifty-seven boards, all of whose heads except one are appointed by the governor, in a majority of cases with the advice and consent of the territorial senate. For purposes of unity and co-ordination the governor forms a cabinet of ten important officers, among whom are found the attorney-general, treasurer,

[23]Chief authorities for the paragraphs on the government of Hawaii are *The United States Code* (1940 ed.), Title 48, chap. iii, and R. M. C. Littler, op. cit. For a discussion of some of the internal problems cf. J. Barber, *Hawaii, Restless Rampart* (1941).

auditor, high sheriff, and various commissioners. He prepares the annual budget with the aid of a bureau of the budget.

SECRETARY OF THE TERRITORY · The secretary of the territory is appointed by the President and the Senate of the United States, and his duties are much like those of a State lieutenant governor and secretary of state combined. He acts in the governor's place in case of the latter's absence or disability; is custodian of the great seal and of the laws; promulgates orders and laws; issues motor licenses; and is in charge of elections.

OTHER ADMINISTRATIVE ACTIVITIES · The crown lands of the old monarchy, comprising about 1,600,000 acres, became the property of the United States upon annexation and since then have been held for the benefit of the people of the territory. Their administration is principally in the hands of a board of six appointed by the governor and the senate. Lands may be sold, leased, or exchanged under varying conditions. In 1921 Congress performed an act of justice by creating a Hawaiian Homes Commission, made up of the governor as chairman and four other members appointed by him with the consent of the senate, to allot lands to persons of native Hawaiian blood. These people, forced off the land of their ancestors and crowded into the cities and towns, might now receive homesteads of from one half an acre to one thousand acres. Health administration is conspicuous and highly centralized; there is a territorial board which operates through thirty-one subordinate districts. A board of agriculture and forestry promotes agriculture and is in charge of the forest reserves, which comprise about one fourth the surface of the territory. Plant inspection, the study and fighting of insect pests, the protection of game and fish, and reforestation are among its functions. The territory shares in the Federal highway subsidies through its highway department.

EDUCATION · At the time of annexation the Hawaiian government had a well-conceived and administered school system, which since has been expanded and improved.[24] It embraces instruction at all levels, including that of the university. Vocational and industrial education and instruction in the English language are given particular emphasis. Administration is in the hands of a board of six commissioners and a superintendent of public instruction, all appointed by the governor and the senate. Unlike that in the United States, the administration is highly centralized. For purposes of the curriculum and the appointment and superintending of teachers, the territory is much like one great school district. A strange exception is the allocation of the construction and control of school buildings to the county authorities. The hiring of teachers, the choice of textbooks, and the framing of courses of study are all done by the territorial department. Attendance at a public or recognized private school is required of all children between the ages of six and fourteen. A distinctive feature is the existence of a large number of privately supported foreign-language schools, chiefly Japanese,

[24] R. M. C. Littler, op. cit. chap. x.

which in 1927 had an attendance of twenty thousand pupils. A territorial law passed in 1920 requiring all such schools to be licensed and their teachers to conform to certain educational standards, including a knowledge of the English language, has not been very well enforced, the Federal courts holding certain parts of it in violation of the liberty guaranteed by the Fifth Amendment. The Japanese schools used the original or modified state textbooks of Japan.

THE COURTS AND JUSTICE · The territorial judicial system consists of a supreme court of three members, whose jurisdiction is largely appellate; five circuit courts, which have general trial jurisdiction; and twenty-nine district courts, whose jurisdiction is comparable to that of the justices of the peace in the States. The district judges are selected by the chief justice of the supreme court, but all others by the President and Senate of the United States. The act of 1900 continued in force the existing civil laws, when not inconsistent with the Constitution and the laws of the United States, but subject to future change by Congress or the territorial legislature. Today the laws of the territory follow the English common law about as closely as do those of the average States.[25] The chief law-enforcing officers are the attorney-general and high sheriff, appointed by the governor and senate. There is a Federal district court of two judges, who may hold court separately or together, and a United States marshal and district attorney, all appointed for terms of six years by the President and Senate of the United States. Appeals may be taken to the United States Circuit Court of Appeals for the Ninth Circuit.

FEDERAL ADMINISTRATION · Branches of the ten Federal departments operate in Hawaii on a scale much like that in the States, including those of health, immigration, post office, weather, and geological survey. The chief difference is in the stress laid on the defense services. The Pearl Harbor naval base and army and air bases make Hawaii our most highly militarized territory.

LOCAL GOVERNMENT · All considerations, economic, racial, and military, combine to require a highly centralized government in Hawaii. As somewhat of an alleviation, however, acts of Congress in 1905 and 1907 divided the territory into four counties and one combined city and county. The large island of Hawaii constitutes one county, and several islands go to make up each of the other three. The city and county of Honolulu includes the island of Oahu and various others, including distant Wake and Midway. Each county has a popularly elected board of supervisors and other officers typical of the mainland county, such as auditor, treasurer, sheriff, and clerk. The counties perform most of the functions of government usual to both cities and counties in the United States. These include police and fire protection, building inspection, water supply, sewage disposal, street lighting, and the building and maintenance of roads. Tax collection and the

[25]Ibid. p. 177.

administration of justice and of public education are outside their orbit. The only local units outside the counties are the judicial, school, election, and health districts.

CITIZENSHIP AND CIVIL AND POLITICAL RIGHTS · The suffrage is extended to all citizens of the United States who have resided not less than one year in the islands, who are twenty-one or more years of age, and who are able to speak, read, and write the English or Hawaiian language. All persons who were citizens of the republic of Hawaii and all citizens of the United States who were residents of Hawaii at the time of annexation in 1898 were declared by the act of 1900 to be citizens of the United States. Otherwise the determination of citizenship is left to the rules of the Constitution and general statutes. Provision is made for the issuance of birth and citizenship certificates by the secretary of the territory upon application. Such evidence is needed by persons of Oriental descent who wish to vote in the territorial elections, to visit the United States, or to return to the islands after traveling abroad. Unfortunately, the Federal immigration officers do not generally honor such certificates, which may account in part for the fact that in September, 1925, only 1596 had been issued, although the census of 1920 showed 63,000 persons entitled to them. The civil rights of the residents of the territory are the same as those of the people of any other incorporated territory of the United States.

## *THE GOVERNMENT OF PUERTO RICO*[26]

LEGISLATURE · The structure of the government of Puerto Rico is set forth in the organic act of 1917. The legislature is composed of a senate of nineteen members, two elected from each of seven districts and five from the island at large, and a house of representatives of thirty-nine members, thirty-five of whom are elected from single-member districts and four at large. Both houses have four-year terms and annual sessions. A bill vetoed by the governor and repassed by a two-thirds vote of both houses is then sent to the President of the United States, who may approve, veto, or fail to act on it; in the last case after ninety days it becomes law. The governor has the item veto for appropriation bills. All laws passed must be transmitted to Washington at the end of the session and are subject to disallowance by Congress. Should the legislature refuse to pass appropriations to support the government by the end of the fiscal year, the sums for the past year are deemed reappropriated.

EXECUTIVE · The supreme executive power is vested in the governor, appointed by the President and Senate to serve at the former's pleasure. The governor is responsible for the faithful execution of the laws, and his powers and position otherwise are much the same as those of the governor

[26]The chief authorities used for the paragraphs on Puerto Rico are *The United States Code* (1940 ed.), Title 48, chap. iv, and V. Clark and associates, *Puerto Rico and Its Problems* (1930).

of Hawaii. Seven departments, those of Justice, Health, Finance, Education, Labor, the Interior, and Agriculture and Commerce, were created by the act. While none may be added, those existing may be consolidated or abolished by the legislature with the consent of the President of the United States. The seven heads, except the attorney-general and the commissioner of education, who are appointed by the President of the United States, are all appointed by the governor and the senate for terms of four years and constitute an executive council. An executive secretary, appointed by the governor and local senate, acts as secretary to the executive council and the public-service commission, promulgates proclamations, is custodian of the laws, and otherwise performs duties common to the office of secretary of state. There is an auditor, appointed by the President of the United States, who keeps the general accounts and is responsible for examining and auditing all expenditures belonging to the government of Puerto Rico. Besides these there are various boards and commissions whose members are appointed by the governor or by men appointed by him; for instance, the board of review and equalization as part of the tax-administration machinery, the police commission attached to the police department, and a mediation and conciliation commission.

INSULAR FUNCTIONS · The administration of justice, the assessment and collection of the property tax, and the administration of elections are entirely functions of the island government, which predominates also in the fields of health, education, sanitation, public works, and benevolent and charitable institutions, leaving little to the municipalities. The department of education, under a commissioner, has full direction of all schools of the island, including the employment of teachers, the granting of their licenses, and the formulation of the course of study. The municipalities maintain the school buildings and may furnish supplementary elementary teachers and provide free school lunches. At the time the United States acquired the island, about 45,000 pupils were reported in the schools, and there were no public school buildings; in 1930 the enrollment was nearly 221,000, housed in 1035 publicly owned and 1109 rented buildings. In the same period the total expenditures for primary and secondary education rose from $186,000 to $5,834,468.

LOCAL GOVERNMENT · The decentralization of government has been carried further in Puerto Rico than in Hawaii or Alaska.[27] The island is divided into seventy-seven municipalities (*municipios*), which in area more nearly resemble townships or counties than cities. Only half a dozen are primarily urban in character. In each is a village or small city which serves as the seat of government after the fashion of the New England town. Uniformity in the form and functions of government are prescribed by the territorial statute. The municipalities fall into three classes, as determined by population and the assessed valuation of local property:

[27] V. Clark and associates, op. cit. pp. 114–136.

first class, population of thirty thousand or more; second class, population of five thousand to thirty thousand; third class, all others. In each is a municipal assembly of eleven, nine, or seven members, depending upon the class; a mayor (*alcalde*) elected by the people; and a board of administration, comprising all the department heads except auditor and secretary.

The functions given over to the municipalities closely parallel those of the mainland cities, and include police and fire protection, garbage collection, the inspection of weights and measures, outdoor relief, and the maintenance of local streets and bridges and of such facilities as markets, meat shops, and hospitals. A careful appraisal of the administration of these municipalities by the Brookings Institution led to the conclusion that a higher degree of centralization in Puerto Rican government would fit both the necessities of the situation and the traditions of the Spanish law, particularly that a few of the urban municipalities should be retained and the administration of all others be given over to the central government of the island.

THE JUDICIARY · The territorial courts of Puerto Rico were established by the local legislature. The supreme court, of five justices, is appointed by the President and Senate of the United States; the seven district courts, which have a general jurisdiction, are appointed by the governor and local senate. Thirty-four petty courts in as many districts try civil and criminal cases in small causes. There are a Federal district court of one judge, a district attorney, and a United States marshal, all appointed for four-year terms by the President and Senate. Appeals may be taken to the United States Circuit Court for New England.

## *THE GOVERNMENT OF THE PHILIPPINE ISLANDS*

THE PROBLEM · The acquisition of the Philippine Islands gave the United States its most difficult problem in colonial administration. Contributing factors were the area of the islands and the distance from the United States; the population, numbering in the millions and representing various racial stocks; and the Spanish culture of its dominant element, which at once excluded any thought of a complete absorption into the American cultural pattern. The United States accepted the sovereignty of the islands with an express disclaimer of an intent to annex them permanently, and a pledge to prepare the Filipinos for ultimate independence. The spirit in which this first venture of the American republic in foreign colonial administration was undertaken was expressed in President McKinley's letter of instructions to the first civil commission sent out to govern them:[28]

In all the forms of government and administrative provisions which they are authorized to prescribe, the Commission should bear in mind that the government

[28]W. C. Forbes, op. cit. Vol. II, pp. 442–445.

which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands; and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. . . . Upon all officers and employees of the United States, both civil and military, should be impressed a sense of duty to observe not merely the material but the personal and social rights of the people of the Islands, and to treat them with the same courtesy and respect for their personal dignity which the people of the United States are accustomed to require from each other.

ESTABLISHMENT OF CIVIL GOVERNMENT · For two years and a half after their acquisition the management of the Philippine Islands was in the hands of the President of the United States as commander in chief. The chief task was the suppression of Filipino resistance to American rule. Civil government, so far as it existed, was in the hands of the military authorities. In 1900 the President sent out a commission headed by William Howard Taft, of Ohio, to aid in the pacification of the islands and to establish a civil government.[29] Not until March 2, 1901, did Congress act, when it declared that all powers of government there shall, "until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct." On July 4, 1901, the president of the commission began his term as the first civil governor of the islands, while the commission legislated to organize the central and local governments. An act of Congress of July 1, 1902, outlined the features of a new government. The president of the Philippine commission, now composed of five Americans and four Filipinos appointed by the President of the United States, was to act as governor; the commission itself, as the upper house of a legislature. The lower house was to consist of eighty members chosen from the civilized provinces according to qualifications set by the act. They were empowered to elect two resident commissioners to sit in the United States House of Representatives.

THE PERMANENT GOVERNMENT. LEGISLATIVE[30] · The accession of the Democratic party to power in 1913 gave that party an opportunity to carry out the policy towards the islands which it had often voiced while in the minority. The act of August 29, 1916, established a bicameral representative legislature. The senate, of twenty-four members, was chosen from twelve districts for terms of six years; the house of representatives, of eighty-one members, from single-member districts for terms of three years. Choice was by popular election, except for a few members from the

[29]Ibid. chap. iv.

[30]Dean C. Worcester and J. R. Hayden, *The Philippines: Past and Present* (Rev. Ed., 1930), pp. 734–736.

less civilized regions, who were appointed by the governor-general. Bills vetoed could be repassed by the two houses, and then sent to the President for his approval or disapproval.

EXECUTIVE · The supreme executive power was vested in a governor-general appointed by the President and Senate of the United States.[31] His powers with respect to appointments, pardons and reprieves, supervision of administration, and military command were much the usual ones. The Philippine assembly was empowered to create new departments and abolish old ones, but the appointment and removal of their heads and the supervision of their work must remain with the governor-general. The salaries of all officers not appointed by the President of the United States were paid out of the revenues of the Philippines. The act provided an auditor, who was to be appointed by the President, and whose authority extended to all units of government. A vice-governor, appointed in the same manner, acted in the place of the governor-general in the latter's absence and was at the head of the department of education. In 1918 Filipino leaders persuaded Governor-General Harrison to establish by executive order a Council of State, composed of the presiding officers of the two houses and the secretaries of the executive departments. This body gradually assumed executive powers, seeking to force the governor-general into the position of a ceremonial and nonactive head, as in the parliamentary self-governing British colonies. With the end of the Democratic regime in 1921 the new appointee, General Leonard Wood, reasserted his statutory position.

ADMINISTRATIVE ORGANIZATION · After the act of 1916 the departments were those of Public Instruction, Finance, the Interior, Justice, Agriculture and Natural Resources, and Commerce and Communications. It was made the duty of their heads to appear before either house when called upon to do so, although their actual responsibility was to the governor-general. The Council of State was composed of eight members, all Filipinos except the vice-governor.

EDUCATION[32] · The Spaniards had kept the masses of the people in ignorance. One of the earliest acts of the Philippine commission was the creation, January 21, 1901, of a department of public instruction. Thereafter the organization of schools of all grades went on apace. Teachers were imported from the United States, later to be supplanted with natives. Trade and normal schools were established. By the early part of March, 1902, over nine hundred American teachers were engaged in instruction, and a distinguished American scholar, Bernard Moses, was Secretary of Public Instruction. In the year 1903 there were only 450 pupils enrolled in the secondary schools; by 1924 the number had increased to 47,410.

[31]Dean C. Worcester and J. R. Hayden, op. cit. chap. xxxvii.
[32]W. C. Forbes, op. cit. Vol. I, chap. x.

HEALTH · In 1901 the commission established a bureau of public health, which promptly began a valiant campaign against the diseases which infected this tropical land. In 1907 it established a general hospital in Manila, and by 1926 forty-five government hospitals and dispensaries had been built throughout the islands and provinces. In 1907 a medical school was established; soon after, training for nurses was instituted. Water-supply systems for the cities and towns were rapidly established, and systematic campaigns to instruct the people in matters of health and sanitation were carried out.

JUDICIARY · The supreme court was composed of eleven members appointed by the President and Senate of the United States. Judges were chosen from both American and Filipino nationalities, with generally an American majority under the presidency of a Filipino chief justice. Courts of first instance, general trial courts, were established in each province, their members appointed by the governor-general and local senate. Justice-of-the-peace courts were established in each municipality, and police courts in the city of Manila in all of which judges were appointed by the governor-general.

LOCAL GOVERNMENT[33] · The Taft commission began its work by organizing local governments called *municipalities*, which correspond approximately to an American township in size. These at one time numbered 1035, but subsequently were diminished to 792. In each are a popularly elected council and chief executive officer, the municipal president. The powers of these governments are similar to those of an American municipality; but the ordinances are subject to review by the provincial boards. The major local units are the provinces, of which in 1919 there were thirty-three regular and twelve special ones, the latter located in the backward regions. The provincial chief executive is a governor elected by the municipal councilors, and there is a provincial board with legislative functions, composed of the governor, the appointed provincial treasurer, and the supervisor. The provincial governments have the duties of maintaining order and supervising the municipalities. An elected governor may not take office until confirmed by the governor-general, who may refuse confirmation upon the ground of ineligibility, disloyalty, or unfairness in the election.

## *THE COMMONWEALTH OF THE PHILIPPINES*[34]

THE INDEPENDENCE MOVEMENT · The movement for independence antedated American occupation, and soon after the occupation it manifested itself in armed resistance. The leader Aguinaldo, after the end of organized resistance, loyally supported American efforts to pacify and modernize

[33]Dean C. Worcester and J. R. Hayden, op. cit. pp. 192–202; W. C. Forbes, op. cit. Vol. I, pp. 157–167; J. R. Hayden, *The Philippines* (1941), chap. ii.

[34]G. A. Malcolm, *The Commonwealth of the Philippines* (1936); J. R. Hayden, op. cit. chap. ii.

the islands; but responsible leaders never ceased to express the desire for complete independence.[35] With the advent of another Democratic administration in 1933, independence seemed certain. In January, 1933, the two houses of Congress, by overwhelming votes, passed a Philippine independence bill which, when vetoed by President Hoover, was speedily reenacted. Several things combined to bring about this action.[36] The original promise of ultimate Philippine independence after a period of preparation for self-government; the strong pleas of American economic interests which felt themselves injuriously affected by the entry of Philippine products into the United States at low rates, pleas which were especially effective in the panicky days of early 1933; and the judgment of military and naval strategists that the islands were outside our natural defensive zone and could not be held in case of war with a strong Oriental power. Passage of the independence bill, however, did not raise the wave of exultation in the Philippines which was expected. After several months of debate the legislature went on record as declining to accept the bill.[37] Among the objectionable features were the permanent retention by the United States of naval and army bases, the sharp reduction in imports of Philippine products into the United States on the quota basis, and the cutting down of immigration to an annual quota of fifty persons. After Roosevelt's accession to power the bill, minus the provisions for military and naval bases but with very small changes in other respects, was revived and repassed and quickly received his signature.[38]

CONDITIONS OF INDEPENDENCE · The act set forth in considerable detail the steps to be taken in establishing the new Commonwealth of the Philippine Islands, the chief ones being these: the election of delegates to a convention to formulate and draft a constitution; submission of the proposed constitution to the people of the islands for approval by referendum; a proclamation by the President of the United States announcing the results of the referendum, the termination of the existing government, and the beginning of the new; the complete withdrawal of the United States from the islands and the recognition of their independence by Presidential proclamation on the July 4 immediately following the expiration of the ten-year transition period. A few things were required of the constitution, referring more to its spirit than its form, such as religious toleration and the guarantee of civil rights. In the period of transition, allegiance was to be continued to the United States, the authority of the United States high commissioner and review by the Supreme Court of the United States of decisions of the commonwealth courts were to be recognized, and foreign affairs were to remain under the control of the United States. On Novem-

[35]G. A. Malcolm, op. cit. chap. vi.
[36]Act of January 17, 1933, 47 Stat. 761.
[37]G. A. Malcolm, op. cit. pp. 122–125.
[38]Act of March 24, 1934, 48 Stat. 456.

ber 15, 1935, in the presence of more than forty members of the American Congress, the new commonwealth began its career.[39] No further action by Congress is necessary to end completely all American authority in the islands as of July 4, 1946.

THE CONSTITUTION OF THE COMMONWEALTH · The constitution, drafted by a committee of able and experienced Filipinos, bears many marks of the years of American tutelage.[40] Only a few of its main features will be noted here. The Philippines are declared to be a republican state, with sovereignty residing in the people and with all government authority emanating from them. Ironically enough, war as an instrument of national policy is renounced. The executive power is vested in a president, elected by a direct vote of the people for a term of six years. His powers closely parallel those of the President of the United States. A vice-president is chosen at the same time and in the same manner. The legislative power is vested in a national assembly, of which the members are chosen for three-year terms by the people and are apportioned among the provinces on the basis of population. Heads of administrative departments may appear before the national assembly on any matter pertaining to their work. The president has the veto power, subject to a two-thirds vote of the legislature, including the veto of items in appropriation bills. The judicial power is vested in one supreme court and such inferior courts as may be established by law. Suffrage is conferred upon all male citizens of the Philippines, not disqualified by law, who are twenty-one years of age or older and able to read and write. Suffrage may be conferred later upon women if, in a referendum election, not fewer than three hundred thousand vote for it. A bill of rights of twenty-one articles includes the long-treasured list of Anglo-American liberties and adds a few others, including the "liberty of abode and of changing the same."

THE FUTURE · At the first election under the commonwealth, September 17, 1935, the people chose for president and vice-president, respectively, Manuel L. Quezon and Sergio Osmena, the two ablest and most experienced political leaders of the nation.[41] The former had served as a provincial governor, floor leader in the first Philippine assembly, president of the senate, resident commissioner to the United States, and leader of various commissions to the United States. Since 1922 he had been the acknowledged leader of the Filipino people. Osmena was a member of the Philippine assembly from its beginning, and later its Speaker, senator and floor leader in the senate, and provisional governor. Will the American flag be lowered from the Philippines in 1946? Congress has given no in-

[39]G. A. Malcolm, op. cit. pp. 398–401.

[40]Ibid. chap. viii; J. R. Hayden, op. cit. chap. xxxi. The constitution of the commonwealth is printed in the Appendix, pp. 807–859.

[41]Ibid. pp. 395–403. Upon the death of Quezon at Washington, D.C., in 1944, Osmena succeeded to the office of president of the Philippine government in exile.

dication of an intention to revoke the agreement. The utter defeat and demilitarization of Japan removed the chief obstacle to Philippine independence. Moreover, the restoration of a balance of power by the revival of Russian, Chinese, British, and American power is a further guarantee. A tentative agreement already has been reached for the establishment of a strong American naval and air base on one of the interior islands.

## *THE GOVERNMENT OF THE DISTRICT OF COLUMBIA*

BASIS OF THE DISTRICT · The Constitution empowered Congress "to exercise exclusive legislation in all cases whatsoever over such districts (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."[42] The purpose was to enable the government to operate on neutral ground and escape all interference from State laws and administrative officials. Congress in 1790 accepted the tender by Maryland and Virginia of lands comprising an area ten miles square lying on both sides of the Potomac.[43] Included were the incorporated towns of Alexandria and Georgetown, and in 1802 the new town of Washington was incorporated by act of Congress. A year earlier the Virginia side of the river had been organized into the county of Alexandria, and the Maryland side into the county of Washington. In 1846 that part of the district lying west of the river was retroceded to Virginia.

GOVERNMENT · The towns of Georgetown and Washington and the county of Washington originally were largely self-governing. The Civil War greatly increased the population and importance of the District, and the need for centralization was pressing. The answer was an act of Congress in 1871 which abolished the old units of government and established a government for the entire District closely resembling that of a Western territory.[44] The legislative power was vested in a council of eleven members, appointed by the President of the United States and Senate, and a lower house of delegates of twenty-two members elected for terms of two years by the people of the District; the executive power, in a governor appointed by the President of the United States and Senate for a term of four years. To him was given the veto power on the usual terms, and the power to commission all officers. The governor was to be assisted by a secretary, appointed in the same manner, who was to act in his place in case of absence or disability. The maintenance of free schools was made a duty of the District government. A board appointed by the President and Senate was set up to administer health and sanitation, and a board of public works was given extensive powers in building, maintaining, and regulating

[42] *United States Constitution*, Art. I, sect. 8, clause 17.
[43] W. E. Dodd, *The Government of the District of Columbia* (1909), pp. 25–26.
[44] Ibid. chap. iii.

streets, sewers, and other public works. The form of government established by the act of 1871 was ill-fitted for the peculiar situation of the District of Columbia. There were mismanagement and overspending by the board of public works, and in 1874 the District was bankrupt. In that year Congress acted to abolish the existing government and place all its affairs in a commission of three members, which was in effect a receivership. This temporary arrangement was continued until 1878, when legislation established the commission as the permanent form.[45] The voters of the District under the act of 1871 had elected a delegate to sit in the House of Representatives. At the abolition of this form of government he was withdrawn, and the people have never since been directly represented.

Today there are no legal cities of Washington and Georgetown; the constitutional and legal status of this district is unique. In the first place, the District of Columbia is an incorporated part of the United States, a dependency subject to the authority of Congress, which might choose to rule it directly. When the entire scope of legislation concerning its government is considered, the District seems to bear various marks of a city, a county, and a territorial government.

LEGISLATION · Congress is the legislative body for the District, but leaves to the local authorities a considerable field for ordinance-making. It may at any time by an ordinary statute change the organic law of the District of Columbia or overrule the acts of its officials. Congressional legislation usually is introduced on the suggestion of the commissioners, after which it is considered in the proper standing committees of the Senate and the House. Recommendations for expenditures come from the same source and finally may find their way into the President's annual budget.

ADMINISTRATION: THE COMMISSIONERS · In general charge of the District government are three commissioners appointed by the President: two from civil life for terms of three years, and one detailed from the Corps of Engineers of the United States army for an indefinite term.[46] They choose one of their members as president. As is usual in commission-governed cities, the three act together for purposes of general administration, but individually are in charge of different services. They have a wide appointing power, including the heads of departments and the members of boards and commissions. Their ordinance-making power is extensive, but somewhat less than that of the average city council. It covers protection, the licensing of places of amusement, and measures in general for the promotion of the public safety, order, and morals. Outside their field are the board of education, appointed by the judges of the supreme court of the District, and the board of charities, appointed by the President of the United States. From 1878 to 1920 one half of the cost of the District

[45] 18 Stat. 116.

[46] L. F. Schmeckebier and W. F. Willoughby, *The Government and Administration of the District of Columbia: Suggestions for Change* (1929), pp. 6–25.

government was borne by the United States Treasury; after the latter date the amount was reduced to 40 per cent.

SELF-GOVERNMENT FOR THE DISTRICT · Much has been made of the disfranchisement of the people of the District, and proposals have been made for giving them not only a greater voice in the local government but also the right to vote for Federal officers. Considerable difficulties stand in the way of both propositions, including a constitutional amendment for the latter. Since the greater portion of the District's inhabitants are Federal employees, it has been urged that their suffrage might often be used to exert pressure for special concessions. On the other hand, because of the almost universal authorization of the system of absent voting, many of the District's inhabitants maintain legal voting residences in the States. It is argued, too, that proximity to the Federal legislature and executive offices makes the District residents more influential in matters of government than any other group in the United States. Frequent opportunity is offered individual citizens and citizen organizations to appear before hearings of the commissioners and the committees of Congress to express their views on pending legislation or administrative acts.[47]

JUSTICE · The law establishing the legal rights and obligations of the people of the District is comprised in a code adopted by Congress in 1901 and subsequent amendments, the ordinances of the commissioners, and interpretations of the courts. The chief trial court is the Supreme Court of the District of Columbia, composed of a chief justice and five associate justices appointed by the President and the Senate for life or good behavior. It holds different terms in which one or more justices may sit as a circuit, criminal, district, equity, or probate court. Its jurisdiction combines those of a Federal district court and a State court of common pleas, to which Congress from time to time has added special matters. A municipal court of five judges, appointed by the President and Senate for terms of four years, has jurisdiction in civil cases approximating that of a justice-of-the-peace court; and it may issue warrants for arrests in criminal cases. There is a police court of two judges, similarly appointed for terms of six years, which has jurisdiction over violations of police regulations and misdemeanors in general. The juvenile court has jurisdiction over most offenses committed by persons under seventeen years of age and over truancy. At the head of the District courts is the Court of Appeals, composed of a

[47]The recommendations of Schmeckebier and Willoughby for change are as follows: the relief of Federal administrative agencies from the performance of duties pertaining to the local affairs of the District and their vesting in District officials; removal of the jurisdiction of the United States Bureau of the Budget over the budget of the District, and vesting in a city manager; creation of a city manager and a legislative council of seven members; grouping of the administrative services into departments; creation of a Department of Education and abolition of the existing Board of Education and Board of Library Trustees; placing of the administrative personnel under the United States civil-service laws; and the creation of a single Supreme Court of Judicature.

chief justice and two associate justices appointed for life in the usual way, which hears appeals from the various District courts and has special jurisdictional fields given it by Congress.

## *THE GOVERNMENT OF THE VIRGIN ISLANDS*

ORGANIC ACT · From their acquisition in 1917 until the passage of the organic act of 1935 the Virgin Islands were governed by the President of the United States through an appointed naval officer. Their laws and administration were such as were provided by his ordinances or by the orders and regulations of his representative. The organic act established two municipalities, one comprising the island of St. Croix, the other comprising the two near-lying islands of St. Thomas and St. John.[48] Each was given the legal status of an American municipal corporation and appropriate legislative and administrative agencies.

LEGISLATURE · The plan of organization of the legislature has no counterpart in the American system. The municipality of St. Croix has a council of nine members elected by the qualified voters for a term of two years, two from each of four districts and one at large. The council of the municipality of St. Thomas and St. John consists of seven members similarly elected for a two-year term: two from each of the two districts of the island of St. Thomas, one from the island of St. John, and two from the municipality at large. The "Legislative Assembly of the Virgin Islands" is composed of the membership of the two municipal councils and holds its meetings at St. Thomas. This body meets only upon the call of the governor, which must be at least once a year. It has power to enact legislation applicable to the Virgin Islands as a whole, but no measures may be considered except those specified in the governor's call of the session. A two-thirds vote of all present is necessary to the passage of a measure. The two municipal councils may legislate upon matters of local importance, and in so doing may amend or repeal existing laws of the United States when this is not inconsistent with the provisions of the organic act. The governor may introduce bills and has a general and item veto, subject to repassage by a two-thirds vote of the legislature and the final decision of the President of the United States. Congress may annul any act of the local legislatures.

EXECUTIVE · The executive power of the islands and of the municipalities is vested in a governor appointed by the President to serve at his pleasure. His powers and position are comparable to those of the governors of the other dependencies. A secretary of the Virgin Islands appointed by the President and Senate not only possesses the usual powers of a secretary of state but is under obligation to attend the meetings of the municipal coun-

[48] *United States Code* (1940 ed.), Title 48, chap. vii, 39 Stat. 1132; L. K. Zabriski, op. cit. chap. xxxiii.

cil of St. Thomas and St. John as the governor's representative. There is also an administrator for St. Croix, appointed by the Secretary of the Interior, who attends the meetings of its municipal council and otherwise acts as the governor's representative. The governor is specifically given the power to issue executive regulations not in conflict with any applicable law or ordinance. He appoints, with the advice and consent of the municipal council, all officers whose salaries are provided in the municipal budgets, and prepares and introduces the annual budgets of the municipalities. He is further assisted by a municipal committee made up of three members from each of the municipal councils, who advise him on fiscal and other matters relating to the municipality.

JUDICIARY · The organic act provides a District Court of the Virgin Islands, with one judge, appointed for a term of four years by the President and Senate, and a district attorney. This court has the usual jurisdiction of the district court of the mainland, as well as over cases arising under laws enacted by Congress and the local legislatures. Inferior courts, however, may be constituted by the legislative assembly, with jurisdiction over such matters, not arising under United States laws, as it designates. Appeals from their decisions may be taken to the district court.

CIVIL RIGHTS · Since the Virgin Islands form an unincorporated territory, the civil rights of their people are what Congress may determine. The organic act contains a bill of rights which restricts the local legislatures, embodying the traditional Anglo-American rights and others forbidding slavery, polygamous marriages, and the employment of children under fourteen years of age in hazardous occupations.

## *THE GOVERNMENT OF THE PANAMA CANAL ZONE*

ADMINISTRATION · The Canal Zone is a strip of land ten miles wide, measured five miles out from the center thread of the canal, including several islands in the Bay of Panama but excluding the cities of Panama and Colon. After its acquisition in 1903 it was governed by the Isthmian Canal Commission of seven members appointed by the President of the United States. The commission's chief task was the building of the canal itself.[49] A letter sent the Secretary of War by the President of the United States under date of May 9, 1904, served as a sort of constitution. The President's authority had been regularized by an act of Congress of April 28, 1904, which stated that "all military, civil and judicial powers as well as the power to make rules and regulations necessary to the government of the Canal Zone . . . shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct."[50]

[49] D. H. Smith *The Panama Canal: Its History, Activities and Organization* (1927); *United States Code* (1940 ed.), Title 48, chap. vi, 48 Stat. 1122.

[50] 33 Stat. 429 (April 28, 1904).

The commission set up administrative and judicial authorities, including a supreme court whose decisions were held not appealable to the Supreme Court of the United States.

With the Canal approaching completion, Congress by act of August 24, 1912, authorized the President to discontinue the Isthmian Canal Commission and to appoint a governor and other civil officials who should "perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated and governed as an adjunct of the Panama Canal."[51] In case of war or threatened war the President may turn over to an army officer the entire civil government and administration of the Canal and military affairs. The President, by ordinance, legislates for the government of the Canal Zone, including such matters as breach of the peace and disorderly conduct, the granting of leases, highway regulations, and regulations for the operation of the Canal. Other rules and regulations are made by Congress and are enforced by the governor, who is directly subject to the President. The President is authorized also to determine what towns or local units shall be laid out in the Zone.

JUSTICE · The Canal Zone, as a mere adjunct of the Canal, is of course an unincorporated territory, and the civil rights of the inhabitants are what the exigencies of a military area may dictate. Trial by jury is guaranteed, subject to such exceptions as may be made in any future code. There is a United States district court, which sits in two divisions and has jurisdiction in general civil and criminal matters, including admiralty. The judges, marshal, and district attorney are appointed by the President and Senate for four-year terms. Appeals may be taken to the United States Circuit Court of Appeals for the Fifth Circuit. In various localities are magistrate courts, of the justice-of-the-peace grade, whose decisions may be appealed to the United States district court.

## *THE GOVERNMENT OF THE INDIANS*

THE PROBLEM · "The Admiral, seeing that they were a gentle and peaceful people and of great simplicity, gave them some little red caps and glass beads which they hung around their necks, and other things of slight worth which they all valued at the highest price."[52] The admiral was Christopher Columbus; the people, American Indians of the Arawak group; the occasion, the landing on the island of Guanahani, October 12, 1492. There were various elements in this first meeting of the white man and the Indian which were to be permanent in the centuries of relations between the two:

[51]37 Stat. 560. The Canal Zone has since been governed by order of the President, who delegates his powers to the governor of the Panama Canal. On June 19, 1934, Congress enacted a Canal Zone Code, which embraces all the permanent laws relating to the Canal Zone. (48 Stat. 1122)

[52]S. E. Morison, *Admiral of the Ocean Sea* (1942), p. 229.

the assumption of white dominion over the soil; the traffic in baubles; and the use of force, for Columbus carried away six Indians to exhibit in Spain. The scant third of a million people enumerated in the census of 1940 as Indians are the descendants of the various tribes which were the owners of that great portion of North America now included in the United States. Their treatment is a matter whose importance is much greater than their relative numbers; for the national honor dictates that they who might have owned all should not stand as beggars at the gate of Dives. In a machine and industrial age the Indians are almost entirely a rural, agricultural people and are unaccustomed to an industrial routine. Not only their customs and traditions but also the treatment accorded them by the government for many generations have unfitted them for successful participation in modern society. Without government aid they could not secure even the minimum of food, shelter, and clothing necessary to health, educate their young, or sustain such a morale as makes life worth living. The government's task with the Indians is different from that relating to any other class of dependents within the United States; for it has to do with a race which has a historic claim to special treatment, and with territorial as well as personal relations.

CONSTITUTIONAL AND LEGAL STATUS · Indians were mentioned in the original Constitution only twice: in one instance "Indians not taxed" were excluded from the population of a State in determining the number of representatives to which it was entitled; the other instance was the clause giving to Congress its power to regulate commerce "with the Indian tribes."[53] These two seemed to imply, at least, that Indians living in their tribal relationship were exempt from State jurisdiction, including taxation. The Cherokee Nation, in its differences with the State of Georgia, claimed to be a foreign state; but Chief Justice Marshall ruled that the Cherokees and the Indian tribes in general were "domestic dependent nations," that they were "in a state of pupilage," and that their relation to the United States was like that of "a ward to its guardian."[54] Indians were not citizens of the United States, and neither singly nor collectively could they become so except by a naturalization act of Congress. Their naturalization was begun at an early day, and it continued piecemeal until made complete in the act of 1924. It is seen that for many years the Indians generally were neither citizens nor aliens but in a sense people outside the Constitution and in a position of wardship to the Federal government.

DEVELOPMENT OF INDIAN POLICY · The government's policy toward the Indians has undergone profound changes between the time, in 1620, when the Indian Samoset met the handful of English settlers at Plymouth with a cry of "Welcome, Englishmen" and today, when the Navajo of Arizona disposes of his handmade blankets and silver ornaments under

[53] *United States Constitution*, Art. I, sects. 2, 8.
[54] *Cherokee Nation* v. *Georgia*, 5 Peters, 1 (1831); 43 Stat. 253.

the benevolent protection of the Federal government. Five periods, each with its distinctive policies, may be distinguished in the course of more than three centuries, which is not to imply that the characteristic feature of one period is not found in some measure in all the other four.

1. *From 1697 to 1871. Subjugation and Removal.*[55] The normal relation between the European colonizers of North America and the Indians was a state of war. In colonial days dealings with the Indian tribes were recognized as a crown duty. In 1778 the Revolutionary government made a treaty with the Delawares at Fort Pitt, a method of dealing with the Indians which was to last almost a hundred years. Treaties thus negotiated were subject to the approval of the President and ratification by a two-thirds vote of the Senate, like those with any foreign state. Conquest of the continent by the English meant not only the extension of political sovereignty but the acquisition of the soil by the crown in fee simple, or absolute ownership. An Indian title of occupancy, however, was recognized. The policy of the English and American governments, with only an occasional exception, was to extinguish this title by agreements with Indian chiefs made under duress or in ignorance of their meaning or by corrupt inducement; but at least the correct form was maintained. Trespassing by whites on the Indian lands was a frequent cause of hostilities, and, although Congress legislated against it, the government was either unwilling or unable to give the Indians protection. Sometimes State governments, notably that of Georgia, enacted legislation hostile to the Indians or attempted to assert jurisdiction over their territories. In 1790 Congress provided that there should be no trading with the Indians except under Federal license; and in 1796, in response to President Washington's request, Congress authorized the establishment of government-operated Indian trading posts. After the War of 1812 the government took up seriously the question of extinguishing Indian titles to lands in the Eastern States and the removal of the tribes to the West. Such agreements were made here and there with individual tribes, and on May 28, 1830, Congress passed an act for general removal, empowering the President to exchange lands in the East for lands in the West, to which a perpetual title would be given. Within a few years the greater portion of the Indians east of the Mississippi had been removed to the west of that river; but not without much resistance, particularly from the tribes of the South, which had advanced to the stage of settled agriculture. As a special inducement the Five Civilized Tribes, namely, the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, were given title to their new lands in fee simple, as distinguished from a mere title in occupancy. Other tribes from the old Northwest Territory, which were located in the Kansas Territory on lands promised them so long as "grass grows and water runs," found themselves dispossessed within a few years

[55]L. F. Schmeckebier, *The Office of Indian Affairs* (1927), pp. 1–66.

and moved on to the Indian country of the present Oklahoma. Some of the tribes dwindled to a few hundred souls or disappeared altogether. While only a few Americans gave thought to the question, undoubtedly the general assumption was that extinction or absorption was the final destiny of the aboriginal population of the country. Intermittent wars with the Indians, followed by treaties providing for the relinquishment of their lands and removal to the West, characterized the period. Corruption and inefficiency in the government Indian service were characteristic. Indian agents pocketed funds appropriated for Indians, lands, annuities, or food and supplies; Indian traders acted in conjunction with the agents to cheat and pilfer. The story has not many redeeming features.

2. *From 1871 to 1887. Segregation and Amalgamation.*[56] The first of these dates marks the approximate completion of the military conquest, and the passage of an act that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[57] The policy, already in effect, of segregating the Indians on reservations under the close control of the Federal Indian Service was carried through to completion. It was coupled with another of paying annuities or issuing rations, since the means of living by hunting had almost disappeared. A treaty with the Sioux made in 1868 provided, for instance, for the issuance of one pound of meat and one pound of flour a day to each Indian over four years of age settled on the reservation. Great inequalities existed in the allotting of lands to the reservations and in the distribution of food and annuities. That the meek do not always inherit the earth is illustrated in the case of the Papagoes of Arizona, who had always been friendly and co-operative with the whites, but who were given a large but barren and almost waterless reservation and no annuities; whereas the Apaches, who had demonstrated their military capacity, received lands with mountains, forests, and streams, and for some years bountiful annuities. This period was characterized also by a great increase in the number of schools maintained by the Indian Bureau and by private associations under government contract. Thus a feeble attempt was made to Americanize the Indians and prepare them for civil life; but this was a small offset to the evils of maintaining the masses of Indians on the reservations in idleness.

3. *From 1887 to 1920. Breakdown of the Tribes; Citizenship and Individualization for the Indian.*[58] The key to the Indian policy of this period was the act of February 8, 1887, which provided for the breakup of the tribal, or communal, lands; their allotment to the Indians individually, with title in fee simple; and the conferring of citizenship. This was to be a final act of the

[56] L. F. Schmeckebier, op. cit. pp. 66–81.
[57] 16 Stat. 566.
[58] L. F. Schmeckebier, op. cit. pp. 80–142.

government in its historic policy of dealing with the Indians as a special group. Hereafter they would be on their own. Agricultural lands were to be apportioned in lots of one hundred and sixty acres to heads of families, eighty acres to single persons over eighteen and orphan children under that age, and forty acres to other persons under eighteen years of age. Grazing lands were to be apportioned in double that acreage. The allotted lands were to be held in trust for twenty-five years or longer, during which time they could not be mortgaged or sold without the consent of the government. In 1906 Congress provided that the Secretary of the Interior might terminate the trust period and issue a patent in fee simple whenever he should be satisfied that any Indian allotee was competent to manage his own affairs. If surplus land remained after all allotments had been made, the Secretary of the Interior might negotiate with the tribe for its sale and the deposit of the proceeds in trust funds. During this period the quality of the Indian schools was bettered, and after 1900 no further funds were appropriated for education in sectarian schools. In 1909 a medical inspector for the Indians was appointed, and expert supervision of their forests began. In 1914 the United States adopted the policy of buying large herds of cattle with tribal funds and gratuity appropriations. In 1917 the policy of issuing patents in fee simple to all Indians of less than half blood was begun, and commissions were established on some of the reservations to pass upon the competency of Indians. By an act of March 3, 1893, the Dawes Commission was created to hasten the allotment among the Five Civilized Nations, who were the most numerous of all the Indian tribes and the best-endowed with lands. Over one hundred thousand Indians were certified for the tribal rolls, and over nineteen million acres of land were involved. Members received a one-hundred-and-sixty-acre homestead, which was inalienable for a period of twenty-one years or during the life of the allotee, and such other amounts of land as the tribal holdings would permit, which might be sold within five years. Generally the allotted lands were to be untaxed as long as they remained in the hands of the original allotee. Hardly had the allotments been completed than movements were started to remove the restrictions on the sale of allotments. The admission of Oklahoma to the Union freed all allotments of persons having less than one half Indian blood, and subsequent laws released other lands. Tribal trust funds were successively distributed among the members of the tribes. Indian lands and Indian funds rapidly passed into the hands of the whites. The Dawes Commission also fulfilled its task of abolishing the tribal governments and closing out their affairs.

4. *From 1920 to 1944. Re-establishment of Indian Nationalism.*[59] Indian policy since shortly after the First World War has had two chief aspects: first, a continuance and intensification of the programs of social and economic welfare, including the promotion of health, education, agricul-

[59]L. Meriam and others, *The Problem of Indian Administration* (1928), chap. iv et passim.

ture, forestry, and the handicrafts; secondly, a sharp reversal of the previous policy which had attempted to destroy Indian customs, language, religion, tribal government, and tribal property holdings. Commissioner of Indian Affairs John Collier, in his annual report for 1940, contrasted the policy of the two periods: "Then [in 1920] Indian democracy seemed to have been reduced to a mere legend, a ghostly sentiment in the minds of the Indians and of admirers of Indians. And with the apparent death of Indian democracy had died, it seemed, Indian culture, Indian energy, Indian group capacity, Indian citizenship, and the spirit of the Indian. The Indian, whatever his biological future might be, appeared to have no . . . spiritual future. And in the United States, his biological future seemed to be that of a rather early extinction."[60] Some of the more important developments of this period will be briefly mentioned.

INDIAN LANDS · When the allotment act of 1887 was passed, the Indians owned 138,000,000 acres of land in about two hundred reservations.[61] By 1935 this had shrunk to approximately 52,000,000 acres. In 1944, of 213 reservations, 118 had been allotted, and 38,000,000 acres of their area had been sold as "surplus" land after the allotments had been made, and the money had been paid over to the tribes and later distributed. These reservations became checkerboarded with holdings by white occupants. The act of 1934 authorized an annual appropriation of $2,000,000 for the purchase of lands for the tribes, to be held for them in trust by the United States; it prohibited the future allotment of tribal lands, or sale of allotted or heirship lands, and restored to tribal ownership all "surplus" lands which had been opened to homesteading. After 1933, by purchase or restoration, or gift from the public domain, the Indians added 4,260,000 acres to their domain. The Navajo tribe pledged its tribal revenue to the amount of $500,000 for the purchase of 324,000 acres of land within the boundaries of its reservation. Federal aids include the construction of irrigation works, the restocking of some of the ranges with cattle, conservation, control of soil erosion, forestry control, and a revolving fund out of which loans may be made to the tribe and individuals for farming and industrial operations.

TRIBAL GOVERNMENT · The act of 1934 provided the machinery for the restoration of what had been so sedulously destroyed: the institutions of self-government.[62] Any Indian tribe, by a majority vote of the adult members of the tribe or of those residing on the reservation, may "organize for its common welfare" a tribal government and adopt a constitution and by-laws. Since the passage of the law 135 tribal constitutions

[60] *Annual Report of the Secretary of the Interior* (1940), p. 356.

[61] An interesting report on "Indian Land Tenure, Economic Status, and Population Trends" (Part X of the *Report on Land Planning*), made by the Office of Indian Affairs, Department of the Interior, was published in 1935 by the National Resources Board.

[62] Act on June 18, 1934, 48 Stat. 987.

have been put into operation, while 77 tribes have voted not to come under the provisions of the law.[63] So far the tribes have dealt in their by-laws with many things formerly administered by the reservation superintendent, such as the use of land, schools, taxation, and game laws. All these constitutions have granted full political equality to women. In 1926 the Indians of New Mexico organized a council for all the New Mexico pueblos. Upon the petition of at least one third of the adult Indians the Secretary of the Interior may incorporate a tribe, giving it the power to hold, purchase, and manage its lands, and the charter must be ratified by a majority vote of the adult Indians.

SOCIAL AND ECONOMIC ADVANCEMENT · The Indian Office in 1934 estimated the Indian population of the United States at 327,958. The difficulty of obtaining exact figures arises from the difficulty of defining who among the large number of mixed blood should be classified as Indians. It seems certain, however, that the Indian population has been generally on the increase since near the beginning of the century, at which time its total was estimated at about 275,000.[64] The increase of population raises some economic questions. The extreme poverty of many of the Indians is in part due to pressure upon their lands. Overstocking of the ranges is usual. The Navajos in 1930 had 1,250,000 sheep and goats on land able to sustain hardly half that figure permanently.[65] The tribe itself had increased in seventy years from about 10,000 to 45,000. The act of 1934 gave the Secretary of the Interior power to restrict the number of livestock grazed on Indian lands to the estimated carrying capacity of such land and to issue regulations for the care of Indian forest lands so that their productive capacity may be maintained without depletion. In the most difficult position are those Indians who are not enrolled as members of any tribe and who are without land. Of the 14,614 counted in 1934, of one-half or more Indian blood, over 90 per cent were living away from Indian reservations; the Federal government no longer took responsibility for them, and the State and local governments assumed responsibility only under extreme pressure.

One of the evils of the allotment system was its division of the lands into uneconomic units.[66] A map of such a reservation shows it checkerboarded into small blocks, with holdings by whites scattered throughout. Heirship lands, held by the government in trust for Indian heirs, became subdivided in the course of two or three generations into lots so small as to be quite useless to the Indian except for what he could obtain from leasing. The act of 1934, while forbidding the sale of any of these lands to outsiders, per-

[63] *Annual Report of the Secretary of the Interior* (1940), pp. 363–364.

[64] National Resources Board, op. cit. pp. 66–70.

[65] The data of this paragraph are from the excellent annual report for 1940 of John Collier, Commissioner of the Indian Office, *Annual Report of the Secretary of the Interior*, pp. 354–400.

[66] National Resources Board, op. cit. pp. 15–21.

mitted their sale to the Indian tribe as communal land or their exchange so that larger holdings might be built up. The effect of allotment is shown typically in the case of the Winnebago reservation of Minnesota. Allotted in 1887, 75 per cent of the allotted land had been lost by 1934, and 24 per cent was in heirship status. The two Sioux reservations in South Dakota had sufficient range for 100,000 cattle, but were carrying only 18,000, chiefly because nearly all their 3,120,000 acres had been allotted or was in heirship status.

The government has aided the Indians in organizing livestock associations, and has constructed and operates irrigation works, collecting about two thirds of the annual cost from the users of water. It builds roads on Indian reservations, supplies agricultural advice and credit, administers Indian estates, furnishes medical and hospital care, and conducts the system of education. The cost of maintaining the schools for about eighty thousand Indian children and the Indian Medical Division was about five million dollars a year; that of construction, including roads, schools, hospitals, and irrigation works, about eight million dollars. Education in the arts and crafts, training for the commercial distribution of goods so produced, and aid in merchandising them are under the Indian Arts and Crafts Board of the Department of the Interior.

INDIAN ADMINISTRATION · Indian administration centers in the Bureau of Indian Affairs, presided over by the Commissioner of Indian Affairs, who is appointed by the President and the Senate.[67] Subject to the direction of the Secretary of the Interior and the regulations which the President may prescribe, the commissioner is given "the management of all Indian affairs and of all matters arising out of Indian relations." In the bureau are Medical, Purchasing, Finance, Land, Irrigation, and Forestry Divisions, whose names suggest their duties. The General Superintendent of Indian Affairs has charge of the field work, acting through nine district superintendents, each of whom is in charge of a region. The agency, its head known as "Superintendent" since 1893 because of the disrepute into which the name "Indian agent" had fallen, is the center of government administration in the Indian country. The officers and employees of the agency include persons in the fields of health, education, forestry, land utilization, and business management. If there are only day schools on the reservation, the superintendent of the agency may give them general oversight; but if there are boarding schools, a principal is in charge. The total of Federal Indian schools is two hundred and sixty; but an estimated forty-five thousand Indian children attend the public schools, and receive Federal contributions toward their expenses if of quarter blood or more. About a quarter of a million dollars is appropriated annually for loans to Indians for tuition and other expenses at vocational and trade schools.[68]

[67] L. F. Schmeckebier, op. cit. chap. iii.

[68] *Annual Report of the Secretary of the Interior* (1940), pp. 388–389.

Positions in the Indian service are now on the merit system. A training school for this purpose, which includes field work in the near-by Indian tribes, is conducted at Albuquerque, New Mexico. As long ago as 1882 Congress provided that preference should be given to Indians for clerical, mechanical, and other positions at the agency and about the reservation; and the act of 1934 provided that the Secretary of the Interior should establish standards of fitness for Indian employees in the Indian service and permit their appointment without regard to the regular civil-service laws. As a result, from a total of several hundred Indians in the service in 1933 the number had increased to 4682 permanent employees in 1940, which included eight superintendents of agencies, 251 in professional positions, 935 in clerical work, and 3475 in other skilled positions.

SUMMARY · All Indians are citizens of the United States, but if living on reservations they are nevertheless wards of the Federal government. The relationship was symbolized in the last century by the poetic designation of the President of the United States as "the Indians' Great White Father." Even the red man must have detected a slightly ironical tinge in the name; for while under that guardianship he found himself steadily robbed of his lands and chattels. The American people have reversed a historic policy which, consciously or unconsciously, looked to the extermination of the Indians as a people. The problems involved in the nation's obligation as guardian are chiefly those of economics and of social adjustment. Much remains to be done in the regaining of lost lands, and their consolidation into usable tracts and restoration to tribal ownership.

## *FEDERAL BUILDINGS, FORTS AND ARSENALS, PARKS, AND OTHER LANDS*

The Constitution gives Congress exclusive jurisdiction over all land, purchased with the consent of the State legislature, for the erection of "forts, magazines, arsenals, dockyards, and other needful buildings." To this must be added the parks, forest reserves, and other lands of its original domain retained by the Federal government. Police regulation, local government, and the trial of all cases are in Federal hands. With respect to the lands acquired for public buildings and works by eminent domain, without the consent of the State legislature, the political jurisdiction of the State continues but never may be used to interfere with the Federal functions. In the case of housing projects owned by the Federal government, contributions to the expenses of local government are made voluntarily.

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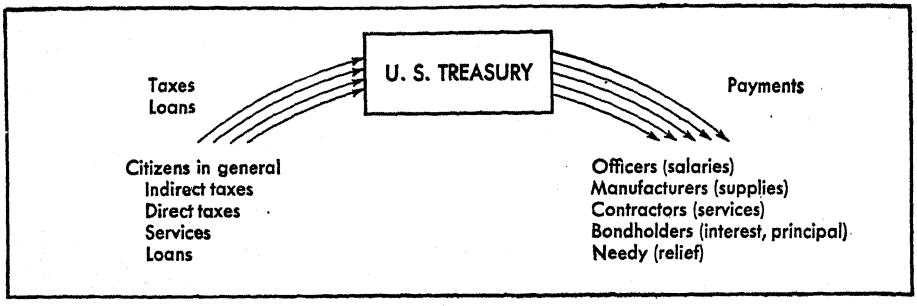
CHAPTER XXXII

# *Government Finance: Revenues*

Life for most adults is a continuous struggle to reach a balance between income and outgo. The individual's task is to produce goods or to render services which annually will bring a price on the market sufficient to pay for the food, shelter, clothing, services, and other things required by his family, with a margin left over. The total of all such margins of individuals and concerns together makes up the annual national savings. Without them new plants and equipment, needed for an increased production, might not be forthcoming. The consideration of income-outgo possibilities is for most people a powerful, and for many the chief, factor in the choice of an occupation, profession, or career. The expansive Mr. Micawber advised youthful David Copperfield: "Annual income twenty pounds, annual expenditures nineteen six: result happiness. Annual expenditure twenty pounds, ought and six: result misery." A chronic failure to match outgo with income is too often taken as the true gauge of the individual's total contribution to society. Without subsidy from relatives, friends, or government his work must cease, and he and his family must exist on a subnormal scale or not at all. What is done by the individuals, by and large, with respect to production, consumption, and saving is the measure of what the state may do; for the state is only the aggregate of individuals.

Government's financial problems follow the same general pattern. It too must match expenditures with income or make up the difference from borrowings or gifts. If, however, one looks through and beyond this general problem, he will find some factors in public finance which are quite different from those involved in private finance. Some of these will be considered briefly.

GOVERNMENT NOT A PRODUCER · In the first place, government characteristically is not a producer. This statement leaves out of consideration those proprietorial functions which now the government increasingly undertakes, such as the operation of utilities, the activities of the Tennessee Valley Authority, and the like. Of course the private individual himself could not be a producer without the protection, the system of legal rights, and the standards of value which government furnishes. Modern governments more and more are instruments of production, but the object is not their enrichment but that of the people as a whole. Government's chief obligation is to maintain the conditions and provide the setting in which the individual may be an efficient producer.




GOVERNMENT'S INCOME FROM PRIVATE INCOMES · Since its books show no tangible profits, the only way in which the government may secure an income is by claiming a portion of the citizens' incomes. *Tax* is simply a name for that portion of the citizen's income or capital which the government takes for its own. If the amount needed at a given moment appears so high as unduly to disturb private business, government may borrow a portion of what is needed instead of taking full ownership in the form of a tax. It follows that the potential prosperity of a government's trea[illegible] directly proportioned to the productive capacity of its citizens. A[illegible] roductive people provides the basis for a well-financed governm[illegible] ple of low production, for a poor government.

THE TREASURY AS A COMMON AGENCY · The private [illegible] bank account may be a measure of wealth, as well as a mean[illegible] ent. The government's treasury is the slack water of a stream[illegible] dly pauses there. The citizens as a whole contribute by taxes a[illegible] the stream which flows into the treasury. Individuals receive [illegible] the stream as wages, salaries, payments for supplies and servi[illegible] st on debts, payment on the principal of loans coming due, or [illegible] for the necessaries which they are not able to supply for themselv[illegible] The entire nation receives for what has been paid into the treasury su[illegible] intangibles as peace, order, safety, and justice, and such material benefits as parks, highways, and water supply. There is no expectation, at the end of the year, of setting aside a profit or a saving for the needs of the future. That privilege is reserved for the individual citizens.

STRENGTH OF GOVERNMENT CREDIT · The failure to show a saving at the end of the year or even to balance the books between income and outgo does not so adversely affect government as it does private credit. The credit of the individual is shaded by the general judgment of investors as to his ability to meet his obligations at the specified time. If he fails for a year or two to make an adequate income, that fact may very well be taken as an indication of the loss of personal capacity or of resources; but a similar failure by government does not necessarily carry any such implication, for the government may choose to levy heavier taxes to make up the deficiency. Only the prospect of inability to compel such payments, seldom

to be expected except under threat of revolution or invasion, will similarly lower the credit of the government.

UNLIMITED CHARACTER OF GOVERNMENT'S INCOME · The doctrine of sovereignty necessarily places government's income in a preferred position. In the last resort the government may take over in any needed amount the income, capital, and personal services of the citizens. What, if any, are the practical limitations on such action? Taxes might conceivably be set at that point where everyone is left with a reasonable minimum of food, shelter, clothing, and other necessaries of plain living, as well as a surplus of savings sufficient to supply capital for the construction of the facilities necessary for production at that level. But if more is taken by taxes, both the physical and moral well-being of the people and the physical plant of production will deteriorate, and the condition will lead to progressively lower government income. The government, if the needs are thought to [illegible] for an emergency of relatively short duration, may choose to counteract such a deterioration, not only taking the income but depleting the capital and the bodily energy of its citizens. The limits of government's income therefore correspond to the resources of the people and land and its own ability to tap them. At bottom the question is one of social cooperation, of which a stable currency and a scientific tax system are important details.

CONTROL OF THE STANDARD OF VALUE · In another respect government has an advantage in the control of income and outgo which no private individual can claim. It establishes the currency and so may alter the standard of value, in the terms of which both taxes and debts are expressed. By arbitrarily changing the metallic content of the dollar or by printing large quantities of irredeemable paper money, as during the Civil War, it may greatly lower the value of the dollar in terms of goods. Thus in 1934 Secretary Morgenthau announced that the treasury had profited to the amount of $2,800,000,000 by the Presidential order decreasing the amount of gold in the dollar. This is not to say that government may create wealth by such means but that it may increase its income, for both devaluation and the printing of paper money are means of taxation.

DELIBERATION AND RESPONSIBILITY · Government finance in a democracy is further set apart from that of the private individual or concern by the factors of deliberation and responsibility. The tax bill may have been the outcome of a lengthy political campaign; the tax as enacted, a compromise growing out of various proposals; and the objects for which its fruits are to be expended, the occasion of a searching debate in the legislature. Finally, both politicians and treasury officials realize that they are only agents of the people in dealing with the public funds and will be held accountable for their acts in the next election. The whole process from the gathering of the funds to their actual expenditure is encumbered with forms and formalities intended to safeguard the public's interest.

## *SOURCES AND KINDS OF REVENUES*

TAXATION · The word *tax* is often used popularly to refer to all the sources of the state's income except its borrowings. In its narrower sense it is set over against certain other classes of state revenue. "A compulsory contribution from the wealth of a person or body of persons for the support of the public powers" is Bastable's definition.[1] *Fee* is the name used for a payment made to government for a service rendered individually, as to the sheriff for serving a summons or to a clerk for furnishing a duplicate of a bill of sale, the idea being that, since the immediate benefit is chiefly to one person, he, rather than the taxpayers in general, should bear all or part of the cost. A *license* is a tax or fee charged for a permission or privilege; for example, licenses are granted for such businesses as selling intoxicating liquors or operating pool rooms. License taxes may have other purposes than raising revenue, such as keeping data on the business for police purposes or restricting the number engaged in the business. A *fine* is a charge levied upon a person as punishment for the infraction of a law. Normally the revenue motive is only incidental, although some cities, unfortunately, have occasionally used fines to secure revenue from vice and gambling, and many cities have used them to secure revenue from infractions of traffic regulations. *Special assessments* are charges levied upon landowners to pay for public improvements in their neighborhood, such as sidewalks, sewers, tree plantings, or boulevards. The amount is determined by the total cost. The term *excise* was held earlier to cover taxes levied on the manufacture, sale, or consumption of commodities within the country; but it is now used loosely to cover almost all internal taxes which are not direct. *Customs* are taxes levied on imports; the word *tariff* refers to a list of such taxes. *Poll*, or *capitation*, taxes are levied on persons at a flat rate of so much a head. The original idea of the *direct tax* was that it was a tax whose burden could not be shifted from the person upon whom it was levied; that of the *indirect tax*, that the burden could be shifted. Experts on taxation have had great difficulty in agreeing on what constitutes shifting, and the courts have backed away from the problem. However, they have come to agree that poll and real-estate taxes are direct, and, since the Pollock decision of 1895, to include income taxes in that category.[2]

OTHER SOURCES OF REVENUE · As government plunges deeper into the realm of commerce other sources of income assume importance. The earnings of such enterprises as the Tennessee Valley Authority, Boulder Dam, the Inland Waterways Corporation, and the Shipping Board assume some importance in the Federal budget; to these may be added the income from the more purely commercial agencies of the Federal Housing Authority, the Reconstruction Finance Corporation, and others. States

[1] C. E. Bastable, *Public Finance* (2d ed., 1895), p. 263.
[2] *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S. 601 (1895).

and cities here and there derive revenues from wharves, food markets, ferries, coal mines, railroads, bridges, canals, streetcar lines, water-supply systems, and other utilities. Receipts from the sale or rental of lands or of forest and mineral products are important in the newer States.

## *THE FEDERAL REVENUE SYSTEM*

EXTENT OF THE TAXING POWER · The grant of the taxing power to Congress is in simple words: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[3] Taxes are restricted to three purposes, two specific and one indefinite: (1) the payment of the national debt, (2) the provision of a system of national defense, and (3) provision for the general welfare. The phrase "general welfare" is vague enough to cover a multitude of objects. Clearly anything which Congress might declare to be for the general welfare would never be questioned by any court. Had the drafters of the Constitution tacked no qualifying objectives to the grant of taxing power, the clear implication would have been that Congress could levy all taxes necessary to carry out the enumerated powers of the Federal government. The power to create an army implied the power to raise funds for its maintenance; the power to create Federal courts, the power to tax in order to pay their salaries and expenses; and so on. But did the Constitution authorize Congress to tax for objects beyond its own sphere of legislation, for what may be called unconstitutional or extraconstitutional things?

THE SPENDING POWER · The issue was joined early in our history. James Madison stated that if the welfare clause were held to permit Congress to tax and spend, it would give to Congress a "fund of power, inexhaustible and wholly subversive of the equilibrium between the General and the State Governments."[4] Hamilton, on the contrary, in his *Report on Manufactures* contended that it was "therefore of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare."[5] Until the Civil War and for some decades thereafter the general practice accorded with the doctrine of Madison, although with a growing number of exceptions.[6] Federal subsidies for

[3]Constitution of the United States, Art. I, sect. 8, clause 1.

[4]Letter to Martin Van Buren, September 20, 1826, *Letters and Other Writings of James Madison* (1884), Vol. III, p. 530; Vol. V, pp. 352–365. See also his letter to Andrew Stevenson, November 27, 1830, *Writings of James Madison* (Hunt ed., 1910), Vol. IX, pp. 411–424, and the *Federalist* (Lodge ed., 1895), No. XLI.

[5]*Works of Alexander Hamilton* (Lodge ed.) Vol. IV, p. 150. For recent discussions of the question cf. E. S. Corwin, *The Twilight of the Supreme Court* (1934), pp. 154–159; C. Warren, *Congress as Santa Claus* (1932), pp. 4–12 ff.

[6]For an excellent account of the development of the spending power cf. L. Wilmerding, *The Spending Power* (1943).

land-grant colleges under the act of 1862, while not based primarily on taxation, marked the beginning of a break away from the old doctrine, and the movement was well under way by the time of Woodrow Wilson. The Maternity Act of 1921 provided for an annual appropriation of funds which should be apportioned among the States to give aid to needy mothers and children, a function clearly not among the enumerated powers of Congress but among those reserved to the States. Two suits were filed to restrain Secretary of the Treasury, Andrew Mellon, from disbursing Federal funds for this non-Federal function, one by the State of Massachusetts and another by one of its taxpaying citizens.[7] The United States Supreme Court held that neither suit could be entertained. Massachusetts had no exclusive right to speak for its citizens, since they were also citizens of the United States; and a Federal taxpayer's interest in the moneys in the treasury was so "comparatively minute and indeterminable" that he had no right to interfere with payments from it. The practical meaning of these and subsequent cases is that Congress may tax and may appropriate the proceeds of a tax to whatever object it may deem a matter of "welfare," whether a Federal power, a State power, or one denied to both; and that no citizen or court may place any obstacle in the way.[8] Thus the Federal government may supply funds for many functions or purposes over which it possesses no jurisdiction, such as schools, the construction of local government buildings, relief, recreation, health, and local utilities. In this way has the spending power, over and above the enumerated and implied powers, been added to the prerogatives of Congress.

SPECIFIC LIMITATIONS. CONSTITUTIONAL · It is required that all indirect taxes shall be levied uniformly throughout the United States.[9] An excise tax of 10 per cent on the price of theater tickets must apply to all theaters of the same class, no matter in what State they are located; and so with sales taxes on automobiles, gasoline, or perfumes. The courts have ruled that the term *United States* includes the forty-eight States, the District of Columbia, and the incorporated territory; other outlying possessions may be taxed at different rates.[10] Secondly, direct taxes must be levied among the States according to their respective populations.[11] For instance, if a real-property tax of half a billion dollars were ordered, New York State, with one tenth of the country's population, would be required to pay fifty million dollars; Ohio, with one twentieth, twenty-five million; and Nebraska, with one hundredth, five million dollars. The only exception to the rule was made by the Sixteenth Amendment, which authorizes the levying of an income tax irrespective of State boundaries and populations.

[7] *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923).
[8] *Helvering* v. *Davis*, 301 U. S. 619 (1937).
[9] *United States Constitution*, Art. I, sect. 8, clause 1.
[10] *Puerto Rico Brokerage Company* v. *United States*, 76 Fed. (2d) 605 (1935).
[11] *United States Constitution*, Art. I, sect. 9, clause 4.

The Constitution also forbids all taxes on exports from any State, a provision which originally was adopted for fear that States might combine to impose discriminating taxes on the productions of other States.[12] Since the international scramble for world markets serves generally to make export taxes undesirable, the provision has little significance, except to rule out taxes upon the products of the extractive industries, such as lumber, pulpwood, oil, and coal, which might be desirable from the standpoints of revenue and conservation. A further limitation that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"[13] debars Congress from setting up discriminations in favor of the ports of one State as against those of another either by taxation or by commercial regulations. It does not, however, prevent Congress from establishing such preferences as making one port a port of entry and others not, or building port facilities, unless these things are done deliberately on the basis of State preference.

IMPLIED LIMITATIONS · The courts have recognized certain other limitations as inferred from the Constitution. In the case of *McCulloch* v. *Maryland*,[14] Chief Justice Marshall held that the State of Maryland could not tax the Baltimore branch of the Bank of the United States, because the bank was a Federal instrumentality. The power to tax implied the power to destroy, and neither State nor Federal government might possess such a power over the other. Neither might tax the salaries of officers of the other, or their bonds held by private individuals.[15] A Federal excise tax on the sale of a motorcycle to a city government and a State tax on gasoline sold to the Federal coast guard were held invalid;[16] but when a State engages in nongovernmental functions, as, for instance, the sale of intoxicating liquors by a State liquor store, such activities may be taxed in common with similar ones by private individuals.[17] This was the practice until the judicial ruling in 1938 which held that the salary of a State employee is not exempt from the general Federal income tax.[18] Now one jurisdiction may tax the income of the employees of the other if it does so in a general law not so directed as to discriminate against the other. Taxes must be levied for a "public purpose," which means for something of benefit to the community as a whole;[19] but this is not a limitation which often embarrasses Congress, since even the voting of money to a private individual may be on a pre-

[12]Ibid. Art. I, sect. 9, clause 5.

[13]Ibid. Art. I, sect. 9, clause 6.

[14]4 Wheaton, 316 (1819).

[15]*Collector* v. *Day*, 11 Wall. 113 (1871).

[16]*Indian Motorcycle Company* v. *United States*, 283 U. S. 570 (1931).

[17]*South Carolina* v. *United States*, 199 U. S. 437 (1905); *Ohio* v. *Helvering*, 292 U. S. 360 (1934).

[18]*Helvering* v. *Gerhardt*, 304 U. S. 405 (1938). The following year the Supreme Court upheld the right of a State to tax the salary of a Federal employee. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939).

[19]*Loan Association* v. *Topeka*, 20 Wall. 655 (1875).

tense of a social benefit. Taxes may not be so levied as to deprive a person of property without due process of law, but this has reference to the procedure of assessment and collection in individual cases rather than to the amount to be raised.

FEDERAL-STATE CONFLICTS · The student must disabuse his mind of the idea that double taxation is constitutionally forbidden. Since all residents in the States are in general subject to two jurisdictions, the Federal and the State, the citizen is subject to two taxing powers. Each may levy excises on production, consumption, sales, and privileges. Except for government property, none is immune from the taxation of both. As a matter of practice the Federal government, because of inconveniences in administration, levies no direct taxes except on incomes. The States are forbidden to tax interstate and foreign commerce; but they may tax the instruments of such commerce, such as railroad rights of way, rolling stock and other structures, ships, and telegraph and telephone lines. Generally the field is open to both. In many States there is dual taxation of gasoline, incomes, and inheritances, as well as of amusements, intoxicating liquors, tobacco, and other things regarded as luxuries. What would happen if the two taxed one thing to the point where neither could collect the whole tax? This question was considered in the *Federalist* by Hamilton, who pointed out that the question was one of prudence which the two must settle by "reciprocal forbearance."[20] One example of co-operation is the provision in the Federal inheritance-tax law which allows a rebate to the taxpayer up to 80 per cent of the amount of the Federal tax for the amount paid as a State inheritance tax. There is great need for a better division of the taxing field between nation and State. The administrative wastefulness of a dual collection of the gasoline and inheritance taxes is plain. Federal-State co-operation in the social-security tax system is more illuminating as an instance of joint legislative policy than of joint tax policy.

DUTIES ON IMPORTS · Among the receipts of the Federal Treasury for the fiscal year ending June 30, 1944, under the heading "Customs" is listed the amount of $324,290,778.06.[21] A tax on imports has the great virtue of ease and economy in collection, since all goods must come into the country through a relatively small number of ports at which are located well-organized Federal offices that would have to exist whether taxes were to be collected or not. The first revenue measure ever enacted by the Congress of the United States under the Constitution was that of July 4, 1789, entitled "An Act laying a Duty on Goods, Wares, and Merchandise imported into the United States."[22] Interesting to the student today is the preamble, which announced its threefold purpose: (1) "the support of the government," (2) "the discharge of the debts of the United States," and (3) "the

[20] *The Federalist* (Lodge ed., 1905), No. XXXVI.
[21] *The Budget of the United States Government, 1945*, p. A7.
[22] 1 Stat. 24.

encouragement and protection of manufactures." The policy adopted thus early has since been followed without faltering, except for the short period between 1842 and 1861. As compared with present-day rates, those of the first tariff were low: on wines they ran from ten to eighteen cents a gallon; on distilled spirits, ten cents a gallon; and there were low rates for tea, sugar, coffee, cocoa, and cheese. Boots, shoes, and slippers paid from seven to fifty cents a pair. A list of miscellaneous goods taxed at 10 per cent ad valorem included clothing, millinery, hats, earthenware, canes, whips, paper, and gold-plated and silver-plated ware. Goods imported in American-owned vessels received a 10 per cent drawback. This act, with another shortly passed levying duties on the tonnage of vessels, was the sole source of Federal revenue for nearly two years.

ARGUMENTS FOR THE PROTECTIVE TARIFF · Alexander Hamilton, in his *Report on Manufactures*, submitted to Congress in 1791, stated the arguments for a system of protective tariffs, which have been merely elaborated by such later political leaders as Henry Clay, Congressman "Pigiron" Kelly of Pennsylvania, and William McKinley. The home-market argument ran that the protected industries, by employing large numbers of people, would furnish a market at home for the products of the farmer, thus saving the expense of shipment abroad and ensuring him a better price. The diversification of employments would give the nation a well-balanced industrial organization, ensuring a plenitude of needed goods and a higher standard of living. In addition, there was the military argument that the wartime needs of the country for ships, guns, and other materials would be provided at home. Again, it was argued that the tariff would provide an ample supply of revenue, which, being paid indirectly, would rouse a minimum of resentment. The infant-industry argument, to answer the accusation that the tariff would increase the cost of living, was to the effect that after a new industry had been started and had been protected through its first years of struggle, it then could produce at a low cost, making a tariff no longer necessary. A further argument, much used in later years, was that by excluding foreign goods or raising their selling price the high-wage scale of the American worker was protected against that of the "pauper" labor of Europe.

ARGUMENTS AGAINST THE PROTECTIVE TARIFF · Opponents of the protective tariff have pushed the attack from many angles.[23] If a tariff builds up manufactures for which the natural resources, climate, or other factors of the country are not suited, the cost will be disproportionate, and the consumers will be deprived of good products at a favorable price from those countries where they may be produced cheaply and well. If such tariffs prevail throughout the world, everywhere the cost of living will rise and the standard of living will fall. Secondly, the burden of such

[23]G. Crompton, *The Tariff* (1917), chaps. iv, vi, vii; F. W. Taussig, *The Tariff History of the United States*. (8th ed., 1931, New York), chap. i.

tariff falls unevenly upon different sections, classes, and individuals in the United States. Agriculture and all industries shipping goods abroad are at a disadvantage because they sell in an unprotected world market and buy at home in a protected market. The unsoundness of trusting the economic well-being of various sections, industries, and classes to the whims and pressures of politicians in a lawmaking assembly, and the certainty that in a country of our great natural resources a sound manufacturing and industrial system would develop without the stimulus of protective tariffs, were often pointed out.

TARIFF-MAKING · Congress has ample power to levy duties on imports, since it may do so under the guise either of raising revenue or of regulating foreign commerce. Since all revenue bills must originate in the House of Representatives, that body has been the chief forum of the debates on the tariff.[24] All general revenue bills originate in the Ways and Means Committee. For the task of drafting a tariff bill this committee of twenty-five members divides itself into subcommittees of three, each of which takes over one of the commodity schedules. Hearings are announced for each schedule, as for woolen textiles, which bring manufacturers and producers to Washington in great numbers. The testimony and briefs of those appearing at the hearings for the act of 1930, when printed, amounted to seventeen volumes totaling 10,684 pages. At the conclusion of the hearings the various subcommittees draft their respective sections, all of which later are adopted, with or without modification, by the entire committee. The bill is then reported to the House and goes through the usual steps of procedure there and in the Senate. The chances for mistakes and errors in principle and in detail in a measure involving thousands of items are obvious.

FORM AND CONTENT OF A TARIFF BILL · The Hawley-Smoot Bill of 1930, named for the chairmen of the House and Senate committees which handled the bill, is typical. Its text would make a book of two hundred or more pages of ordinary size and print. "Title I," the "Dutiable List," is divided into "schedules," each covering a general class of products such as "chemicals, oils, and paints," "cotton manufactures," or "papers and books." Each schedule is subdivided into "paragraphs." "Title II" is the "Free List"; "Title III" is divided into five parts, containing provisions relating to the colonies and to the entry and unlading of vessels, and details involving the administration of the act. Tariff bills involving changes in a few schedules only are much briefer. Twenty-four tariff bills of a comprehensive nature had been passed down to 1945.

THE TARIFF COMMISSION · A general realization that the existing machinery was inadequate for the drafting of a scientific tariff was responsible

[24] In his *Politics, Pressures, and the Tariff* E. E. Schattschneider gives an account of the making of the tariff revision of 1929–1930. Cf. also P. W. Bidwell, *The Invisible Tariff* (1939), and E. Stanwood, *American Tariff Controversies in the Nineteenth Century* (1903).

for the creation in 1916 of the Tariff Commission.[25] This agency, made up of six members appointed by the President for terms of six years, is clothed with a variety of powers related to the questions of tariff-making and tariff administration. Its powers of investigation are broad, covering the effects of the customs laws of the country on industries and labor; the relation between the tariff and the cost of finished products; the effect of the tariff on commercial relations between the United States and foreign countries; the relative costs of manufacture in the United States and various foreign countries; and improvements in the arrangement of schedules. It is required also, upon request of the Senate or House committee dealing with the tariff or of the President of the United States, to carry on special investigations of matters connected with the tariff.

FLEXIBLE AND RECIPROCAL TARIFFS · Once tariffs were enacted, their hard and fast character proved a defect. Changes in price levels and in the kinds of things produced at home and abroad tended to make some rates higher and some lower than even those most interested in them desired. To introduce flexibility into the system, the act of 1922 provided that the President, after investigation by the Tariff Commission, might raise or lower any rate of duty by as much as 50 per cent if this were found necessary to equalize the difference between the cost of production at home and abroad. Difficulties in ascertaining such costs made the law largely unworkable. In the eight-year period 1922–1929 the President changed only thirty-eight out of the twenty-eight thousand items in the tariff act of 1922.[26] Although the flexible provisions were repeated and strengthened in the act of 1930, and a new and more active commission was appointed, the law remained without effectiveness. In the years from 1930 to 1938, of seventy-eight investigations made by the commission, twenty-two resulted in higher rates, twenty-five in lower, and thirty-one in no change of duty.[27]

A new tariff policy was written into the Reciprocal Trade Agreements Act of 1934. As a tool for bargaining the President is given the power to reduce tariff rates as much as 50 per cent from existing levels in return for concessions on the part of foreign nations. He may withhold tariff concessions from any country because of its discriminatory treatment of American commerce. If he finds unfair methods of competition or practices with respect to any kind of goods, he may exclude such goods from entry into the United States; and he may lay new and additional duties on the goods of any country which uses any practice or regulation calculated to place our commerce at a disadvantage as compared with that of other countries. The Tariff Commission plays a major part in supplying the President with the information needed for the administration of this act; but the President

[25] *United States Tariff Commission, Twentieth Annual Report* (1936); F. W. Taussig, op. cit. pp. 478–480.

[26] P. W. Bidwell, op. cit. p. 120.

[27] Ibid. pp. 128–130.

is required to consult also the departments of State, Agriculture, and Commerce. Between June, 1934, and April, 1939, reciprocal trade agreements had been concluded with twenty countries, and 1068 tariff rates had been reduced, 97 bound to the existing level, and 150 items placed on the free list. The soundness of the program in principle and in practice has been demonstrated.

EXCISES · The term *excise*, mentioned in the Constitution, is usually applied to taxes levied on goods produced and consumed within the country. In late years it has been extended to apply to so many other taxes, such as those on documents and on transactions and other activities, that it is almost synonymous with the whole of the Federal internal taxes other than those on incomes. Englishmen of colonial times were familiar with this kind of tax, and the exciseman was never a popular figure. Persons charged with frauds against the revenues were given a summary trial before a royal commissioner. Federal excises began in the act of March, 1791, which levied from eleven to thirty cents a gallon on distilled spirits. The excises were soon extended to include tobacco, carriages, sales at auction,[28] and legal instruments. These lapsed under the Jeffersonian regime, but the War of 1812 led to their reimposition and their extension to a wider list of things. By 1817 all excises again had been repealed. The Civil War was the occasion for the establishment of a wide list of excises, which were progressively extended by later acts. The Spanish War brought new life to the excise, and the First World War fastened a comprehensive system firmly on the country.[29]

PRESENT FEDERAL EXCISE TAXES · For the fiscal year ending in 1943 there were miscellaneous Federal internal-revenue taxes of $3,776,956,397.87, exclusive of the income tax. The greater portion of this vast sum came from half a dozen sources. Excises on tobacco, its manufacture and sale, amounted to $915,301,033.49; on intoxicating liquors, $1,423,474,248.77; on miscellaneous manufactures, $487,156,897.02; on estates, $414,530,598.81; and on gifts, $32,965,078.68.[30] Other sums came from taxes on the issue of bonds and capital stock and on playing cards. About one eighth of these taxes came from New York State and about one ninth from the much smaller State of North Carolina, where the processing of tobacco is centered; but the burden rests generally on ultimate consumers throughout the country.[31] Of the manufacturers' excise taxes the tax of one cent a gallon on gasoline was the most productive, returning $288,785,826 in 1943, and that on electrical energy second, with $48,705,138.94.[32] The greater portion of the huge Federal excises is shifted from the original payer, so that it becomes a general charge on the consuming public.

[28] 1 Stat. 199 (March 3, 1791).
[29] F. W. Taussig, op. cit. Pt. I, chap. i.
[30] *The Budget of the United States, 1945*, pp. A6, A7.
[31] *Annual Report of the Commissioner of Internal Revenue, 1943*, pp. 104, 105.
[32] *The Budget of the United States, 1943*, p. A6.

INCOME TAXES · A tax upon the net income of individuals had long been highly favored by economists. It is more easily borne than some other taxes, for it rests upon the ability of the person to pay; may easily be levied at a progressive rate increasing with the amount of net income, which gives it an aspect of social reform by discouraging the piling up of large fortunes; is difficult to avoid and economical in collection; and is a highly productive source of revenue. These are strong arguments, and little can be said on the other side except that it is frankly a class tax, which, in the hands of special interests in the legislature, might easily be used as an instrument of political punishment. For the year 1943 the income taxes amounted to $16,868,151,135.43, divided in about the ratio of 2 to 3 between the individual and the corporation taxes.[33]

CONSTITUTIONAL BASIS · Congress enacted its first income tax in 1861, and followed it by later amendments and acts which were in force until 1872. Is it a direct tax and so subject to the constitutional rule of apportionment among the States according to population? The Supreme Court in 1880, upholding the Civil War taxes, rejected this theory; but when a new general income tax was passed in 1894, it took the other view.[34] Since taxes on real estate and on personal property both had consistently been held to be direct, it seemed logical to include those on the income from such properties. It was eighteen years before the way was cleared for Federal income taxes by the constitutional amendment of 1913.[35] The effect of this amendment was simply to except income taxes from the general rule requiring apportionment among the States according to population. Did its words "on incomes from whatever source derived" operate to set aside the old rule prohibiting Federal taxation of the salaries of State and local officers or of other instrumentalities of government? The Supreme Court, in the case of *Brushaber* v. *Union Pacific Railroad Co.* (1916),[36] ruled that the amendment had changed nothing except the rule of apportionment, and two decades later upheld the chief engineer of the bureau of water supply of New York City in his refusal to pay a Federal income tax on his salary.[37] A year later, however, the Court in effect reversed itself when it sustained the imposition of a tax on the salary of an employee of the New York Port Authority, pointing out that it did not threaten "to obstruct any function essential to the continued existence of the state government."[38] As the matter now stands, the Federal government and the State may apply their taxes to officials of the other, if the taxes are not discriminatory and do not unduly burden the government affected.

[33]Ibid.

[34]*Springer* v. *United States*, 102 U. S. 586 (1880); *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S. 601 (1895).

[35]Amendment XVI.

[36]240 U. S. 1 (1916).

[37]*Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352 (1937).

[38]*Helvering* v. *Gerhardt*, 304 U. S. 405 (1938).

THE FEDERAL INCOME-TAX SYSTEM[39] · The existing law (1945), the greater portion of which was enacted in 1943 and 1944, is one of extreme intricacy. Few years have passed since the adoption of the first relatively simple law in 1916 without alterations by amendment. The demands of two great wars for additional revenue accounted for sharp increases in rates, as well as the extension of the levy to smaller incomes and changes in the methods of collection. While it would be fruitless to attempt to trace the growth of the law in detail, some of its provisions of economic and social significance are worthy of notice.

The law actually falls into two parts:[40] that which applies to individual and that which applies to corporation incomes. The income which is taxed is the net income, or that which remains after the necessary expenses connected with the production of the income are deducted. Deductions are allowed for taxes paid to other units of government, for gifts to charitable and benevolent institutions, and, until abolished in the act of 1943, for "earned" income, by which was meant income derived from personal earnings, such as salaries and wages, rather than from investments and businesses. The full income tax is composed of two parts: the "normal" tax of 3 per cent and the "surtax," whose rate increases progressively with each block of increase in income. The surtax rates are 20 per cent on the first $2000 of net income, 22 per cent on the second $2000, and 26 per cent on the third $2000, thereafter increasing on each block of income by 4 per cent up to the $16,000–$18,000 block, when the rate of increase begins to decline, falling to 1 per cent at the $150,000–$200,000 block. Thus a person with a net income of $200,000 pays, besides the normal tax of 3 per cent, a surtax rate of 91 per cent on his last $50,000, or a total surtax of $156,820. The law places a ceiling of 90 per cent on individual income taxes, so that, although the total of the income tax might call for more, the person of $5,000,000 net income would be left with $500,000.

The extension of the income tax to millions of persons who formerly had been exempt greatly increased the difficulties of its administration. To facilitate collection, in 1943 a new feature was added, that of withholding the amount of the tax by the employer, or collection at the source. The employer, in effect, is made a tax-collecting agent of the government, paying over from 18 to 22.5 per cent of the pay roll after certain deductions have been made. The salary or wage deduction may or may not be sufficient to cover the entire income tax due from the individual. The exact amount is determined when the annual income-tax return is made, and overpayments or underpayments are duly refunded or made up, respectively.

[39]Roy G. and Gladys C. Blakey, *The Federal Income Tax* (1940), gives a comprehensive account of the development of the Federal income taxes and their administration.

[40]57 Stat. 126 (June 6, 1943) and Public Law No. 315, 78th Cong., 2d Sess., May 29, 1944; Commerce Clearing House, *Individual Income Tax Act of 1944* (Washington, 1944).

INHERITANCE AND GIFT TAXES · Death taxes, or "inheritance" taxes as they are generally known, are levied on the privilege of inheriting property. The death taxes may be levied in either of two ways: on each heir separately as to the share of the estate which he receives; or on the estate as a whole, irrespective of the heirs. The former is an *inheritance tax* proper; the latter, an *estate tax*. The laws governing inheritances and bequests are of deep social significance; for they determine how the property of one generation passes on to the next. The rules of the English common law carefully graded the right to inherit according to the closeness of kinship, as one, two, three, or more "degrees" or "removes"; and it distinguished between "direct" heirs, namely, direct descendants from an ancestor, as son, grandson, or great-grandson, and "collateral" heirs, the descendants of a brother or sister, such as a nephew or niece, grand-nephew or grand-niece. The earlier attitude was that the right of close kin to inherit was a "natural right" which the state must respect. This, however, generally gave way before the social, or collectivist, viewpoint, which regards inheritance as a "privilege" which the state may diminish or take away. Following the latter view, the United States courts have held that the tax on inheritances is not a direct tax on property, requiring allocation among the States on the basis of population, but a tax on the privilege of inheriting or of receiving bequests and therefore an excise.

In 1916 Congress levied its first inheritance, or estate, tax, but the present law is derived chiefly from the acts of 1926 and 1932.[41] The amount due the Federal treasury is computed from the "basic" rates of the former and the "additional" rates of the latter. But the estate is allowed a credit of the whole amount of any estate tax paid a State, or 80 per cent of the basic tax, whichever is the smaller. This concession was made for the purpose of forcing the States to levy estate taxes for their own use. The basic estate tax begins with estates of the amount of $50,000; the additional tax, with estates of $10,000. Both tax rates are sharply progressive, the former beginning with 1 per cent and rising by steps to 20 per cent for that portion of an estate over $10,000,000; the latter, at 2 per cent, rising by steps to 70 per cent for that portion of an estate over $50,000,000. Thus an estate of $10,000,000 would pay a tax of $4,962,600, of which a maximum of $1,073,680 might be allowed as a credit for a similar State tax. For an estate of $50,000,000 the amounts would be $32,362,600 and $7,473,200 respectively. This is not quite the whole story; for in 1940 a Defense Tax of 10 per cent of that required under the existing laws was added, raising the amounts due from the two estates cited to $5,458,860 and $35,598,860.

The severity of the tax, with its sharply progressive rates, brought forth various schemes of evasion. One was the distribution of the estate among

[41]Acts of February 26, 1926 (44 Stat. 69), and June 6, 1932 (47 Stat. 243), and Defense Tax Act of June 25, 1940 (54 Stat. 521).

the heirs before the death of the owner. The gift taxes, begun in 1924, were devised to stop this leakage. Gifts within the year totaling less than $5000 are exempt, as are all gifts to charitable and educational institutions and to units of government. The rates are sharply progressive, beginning with $2\frac{1}{4}$ per cent and running to $57\frac{3}{4}$ per cent at $10,000,000, at which point the tax amounts to $4,566,150.

The estate and gift taxes were originally conceived more as social reform than as revenue measures. Inherently they indicate a question as to the expediency of the ancient right of inheritance as applied to large fortunes, and help to make good the old saying "It is only three generations from shirt sleeves to shirt sleeves." They have not been long enough in existence to warrant conclusions as to their efficacy in breaking up large family fortunes. As to their possible effect on individual initiative and the volume of production, they seem to have a higher expediency than high income taxes, which might easily have the effect of discouraging production and cutting down the income of all persons, rich and poor. That the estate and gift taxes are not to be discounted as revenue measures is shown by the combined return of $447,495,678 in 1943.[42]

## *NATIONAL TAX ADMINISTRATION*

THE DEPARTMENT OF THE TREASURY · The tax-assessing, collecting, and custodial functions of the Federal government are concentrated in the Department of the Treasury.[43] The duties of the department, however, are considerably wider than this, and it is organized into twenty-three principal bureaus, offices, and divisions. Those directly engaged in tax-collecting work are the Bureau of the Customs and that of Internal Revenue; but other key bureaus or divisions are those of Engraving and Printing, the Mint, Loans and Currency, Savings Bonds, Disbursement, Public Debt Accounts and Audit, and the offices of the Treasurer, the Register of the Treasury, and the Comptroller of the Currency. At the head is the Secretary of the Treasury, who is directly assisted by the Undersecretary of the Treasury. There are two Assistant Secretaries of the Treasury, one at the head of the Bureau of Internal Revenue, the other at the head of the Bureau of the Customs and the Coast Guard, Narcotics, and Secret Service agencies and offices.

THE BUREAU OF THE CUSTOMS · The Bureau of the Customs has the task of collecting the customs on all goods entering the country by ship or other carrier.[44] Its work is beset with many difficulties and is highly technical, requiring experts in trade and commerce, science, and law. Goods

[42] *Annual Report of the Secretary of the Treasury, 1943*, p. 242.

[43] D. T. Selko, *The Federal Financial System* (1940), chaps. xi-xiii; L. F. Schmeckebier and F. X. A. Eble, *The Bureau of Internal Revenue* (1923), chaps. ii, iii.

[44] D. T. Selko, op. cit. pp. 189–197; L. F. Schmeckebier, *The Customs Service* (1924).

offered for entry may, under the law, (1) be free of duty; (2) be dutiable, in which case the schedule and class to which they belong must be determined; (3) fall into that class of goods which, because of special treaty agreements, have special rates; or (4) be entirely excluded from the country by law. The work of assessment and of classification is performed by appraisers. Goods may enter only through a port of entry, of which there are more than three hundred, grouped into forty-nine collection districts. At the head of each is a collector who is a political appointee of the President and normally ignorant of the duties of his office. To remedy this weakness, an assistant collector chosen from the permanent civil service is appointed in each district to do the work, while the political head draws the chief salary and watches the political fences for the administration. For each of the seven larger districts, there is also a comptroller, whose task it is to review the accounts of the collector and check his classification of the articles entered. He also is a political appointee with a permanent administrative assistant who is competent to do the work. In 1941 the working force of the Bureau of the Customs was composed of 8281 employees and officers, of whom only 830 were stationed at Washington.[45]

THE BUREAU OF INTERNAL REVENUE · The Bureau of Internal Revenue has a much wider variety of taxes to collect, but its duties of assessment are far fewer than those of the customs service.[46] Supervision of the field services is in the hands of the Commissioner of Internal Revenue, who is responsible directly to an Assistant Secretary of the Treasury. The country is divided into sixty-four collection districts, at the head of each of which is the collector, a political employee, with a chief aid, the assistant collector. The personnel of the bureau in 1943 numbered 36,438, of whom only 4377 were in the Washington office.[47] The size is partly accounted for by the labor involved in the collection of the income, inheritance, and gift taxes. While these are self-assessed, a large corps of traveling auditors is necessary for the purpose of examining the returns. About 80 per cent of the field forces are outside the classified service. Supervisors from a bureau of accounts visit each collection district at least twice a year and make audits of the accounts. Some of the internal taxes, notably those on tobaccos and liquors, require duties of assessment.

## *REVENUE SYSTEMS OF THE STATES*

NATURE AND CHARACTERISTICS · The revenue system of a typical State is much more intricate than that of the Federal government. Because State administration is much more democratic, it is also highly decentralized; and decentralization leads to many overlapping authorities and a

[45] *Annual Report of the Secretary of the Treasury, 1941*, pp. 645–646.
[46] D. T. Selko, op. cit. pp. 197–205; L. F. Schmeckebier and F. X. A. Eble, op. cit. chap. ii.
[47] *Annual Report of the Commissioner of Internal Revenue, 1943*, p. 5.

constant contest among them for revenues. Congress is the sole tax-levying authority for the entire Federal jurisdiction; whereas the State legislature, city and village councils, county, township, and district boards, as well as the people themselves (within each unit) by referendum, may levy taxes. State finance bristles with written limitations on the kinds of taxes that may be used, their amounts, and the purposes for which they may be levied, as well as with limits on debts. In no other aspect of American government has democratic control been carried further than in State taxation. Popular control of the kinds and amounts of taxes and of the purposes for which the funds may be expended is immediate and direct. That the fitful attention of the public characteristically leads to alternations of underspending and overspending, without long-term planning, is all too true; but the easily seen connection between new taxes and expenditures and their resulting burden on the taxpayer generally acts as an effective deterrent to extravagance.

CONSTITUTIONAL BASIS · The State legislature, even without authorization in its constitution, would have a complete general power of taxation, except for the Federal restrictions. Limitations in the State constitution expressed directly, or indirectly by conferring taxing powers on the units of local government, greatly narrow this general power.[48] These vary greatly from State to State. The requirement of a "uniform and equal rate of taxation" is one of the most frequent; another requirement is that all taxes shall be levied by "general laws." Limitations on the amount of taxes are found in some form in all but half a dozen States. These may take the form of a limitation on the total number of mills (for instance, ten, fifteen, or thirty) per dollar of taxable property which may be levied, or they may limit State, county, city, or district by named amounts. Specific taxes may be forbidden, such as capitation, or poll, taxes. The amount by which the rate may be increased over the preceding year may be limited; for example, to 5 per cent in the State of California. Missouri has a twenty-mill limitation, which falls to fifteen mills whenever the taxable property of the State rises to nine hundred million dollars.

KINDS OF TAXES USED IN THE STATES · It already has been pointed out that many Federal taxes are duplicated in the State systems. There are State taxes on incomes, inheritances, and gifts, and a wide variety of excises on intoxicating liquors, tobacco, luxuries, and other manufactured goods.[49] Some of the States have "severance" taxes on natural resources taken from the soil, such as those on copper, iron, anthracite coal, petroleum, and timber. Business taxes bulk large, such as taxes on gross or net earnings

[48]H. M. Groves, *Financing Government* (1939), chap. xx; W. B. Graves, *American State Government* (2d ed., 1941), pp. 462–464.

[49]Ibid. op. cit. pp. 494–501; J. W. Martin, "Significant Trends in State Taxation," *Book of the States, 1943–1944*, Vol. V, pp. 167–170; G. H. Watson, "Recent Trends in State Revenue," ibid. pp. 171–177.

or sales, license taxes, and general and special sales taxes. Property taxes still yield in the aggregate more than any other tax and are one of the oldest classes in existence. Real-property taxes are those on real estate, that is, land, buildings, and the natural resources of the soil; personal-property taxes, those on movables, which are divided into tangibles, or material things, and intangibles, or the paper evidences of wealth, such as stocks, bonds, mortgages, and bills of lading.

THE GENERAL-PROPERTY TAX · The general-property tax is a tax on property in general levied at a uniform rate within the taxing district.[50] The original theory of it was that the property owned by each individual was a valid index of his ability to pay. Thus the person with a total property consisting of land and livestock valued at twenty thousand dollars was as able to pay for the support of government as the person with a fortune in stocks and bonds valued at that amount. The general-property tax developed in the early days of the Republic and came to be the chief source of revenue for all the States. In the beginning only selected classes of things were taxed. Then the list became longer, until finally the enumeration was dropped and the tax was made all-inclusive, as in the Ohio law of 1846: "All property whether real or personal within this State and all moneys and credits of persons residing therein, unless exempted, shall be subject to taxation."[51]

INDIVIDUAL OPERATION OF THE TAX · Annually all property located within the taxing district is assessed, that is to say, given a valuation. The law usually requires that it shall be assessed at its true market value. This usually results, however, in an undervaluation, since true market value is not often easy to determine. The various tax levies within the district are added together, and the property owner's tax is computed by multiplying the assessed valuation of his property by the aggregate rate. The following is an example of what the annual return of a farmer living in a township might be:

| | |
|---|---|
| Land and buildings | $12,000 |
| Livestock | 3,000 |
| Farm implements | 1,500 |
| Personal property and furniture, etc. | 1,000 |
| Bank stock | 1,500 |
| Cash on deposit | 500 |
| Gold-mining stock | 500 |
| Total assessed valuation | $20,000 |

Township rate, 3 mills; road-district rate, 2 mills; county rate, 3 mills; State rate, 3 mills; school-district rate, 9 mills. Total, 20 mills. At 20 mills on the dollar, or 2 per cent, this farmer's annual tax is $400.

[50]H. M. Groves, op. cit. chap. iii; W. B. Graves, op. cit. pp. 465–471.
[51]H. L. Lutz, *Public Finance* (1924), p. 322.

ASSESSMENT · The work of assessment is carried out in most places by elective officials.[52] In the States having towns, as in New England, or townships, as in the Middle West, it is done by an official elected for that purpose, except in Ohio, where the township assessor's duties have been given over to the county auditor. In the South and the Rocky Mountain States there is an elective county assessor. Assessing in sixteen States is done by officers elected in towns and townships, villages, and even school districts; in thirty-two, by county officials or a combination of county and subdistrict officials. Only in six States are county assessors appointed; and while in the larger cities the head assessor may be elected, the actual work is performed by appointive members of his office. The work of assessment in a purely agricultural community is not very difficult; a knowledge of local land values and livestock is the chief requisite. That in urban communities is highly technical, and even when performed by an experienced and highly specialized staff seldom approaches accuracy. The assessment of great utility properties, such as railroads and telephone and telegraph lines, is now generally in the hands of a State board.

EQUALIZATION · Although the law requires assessment at the full market value, the assessing authority of a given unit or district is apt to set a considerably lower standard. So it may develop that in one township the property has generally been valued at 75 per cent of its real value, in another at 80 per cent, and in another as low as 50 per cent. While this will not affect the amount of the citizen's township tax if done consistently, it does make a difference with respect to the taxes of the wider areas, such as the county and the State. To remedy this inequality, a county board of equalization, in many States the board of county commissioners, raises or lowers in blanket form all assessments within each county subdivision in order that all may stand at one level.[53] Since the standard set by a particular county board of equalization may be higher or lower than that in neighboring counties, a State board goes through the same process in order that the assessments of the various counties may be evened. A study in Chicago showed that in 1923 the assessments averaged 35 per cent of the full value for the whole city, with individual variations from 1 per cent of the true value to 100 per cent.[54]

WEAKNESSES OF THE GENERAL-PROPERTY TAX · Certain weaknesses, inherent in the general-property tax, became glaring as the country passed from a dominantly rural to a dominantly urban character.[55] The first is that the total value of property owned is not a dependable index of the ability to pay taxes. Taxes on some kinds of property, such as realty used for commercial purposes may be passed on to other people; while

[52]H. M. Groves, op. cit. pp. 82–96; W. J. Shultz, *American Public Finance* (1938), p. 328.
[53]H. M. Groves, op. cit. pp. 94–96; W. J. Shultz, op. cit. p. 333.
[54]Ibid.
[55]C. L. King, *Public Finance* (1935), pp. 242–244.

those on other kinds, such as most intangibles, fall entirely upon the owner. The tax on an apartment building may be wholly or in part paid by the people who rent its suites, but a tax on bank deposits and on dividends rests finally with their owner. Secondly, the general-property tax furnishes a particularly aggravated form of multiple taxation. For instance, an automobile factory pays the usual local general-property tax, while the stocks and bonds which are paper evidences of the same values are assessed again as the property of their owners. Let us take another example. A well-equipped fruit farm might be assessed at a value of $100,000 and pay the rates which exist in that jurisdiction, say ten mills, making a $1000 tax. Should its owner decide to incorporate the farm for $100,000 and sell a portion of the stock here and there, such stock would be assessed and pay another $1000 in total tax if held in that neighborhood; if held in a district of higher rates, the total tax would be higher. Thirdly, the inherent difficulties in assessment make it an unequal tax. The problem of real estate is not easy, but of all classes of property is the least difficult. Intangibles to a large degree escape taxation for two reasons: because the tax bears with unreasonable severity upon them and because they may be easily concealed. The result is that in a taxing district with both rural and urban areas the former pays a disproportionately large part of the taxes. Fourth is its moral effect on the community. The patent unfairness of a tax which may take from one fourth to three fourths of even small incomes, if such incomes happen to be from bank deposits or certain other forms of intangibles, places a near respectability upon concealment and false returns.

THE CLASSIFIED-PROPERTY TAX · The classification of property for purposes of taxation at different and equitable rates is one method by which various States have alleviated some of the evils of the property tax.[56] Usually this has required a constitutional amendment, for which a generation or more of political agitation was necessary. Ohio, a State which had become greatly industrialized, was often cited as an outstanding example of bad taxation arising from the requirement of a general-property tax. Its constitution required that all property, with the usual exemptions from all taxes, should be taxed by a "uniform rule." A constitutional amendment adopted in 1930 left the requirement of uniformity applicable only to real estate.[57] The variations as to the amount of tax are made (1) by providing for the listing of various classes of property at a specified percentage of the value of each or (2) by specified rates. Thus machinery, tools, and domestic animals used in manufacturing, mining, and agriculture are assessed at 50 per cent of their true value; merchandise in stores, at 70 per cent; but electrical generating and distributing machinery, at 100 per cent. Bank deposits pay only two mills on the dollar (the general-

[56]Ibid. chap. xiv.

[57]*Constitution of the State of Ohio*, Art. XII, sect. 2.

property tax ran as high as thirty-five mills); money, credits, and all other taxable intangibles, three mills on the dollar.

PROPERTY TAXES TODAY · Property taxes had become of such minor importance in the schemes of State-wide taxation that by 1941 they accounted for only $250,000,000, or 5 per cent of their revenue.[58] Fifteen States collected no such tax; twenty others, only on selected types of property. In all the States, however, the property tax remains the chief source of reliance of the political subdivisions, amounting in 1941 to $4,224,000,000, or 80 per cent of their revenue.[59]

INHERITANCE, INCOME, AND GIFT TAXES · By 1944 the States had made extensive inroads on this choice preserve of the Federal government. Thirty-two States taxed the incomes of persons, and thirty-one the incomes of corporations.[60] State income taxes in most cases begin at a lower amount, and the rates are considerably lower than in the Federal scheme. Exemptions as low as $600 for single persons and $1200 for married persons are found, but are not common; and the rate for the lowest bracket is most commonly 1 per cent. The total of State income taxes in 1944 was about $866,000,000.[61] State inheritance taxes are generally levied at a lower rate than Federal ones and have a lower exemption. The annual yield of State death and gift taxes varied from $93,000,000 to $181,000,000 during the decade 1930–1940.[62] The progression of these taxes is generally slower than that of the Federal tax, but the Minnesota rate runs up to 60 per cent for collateral heirs. The Federal law allows credits of State death-tax payments against Federal estate-tax payments, beginning with ¾ per cent on the first $50,000 of the estate in excess of $100,000 and reaching 16 per cent on the excess over $10,100,000. The effect is to coerce States into levying death taxes, and all have fallen into line except Nevada. About half a dozen States have levied estate taxes.

AUTOMOBILE AND GASOLINE TAXES · Automobile-license and gasoline taxes of the States in the year 1943–1944 yielded $1,089,000,000, in the ratio of about 4 to 7, which ranked them third of all taxes in productivity.[63] Their yield has usually been allocated to the highway fund, although parts have been earmarked for other purposes, such as schools and relief. Originally they were levied on the benefit theory, as a payment for the use of the highways, of which the amount of gasoline used was considered a fair

[58]State and local finance total. Bureau of the Census, *State Finances: 1944*, Vol. 2, *Topical Reports*, No. 1, p. 5. Evidently little more than half of this amount was from the general-property tax. In 1942 the total State income from property taxes was $270,939,000, of which $174,623,000 was from the general-property tax. Ibid. *State Finances: 1942*, Vol. III, p. 17.

[59]Bureau of the Census, *Financing Federal, State, and Local Governments: 1941* (State and Local Government, Special Study No. 20, pp. 20, 39) (1942).

[60]*Book of the States, 1943–1944*, p. 195.

[61]Bureau of the Census, *State Finances: 1944*, Vol. 2, No. 1, *Topical Reports*, p. 5.

[62]The State inheritance and gift taxes amounted to $112,000,000 in 1944. Ibid. p. 5.

[63]Ibid. p. 5.

measure. The reduced tax rate, allowed in some States, for gasoline used in stationary engines is therefore logical. Oregon's motor-vehicle gasoline tax, enacted in 1919, was the first, but today every State and the District of Columbia have one. Rates run from one to seven cents a gallon, which is paid by the retailer, who recoups himself from his customers. It was estimated in 1930 that these two taxes more than paid for the maintenance and amortization cost of the State and local highways.

The automobile-license tax originated as a regulatory measure.[64] New York in 1901 required the registration of automobiles and charged a fee for it. The movement spread rapidly, and the fees were increased to provide revenue. More and more States graduated the charges on the basis of the horsepower or the weight of the car. Higher rates are usually set for cars in commercial as against private use, and for freight as against passenger vehicles. Common carriers are generally charged a higher rate than private carriers. Here too the principle of benefit underlies the tax, of which the weight and capacity of the vehicle are taken as gauges. Since the hard-surfaced road, built at public expense, has enabled motor trucks and busses to compete with railroads, whose rights of way are built and maintained at private expense, the justice of a charge which would pay a due proportion of the cost of maintenance of the highways is patent. In some States the annual license fee is in lieu of all other charges, including the general-property tax.

BUSINESS TAXES · Taxes on business activity are used increasingly by all the States. They commend themselves because of the relative ease of collection, the fruitful returns, the lack of legal obstacles, and the popularity of increasing the burdens of large business concerns. The earlier business taxes were those imposed upon railroad companies. In the year 1941–1942 State business and occupation taxes yielded $515,887,000.[65] Business taxes take many forms, but are mostly levied on corporations. The majority of the States employ a gross-earnings tax on public-service corporations, such as electric-power and electric-light, street-railway, steam-railroad, and express companies, the rates running from 2 to 4 per cent. For corporations in general, taxes are levied on the capital stock and franchises, and fees are charged for the privilege of organizing or of doing business in the State. The corporate-income and excess-profits taxes are of course types of business tax. In some States such taxes on public-service corporations are in lieu of the general-property tax. Banks are taxed as a rule on the basis of their capital stock or of dividends; they may be taxed also on the basis of their general corporate income or may pay a general-

[64]W. J. Shultz, op. cit. pp. 86–92.

[65]Bureau of the Census, *State Finances: 1942*, Vol. 3, p. 13. This does not include the manufacturers' gross-sales tax. In 1944 the sales and gross-receipts taxes on various businesses, exclusive of manufacturers' gross-sales or receipts taxes, totaled $1,438,933. Ibid. *State Finances: 1944*, p. 7.

property tax. There are many business-license taxes, such as those on dealers in tobacco, intoxicating liquors, drugs, and soft drinks; on manufacturing and processing, such as the making of oleomargarine and the bottling of drinks; and on service enterprises, such as employment agencies, loan agencies, and cold-storage houses, and those of commission merchants, pawnbrokers, and auctioneers. Amusement taxes, paralleling the Federal ones, are widely used and are justified as a burden on luxury; for example, those on theater, motion-picture, and circus tickets, athletic contests, pool and billiard halls, and race tracks. Taxes imposed upon the "severance" of natural resources from the soil are generally used now by those States which possess resources of significance in national commerce. These taxes are defended on the ground that the State may well claim a portion of that privately owned wealth which is a gift of nature. They are levied on the basis of gross receipts from sales, or of so much a unit for coal, iron, or copper ore or crude oil. In most cases these taxes are in addition to the general corporation and property taxes. Miscellaneous excise taxes such as those on billboards and advertising exist in all States. Taxes on chain stores, which began in 1927, now exist in about half the States. The immediate purpose of their enactment was the protection of independent grocers, druggists, and other merchants against the competition of large concerns operating in chains. The annual tax for each store is on a sliding scale, depending upon the number of outlets in the chain. In Texas the rate for each store in excess of fifty is $750. The total yield of the chain-store taxes in 1942 was only $3,871,000.[66]

THE GENERAL SALES TAX[67] · A general tax on gross sales is in force in twenty-six States, the first being that of West Virginia in 1921. In 1944 the total amount received from all sales and gross-receipts taxes was $2,160,000,000, of which only $721,000,000 was derived from general sales or gross receipts.[68] In 1944 twenty-seven States and a few cities had these taxes. Among them are several different types. One is a retail tax levied on the sales of tangible personal property only; another extends to the sales of jobbers, manufacturers, and wholesalers; and still another applies to personal and professional services, in which case it is called a gross-receipts tax. Most retail-sales taxes are at rates of 2 or 3 per cent. Those on manufacturers and jobbers are generally lower than those on retail sales. Ten States had a "use" tax, which is one levied at the same rate as the sales tax on goods bought outside the State and brought in and used. Its purpose is to discourage the making of purchases outside the State to avoid its sales tax. An out-and-out tax on transactions made in another State would be illegal for two reasons: one that it was beyond the jurisdic-

[66]Bureau of the Census, *State Finances: 1942*, Vol. 2, p. 16.

[67]The standard work on this subject is that of R. M. Haig and Carl Shoup, *The Sales Tax in the American States* (1934).

[68]Bureau of the Census, *State Finances: 1944*, Vol. 2, *Topical Reports*, p. 7.

tion of the legislature, the other that it would amount to the taxing of a transaction in interstate commerce. The Supreme Court, however, has upheld use taxes as legitimate excises.[69]

## *REVENUE SYSTEMS OF THE STATES: NONTAX SOURCES*

CHARACTER · Revenues from other sources than taxes play a considerable role in financing the operations of the State governments.[70] These revenues fall into four general classes. First, administrative revenues derived from special services performed for the citizen or privileges conferred upon him, such as fees, licenses, and special assessments. Second, revenues derived from enterprises of a commercial character operated by the government, represented, for example, by electric-light, water, and gas plants, and street railways, warehouses, and docks. Third, revenues from the State domain, that is, from the sale of such things as timber, minerals, and oil. Fourth, a miscellaneous group of sources including subsidies, escheat, and expropriation.

ADMINISTRATIVE REVENUES · A fee is the charge made by government for a special service rendered an individual. Seldom is the fee high enough to pay for the service rendered. The fee system was more extensively used in the earlier days of the Republic than now, often as an entire substitute for a salary. Its evils were palpable. Officers exerted themselves to increase their services for the purpose of personal gain; sheriffs, constables, justices of the peace, and tax-collectors often were able to make large incomes in this way. The tendency now is to pay flat salaries, while the fee goes into the general fund. Ordinarily fees pay only a small part of the cost of a government service, although in the administration of justice they amount to a considerable total. Fines are assessed for the purpose of punishment, with the income aspect only incidental. However, those derived from traffic violations may be a source of considerable revenue in villages and townships. Licenses confer a privilege or permission. The charge which accompanies the license may be regarded as a payment for the privilege, such as a charge for the issuance of the license, or as a payment for a benefit, such as the automobile-license tax for the use of improved roads. It may also be in the nature of a payment for the cost of supervising the activities which are licensed, such as the operation of saloons, billiard halls, or amusement parks. The revenue derived from licenses is incidental to the purposes of control and regulation. Special assessments are levies to pay for the making of a public improvement, such as a sewer, sidewalk, or boulevard, which is of particular value to a certain person or neighborhood. Since the improvement is in the nature of a capital investment, it

[69] *Henneford* v. *Silas Mason*, 300 U. S. 577 (1937).

[70] W. B. Graves, op. cit. pp. 456–460; H. L. Lutz, op. cit. chaps. x–xiii; W. J. Shultz, op. cit. chaps. xxiv, xxv.

amounts to a capital levy rather than a recurring annual tax. It is a charge against the real estate of the vicinage, irrespective of ownership. In new and expanding communities the special assessment is an important source of revenue, but in the older ones it becomes insignificant. By far the greater portion of special assessments are levied by the local governments.[71]

COMMERCIAL REVENUE · States and cities have in varying degrees entered the field of commercial enterprise. Revenues from these sources may represent payments for actual services rendered to customers, as for water, electric current, and railway or bus transportation. Before the Civil War, States engaged in the building and operation of canals and highways, for which tolls were charged; or they lent their credit for these and for privately owned railroads. Today only two States, New York and Louisiana, operate canals. Others operate bridges, ferries, coal mines, grain elevators, and irrigation works. The Dakotas experimented with State-owned grain elevators, farm credit, and crop insurance; North Dakota, with a cement plant and bank. In 1930, 296 out of the 310 cities of thirty thousand population or over operated commercial enterprises. Two years later more than half the municipal electric-power systems (mostly in the smaller places) were publically owned, as were about three fourths of the water-supply systems of the municipalities.[71] The most rapid advance in the commercial field has been in the retail sale of intoxicating liquors, and here the profits have been surer and larger than elsewhere. In 1944 sixteen of the States operated liquor stores and reported a net profit of $80,740,000.[72]

REVENUES FROM THE PUBLIC DOMAIN · Nearly one quarter of the entire public domain of the Federal government was granted to the various States for purposes of education, conservation, and the building of railroads or other public improvements. The greater portion of these lands was sold to settlers, and the cash was soon spent. Some States, however, built up large funds for the endowment of their schools. Minnesota in 1922 had such a permanent endowment fund of $35,860,000; Texas, one of $26,942,000. Others have retained extensive domains of minerals, stone, and timber, from which a substantial income is derived through direct sales or through lease. In Wyoming, New Mexico, North Dakota, and nine other States less than 5 per cent of the school cost was derived from taxation. In 1933–1934 the school endowments were carried on the books at a value of $445,171,000, and unsold school lands at an additional value of $277,524,000. Nevertheless, for the country as a whole the income from these funds and lands accounted for but slightly more than 1 per cent of the school revenues.[73]

[71]W. J. Shultz, op. cit. p. 163.
[72]Bureau of the Census, *State Finances: 1942*, Vol. 3, p. 77.
[73]H. J. Bitterman, *State and Federal Grants-in-Aid* (New York, 1938), pp. 69–70.

MISCELLANEOUS NONTAX REVENUES · There remain a number of sources of revenue, some confined to a particular State, which are not in any of the foregoing categories. Among these are the sale of obsolete or worn-out government property; the sale of prison-made goods, whose manufacture is only incidental to the administration of penal institutions; and interest on public funds deposited in banks or lent to individuals.[74] "Excess condemnation," by which is meant the policy of condemning more land than is needed for a given public improvement, is the source of revenue when later the excess is sold. Under the English common law the property of a person who dies without heirs or a will was said to "escheat" to the king, a rule which exists in America, with the States as the recipients. Regular subsidies from the Federal Treasury have existed since Civil War times, but did not become an important source of revenue until the First World War. By 1942 they had reached a grand total of $786,585,000.[75]

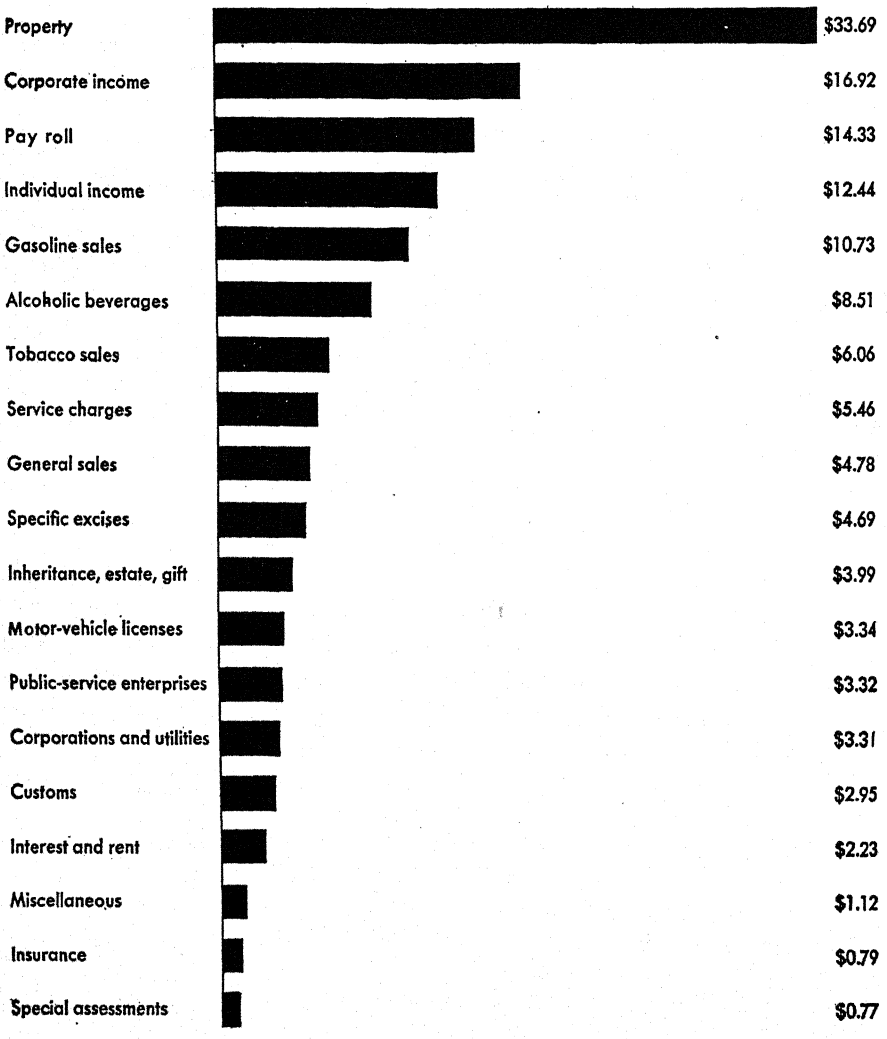
THE TOTAL TAX LOAD · The amounts of the various Federal and State taxes may be obtained and computed with a high degree of accuracy, but not those of the 175,000 local taxing units. However, the Bureau of the Census in 1942 made a comprehensive study covering both the sources of revenue and the major items of expenditures for the previous year. It was found that the total return from all taxes was $18,641,662,000, which meant an average payment of $139.26 for every person in the United States, or a payment of $557 for every family of four. The State and local taxes amounted to $10,213,467,000 of the total. An additional income of $1,588,236,000, not counted in the total, was obtained from various nontax sources, such as the special assessments, charges for services, leases or sales of government property, penalties, and escheats, and the net proceeds of government-owned public utilities. The yields of some of the principal taxes, Federal, State, and local, are given in the following table:

| | |
|---|---|
| Income tax | $5,566,680,000 |
| Property tax | 4,499,339,000 |
| Pay roll | 1,902,450,000 |
| Gasoline | 1,424,089,000 |
| Alcoholic liquors | 1,030,800,000 |
| Tobacco | 808,809,000 |
| Sales | 633,599,000 |
| Inheritance, estate, gift | 529,538,000 |
| Corporation, public utilities | 440,478,000 |
| Customs | 403,179,000 |
| Vehicle licenses | 441,332,000 |
| Miscellaneous excises | 411,897,000 |

[74]Bureau of the Census, *State Finances: 1942*, Vol. 3, p. 22. The total State income from this group in 1942 amounted to $31,342,000.

[75]Ibid. p. 19. The chief items were $369,446,000 for general-welfare projects, $166,866,000 for highways, and $98,553,000 for national defense.

## PER CAPITA FEDERAL, STATE, AND LOCAL GENERAL-GOVERNMENT REVENUE FOR THE YEAR 1941[76]



The figures obtained do not give an accurate picture of the expenditures of each unit of government, since they left out of account borrowings, Federal subsidies to the States, and State subsidies to the local governments. The property tax, while of relatively less importance than formerly, accounted for 24.1 per cent of all taxes collected, and surpassed any other in yield if the individual and corporate income taxes are counted separately. The central State governments, however, generally rely little on the property tax, giving it over chiefly or wholly to the local governments.

SOME ILLUSTRATIVE STATE TAX SYSTEMS. NEW YORK · New York State has one of the better-balanced revenue systems.[77] Its taxes fall into three main classes: those (1) on property, (2) on business, and (3) on persons. The property taxes include the usual ones on real estate, mortgages, and motor vehicles. The business taxes cover a wide field. Banks pay franchise taxes based upon the amount of surplus and undivided earnings, and insurance companies upon the amount of premiums written in the State. Public utilities, including water, gas, electricity, railways, steamboats, and busses, pay gross-earnings or capital-stock taxes as franchise taxes. Other incorporated businesses pay franchise taxes, according to the amount of capital stock or net income. Then there is a large miscellaneous group of business taxes on stock transfers, alcoholic beverages, gasoline, the exhibition of motion-picture films, billiard halls, and athletic contests. The personal taxes include levies on estates and incomes. All personal property is exempted from the general-property tax. In 1942 the total amount of taxes, State and local, collected was $1,341,232,831.17, of which 67 per cent, or $815,494,145, was derived from the real-property tax. The alcoholic-beverage tax, of $93,825,329.38, was second, followed by the business-corporation tax, of $84,513,136, and the personal-income tax, of $58,656,984. Next in order were the automobile-license, cigarette, and utility taxes.

ARKANSAS · Arkansas is an example of a State whose chief taxing resources are real estate, farm and urban, and timber and minerals. The local governments depend almost altogether upon the property tax; the central government, upon more than thirty separate business, property, and personal taxes.[78] From these, $49,466,995.37 was collected in the biennium 1939–1940. In the lead was a gasoline tax of 6½ cents per gallon, yielding $21,334,973.54; a general retail sales tax on tangible goods and

[76]The graph on page 792 is adapted from the study by Dr. Wylie Kilpatrick and staff for the Division of State and Local Government, Bureau of the Census. Special Study No. 20, *Financing Federal, State, and Local Governments, 1941*, p. 38. The total revenue of the State governments for the fiscal year 1944 was $5,387,000,000, of which $1,319,000,000 was derived from the unemployment payments of the social-security system.

[77]State of New York, *Annual Report of the State Tax Commission, 1942*, pp. 7–44; National Industrial Conference Board, *The Fiscal Problem in New York* (1928), chap. iii.

[78]State of Arkansas, *Biennial Report of the Department of Revenues, 1938–1940.*

amusement tickets at 2 per cent, yielding $10,501,931.11, and a liquor excise, yielding $2,307,472.50. There were taxes and other excises on cigarettes, bottled beverages, pool tables, and travel bureaus; inspection fees on feed and oil; personal-income and estate taxes; severance taxes on timber, bauxite, sand and gravel, and manganese; and automobile taxes.

NORTH DAKOTA · North Dakota is a State whose taxable resources are almost altogether agricultural. The lands are valuable primarily for grazing and wheat-raising. Small cities and villages exist only as adjuncts to the agricultural industries. As might be expected, the general-property tax, confined to real and tangible personal property, is the chief source of revenue.[79] In 1937 it returned a total of $21,098,529.09, one seventh of which went to the central State government. The gasoline tax of three cents a gallon amounted to $3,234,699.10, which was divided between the State and local governments in the ratio of 2 to 1. A general retail sales tax yielded $2,885,626.80, all of which was retained by the State. Other revenues included excises on tobacco, alcoholic liquors, and oleomargarine, taxes on the franchises of utility corporations and on bank stock, an incorporation tax based upon the amount of the stock issued, a school poll tax of one dollar, estate taxes, and personal and corporation income taxes. In 1937 there were 16,569 income-tax returns, averaging $10.46 each and totaling $173,450.23.

## *STATE TAX ADMINISTRATION*

In no State is there a department of finance with duties comparable to those of the United States Department of the Treasury in the collection of the taxes. State, county, township, and city share the duties of assessment, collection, and custody of public funds.[80] Even within each of these there may be multiple authorities. Illinois, for instance, in 1937 had a dozen or more central State agencies engaged in the assessment and collection of taxes. Among these was the State tax commission, which exists in nearly all the States.

STATE TAX COMMISSION · This body, typically of three members appointed by the governor with the advice and consent of the Senate, has three main functions.[81] The first is to equalize the tax assessments, as among the counties of the State and among different kinds of property, such as the aggregate of real estate, or of personal property, or of the property of utilities. Second is the task of assessing certain properties which, because of size, location in more than one county, or the technical

[79]State of North Dakota, *Fourteenth Biennial Report of the Tax Commissioner, 1936–1938.*

[80]H. M. Groves, op. cit. pp. 719–723; W. J. Shultz, op. cit. pp. 328–339; *Book of the States, 1943–1944,* Vol. V, pp. 474–475.

[81]H. L. Lutz, *The State Tax Commission* (1918).

difficulties involved, cannot well be assessed by local officials. Chief among these properties are railways, bus lines, those of telephone, telegraph, and radio companies, and great factories and mining properties. After the assessment is made, the amounts are certified to the various subdivisions in which the property lies. The third function is that which logically would be expected of a central State department, namely, the supervision of the assessment and collection of taxes by the local authorities. In no instance has this function been carried to the point of effectiveness. Fragmentary powers of this type possessed here and there by the various commissions are the making of inspections, the prescribing of forms, the requirement of reports, and in some cases the entire reassessment of local properties.

OTHER STATE AGENCIES · Any generalization as to State tax administration machinery, other than to point out its decentralized character, is likely to convey an erroneous impression. The automobile-license and drivers'-license tax may be collected by the secretary of state; the employment-agencies'-license tax, by the department of labor; the gasoline, liquor, and retail-sales tax, by the department of finance; the utility-securities tax, by the commerce commission; and the building-and-loan-company and trust-company taxes, by the state auditor. In Michigan the department of state collects not only the various highway taxes but also the malt and chain-store taxes. Occasionally the State treasurer collects one or more taxes, as, in Illinois, the athletics-admission and railroad-charter taxes.

COUNTY TAX AGENCIES · The character of the county as the State's alter ego is exemplified in the general responsibility given it in the field of taxation. The collection of newly invented taxes, such as excises, and those on business is usually thrown to existing county officers. In some States, notably Ohio, the county is the principal tax-assessing and tax-collecting agency for all units of government, State, city, township, and district, paying over to each at stated periods the amount due from its particular levy. The county usually has also a board of equalization for assessments made in the various townships or municipalities. Its treasurer is the general custodian of the funds of all constituent subdivisions.

TOWN, TOWNSHIP, AND CITY · In those States (except Ohio) which have townships, the township is the unit for the assessment of property under the property tax; in others the city or the county is the unit. Assessors generally are popularly elected and are often unskilled in the work for which they are chosen. New York State has as many as eleven thousand assessors chosen in the towns. The unevenness of assessment, running in some States from 30 per cent of true value to nearly 100, is striking evidence of the weakness of the system. Gradually the larger cities have improved the system of assessment by building up permanent staffs of technically qualified assessors.

## *THE TAXPAYER'S BURDEN IN PEACETIME*

Taxes are an item of expense which every prudent person and industry must reckon with and budget. Whether the tax level is so high as to bring about actual social injury is in part dependent upon the use to which government puts the proceeds. Government spending which contributes directly to raise the standard of living or to promote production, such as expenditures for business statistics, scientific research, health measures, light, water, and recreation facilities, is to a certain extent in lieu of what private individuals would have had to spend; but some expenditures are plainly deductions from the standard of living for all members of the community. The nation's 1941 tax bill of $18,641,662,000 was taken out of an estimated national income of $92,100,000,000, indicating that about one fifth of the people's income was taken by government for its purposes. The total expenditures of $27,187,321,000, however, were considerably higher because of the borrowings of governments at all levels. How heavily taxes bear on people of various grades of incomes is a matter about which there has been much interest but little exact information. In 1937 the Twentieth Century Fund published a study made of families in two States for the tax years 1935 and 1936.[82] Ten categories of families in New York and Illinois, respectively, were taken, with incomes of $500, $1,000, $2,000, $5,000, $20,000, $100,000, and $1,000,000. These were chosen from five occupational classes: farmers, merchants, wage-earners, salaried workers, and corporation officials. The burden of each Federal and State tax was estimated separately. The per capita tax average in New York was found to be $115.79, and that for the family $463.16; in Illinois, $84.46 and $337.84 respectively. It was computed that the New York farm family with a $500 income paid 12 per cent of it in taxes; the family with a $2000 income, 9.8 per cent if engaged in farming, but 17.2 per cent if in the wage-earning category. If the income was $1,000,000, 84.5 per cent of it was paid in taxes. Figures for the Illinois families ran somewhat less. The authors summarized thus:

> It seems safe to conclude, likewise, that no one escapes making a substantial contribution to our tax revenues, however well concealed his share in the burden may be. There are enough shiftable taxes on a wide enough variety of bases to insure this effect. It seems probable that the tax burdens of the higher income groups [persons with income of $100,000 or over] exceed half of their income unless they are evading taxes illegally.

[82] Twentieth-Century Fund (Carl Shoup and associates, editors), *Studies in Current Tax Problems* (1937), pp. 21 ff.

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## CHAPTER XXXIII

# *Government Finance: Expenditures and Debts*

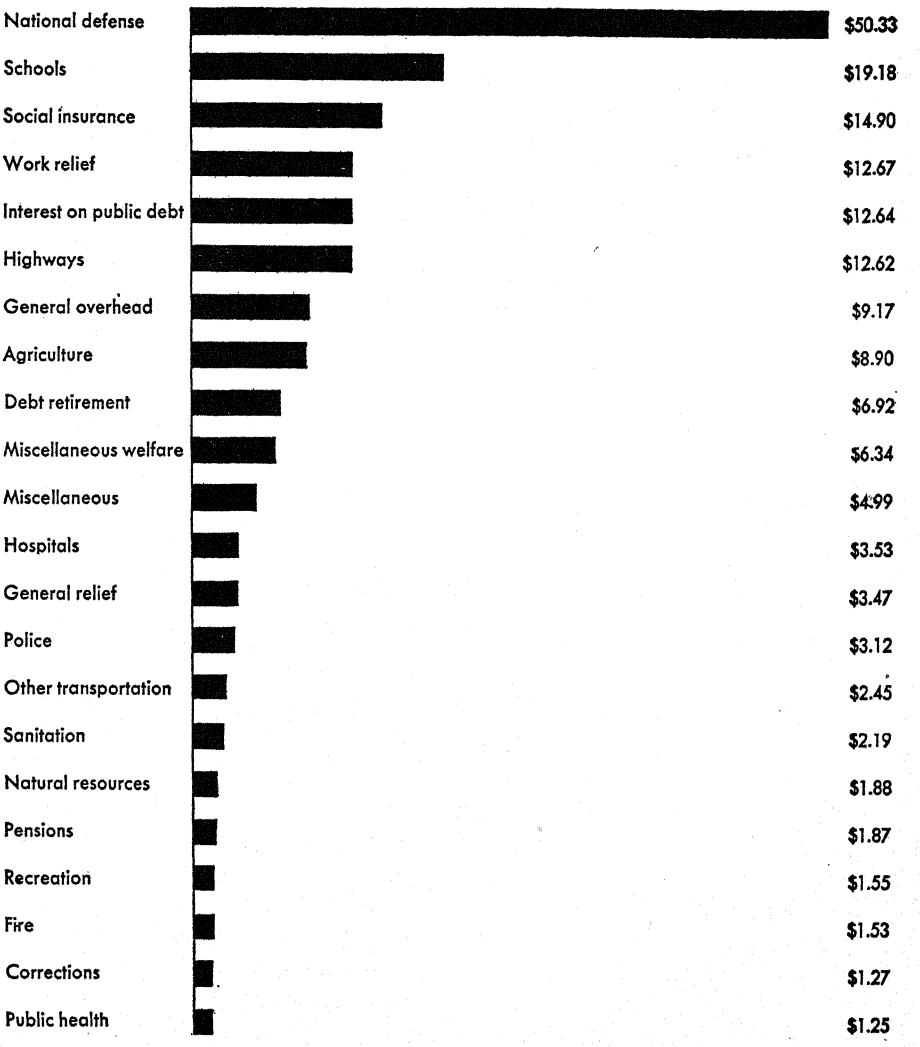
One of the arguments frequently used during the eighteenth and nineteenth centuries in advocacy of republican government was its supposed economy as compared with monarchy.[1] The lavish royal court and the frequent wars caused, it was thought, by dynastic ambitions placed burdens of expense on the taxpayers which would not be present in a republic. President Jefferson himself sought to impress on the government an atmosphere of "republican simplicity" in contrast to what he considered the pomp of his Federalist predecessors. Down to the opening of the new century American public opinion was sharply critical of ostentation in office, which was taken as evidence of useless spending at the taxpayers' expense.

EXPENDITURES IN A DEMOCRACY · It did not take long to discover that republics were not averse to engaging in war whenever it seemed to their interest. The per capita expenditures of government everywhere steadily increased as states broadened their democratic bases. When the scepter of power passed from the one or the few to the many, the potential demands for subsidies from the public treasury were many times multiplied. Accompanying the steps in democratization were new theories of community responsibility for the welfare of individuals. The basic functions of government, relating to defense, highways, police, and justice, still called for the usual high expenditures, while those of a social or economic character demanded other sums of great magnitude.

The chart opposite shows the combined Federal, State, and local per capita expenditures for the operations or functions of government in 1941, the last peacetime year. As was to be expected, that for national defense far surpassed any other, its nearest competitor being public education. Noteworthy were the two items for interest on the public debt and for debt retirement, which, combined, equaled the expenditures for education; the expenditures for work relief, which in a year of high employment stood fourth in the list; and the subsidy for agriculture, the eighth in magnitude.

[1]George Mason and James Madison, in the Philadelphia convention of 1787, had favored giving Congress the power to pass sumptuary laws so that the habits of the people might be regulated in the direction of economy and republican simplicity. Mason spoke against the "extravagances of our manners, the excessive consumption of superfluities"; and Madison asserted, "No Government can be maintained unless the manners of the people be consonant with it." M. Farrand, *Records of the Federal Convention*, Vol. I, pp. 344, 606.

## PER CAPITA EXPENDITURES BY GOVERNMENTAL FUNCTIONS, FEDERAL, STATE, AND LOCAL, FOR 1941




Adapted from the study by Dr. Wylie Kilpatrick and staff for the Division of State and Local Government, Bureau of the Census. Special Study No. 20, *Financing Federal, State, and Local Governments, 1941*, p. 69

DEMOCRATIC SAFEGUARDS · In the long-drawn-out contest between king and Parliament in England it became clear that whoever controlled the raising and the expenditure of public funds possessed the key to the supreme power in the government. An executive with a full treasury and free to spend it was, then as now, in a strong position. The funds might be used to maintain an army as the bulwark of his power or to keep popular support by winning doubtful elections by subtle and indirect means. With the accession of William of Orange in 1688 the rule was finally established beyond dispute that no taxes could be levied or funds expended without the consent of Parliament, and, as a further precaution, that all appropriations for the army should lapse at the end of a year. Our Constitution followed this cue in providing that "no money shall be drawn from the Treasury but in consequence of specific appropriations made by law," and, furthermore, that no appropriation for the army might be made for a longer period than two years.[2] Every State constitution has a safeguard similar to that of the Texas constitution: "No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law."

STEPS IN THE EXPENDITURE PROCESS ·-It is apparent that there are three major phases in the expenditure of public funds in a democracy. These are (1) the formulation of the policies which call for the expenditure in question; (2) the act of appropriation itself, which technically consists in separating the money from the public treasury and dedicating it to a specific use; and (3) the expenditure of the money by the designated agency. The first phase is a part of the whole process of policy-making, involving public opinion, elections, and legislation, which were considered at length in previous chapters. The remaining two are the subjects of the following sections.

VALUE OF THE BUDGET · In early English language the word *bouget* meant "bag" or "wallet." After Parliament took over the financial powers of the kingdom in 1688, the king's finance minister habitually appeared before that body carrying a large leather bag in which were the papers with the data on the expected expenditures and revenues for the coming year. This assemblage of documents was known as the "budget," and so the term came into general usage among modern states. The word is applied to a plan of expenditures for a definite period, such as a year or a biennium, and a statement of the sources of income available to finance it. The place of a budget in the scheme of financial management, whether for an individual, a family, a business concern, a corporation, or a unit of government, is almost self-evident. First of all, it provides a perspective of the purchases to be made, scattering the available funds among commodities and services so that the maximum satisfaction can be obtained for the money expended. It eliminates the starving time at the end of the fiscal year by making apportionments for each month. It is a force in

[2]*United States Constitution,* Art. II, sect. 9, clause 7, and sect. 8, clause 12.

maintaining solvency and good credit by keeping expenditures within income and providing for regular payments on incurred indebtedness. As applied to government it is an instrument of democracy. It requires a scheme for annual appropriations, by which the amounts for each service, year after year, can be compared. It is a means of correlating the executive and legislative departments, particularly valuable now when the executive everywhere is gaining greatly increased powers. The budget, with its necessary system of accounts and reports from the spending agencies, is the legislature's way of holding the swollen executive power to account.[3]

## *THE OLD SYSTEM OF FEDERAL EXPENDITURES*

Until the authorization of the national budgetary system in the act of 1921 there was no established procedure in Congress for considering at one time the whole problem of financing the government, nor any systematic attempt to balance expenditures and income.[4] At that time the United States stood alone in this respect among all states with constitutional governments. The beginning made under the wise counsel of the first Secretary of the Treasury, Alexander Hamilton, was auspicious. The law required that the Secretary of the Treasury should "prepare and report estimates of the public revenues and the public expenditures" to Congress annually. Eleven years later this was elaborated by the statute requiring him, at the beginning of each session of Congress, to make a report on finance giving estimates of the revenues and expenditures for the year and plans for improving and increasing the revenues. This was re-enacted on August 26, 1842, at which time the fiscal year was changed from the calendar year to the present one ending June 30. At the time these powers were given the Secretary of the Treasury, the conception of the President as the head of the entire Federal administrative system did not exist. Now it matters little whether a statute confers a power upon the President in name or upon one of the cabinet officers; for the responsibility in each case is the President's. Andrew Jackson established the President's full administrative supremacy over his cabinet officers, and in time Congress shifted the duty of preparing the annual estimates of spending needs from the Secretary of the Treasury to the several departments acting independently of one another.

How It Worked · The Secretary of the Treasury compiled the figures given him by the spending agencies, sending them on to Congress unrevised as a "book of estimates." These figures were accompanied by no budget message or set of recommendations or balance sheet. Each agency

[3]The literature on public budgets is voluminous. For accounts of the origin and nature of budgets cf. A. E. Buck, *The Budget in Governments Today* (1934), chap. i, and W. F. Willoughby, *The Problem of a National Budget* (1918), chap. i.

[4]W. F. Willoughby, *The National Budget System* (1927), chap. ii.

habitually asked for more than it needed or expected to get by perhaps 20 to 40 per cent, and Congress in the same spirit cut the appropriations in a hit-or-miss fashion. The estimates were sent to the appropriate committees of each house. In the lower house they were distributed among eight separate committees, which regularly reported out eleven annual appropriation bills. The committee on naval affairs, for instance, reported appropriations for the Navy Department; the committee on foreign affairs, appropriations for the Department of State, including the diplomatic and consular services; and so on. No one knew until the end of the session what the total of the year's expenditures would be. Matters were handled in a similar way in the Senate, where the items of appropriation might be greatly changed and become the subject of adjustment between the conference committees of the two houses. Each committee naturally considered itself the champion of the department allotted to it, and defended its recommendations on the floor of the house. No one was responsible for considering the expenditures of all the various agencies in perspective or reconciling total expenditures with total income, except as the President, the Secretary of the Treasury, the Speaker of the House, or the Ways and Means Committee might give the subject fitful attention.

ESTABLISHMENT OF THE FEDERAL BUDGETARY SYSTEM · A few minutes before Taft took the oath of office as President, a bill became law which foreshadowed better things. The Secretary of the Treasury, upon receiving all the estimates, was now to make an estimate of the probable revenues of the year; and if these were exceeded by the demands of the spending agencies, he should transmit all this information to the President. The purpose as stated was to give the President in his annual message an opportunity to "advise the Congress how in his judgment the estimated appropriations could with the least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, if such reduction be not in his judgment practicable without undue injury to the public service, that he may recommend to Congress such loans or new taxes as may be necessary to cover the deficiency."

Thus, after a hundred and twenty years of government under the Constitution, Congress had finally signified its approval of two elementary principles in public finance: (1) that one person, the President, should assume responsible leadership in the matter of national finance, and (2) that income and outgo should be balanced. The law, of course, was only suggestive so far as the President was concerned; but President Taft and his cabinet seem to have gone over the estimates carefully, acting somewhat in the capacity of a budget commission. This, however, was only a poor makeshift, since a full-time agency was needed. In 1911, at the President's insistence, a Commission on Economy and Efficiency was authorized, to which were appointed some men of distinguished ability. After a careful study of Federal finances reports were made to Congress recommending

the establishment of a national budgetary system. After years of discussion Congress finally passed such a bill in the last year of Woodrow Wilson's administration; but it was vetoed on the ground that placing the Comptroller-General beyond the removing power of the President was unconstitutional. The bill, with a few minor changes, was repassed the next year and received President Harding's approval on June 10, 1921, as the Budget and Accounting Act of 1921.[5]

## *THE NEW SYSTEM OF FEDERAL EXPENDITURES*

ADMINISTRATIVE ORGANIZATION · The new act gave proper recognition to the part which a chief executive should play in the fiscal affairs of a modern government.[6] The President is required to "transmit to Congress on the first day of each regular session, the Budget," and he is given the duty of making recommendations for new taxes and expenditures. To enable him to fulfill this duty, a Bureau of the Budget was established, located in the Treasury Department until made a staff agency of the President in 1939, with a director appointed by the President to serve at his pleasure. The actual work of preparing the budget is performed by this bureau subject to such "rules and regulations" as the President may prescribe. In performing this duty the bureau may "revise, reduce, or increase" the estimates which the spending agencies have sent in. Coupled with this bureau is a General Accounting Office, which is independent of the various executive offices and is placed under the direction of a Comptroller-General of the United States. This officer is appointed by the President for a term of fifteen years, is paid a salary of ten thousand dollars, and is removable from office for cause, upon notice and hearing, by joint resolution of Congress. His chief duties are auditing the accounts of all United States officers; adjusting all claims in behalf of or against the United States; making investigations of the receipt, disbursement, and application of public funds; and prescribing uniform accounting forms and procedure for the various departments and offices.

FEDERAL BUDGETARY PROCEDURE · Transferring several billions of dollars from the United States Treasury into the hands of several million recipients is a very large and, in some respects, a delicate operation. Congress and the President, representing the majority party, formulate the policies which determine the broad purposes for which the money is to be spent. The money must then be voted from the treasury in itemized amounts; disbursements must be made promptly and accurately; and all officers in the entire process must be held responsible by a thorough inspection of accounts. The whole spending process has five successive phases,

[5] 42 Stat. 20 (June 10, 1921).

[6] W. F. Willoughby, *The National Budget System* (1927), chaps. v and vi.

which may be designated as (1) estimates, (2) budget, (3) appropriations, (4) disbursement, and (5) audit. Each of these phases will be briefly described.

1. *Estimates.* The first phase is the preparation of the estimates of expenditures. Late in June or early in July of each year the Bureau of the Budget sends to each spending agency, such as the Department of the Interior or the Interstate Commerce Commission, blanks in which are to be placed the detailed and itemized estimates of the financial needs for the next year. The spending agency meanwhile has designated one of its staff to act as "budget officer" for the year, his particular care being to make a year-round study of its operating needs. All such estimates are in the hands of the Bureau of the Budget by September 15. In order that departments may not go over the President's head, the law provides that no estimate or request for an appropriation or for an increase in any item may be made to Congress or any of its committees unless at the request of either house; all such requests and information must go directly to the President and through him to Congress. Violations of this obligation brought admonitions from President Harding, who threatened the dismissal of the employees responsible.

2. *Budget.* The departments are requested first to prepare preliminary estimates not worked out in detail. When these are all in hand, they are totaled up, to see if they exceed the maximum expenditure set by the President for the year. Normally they are in excess of his determination. Each department is notified of the amount assigned it by the President and is requested to send in detailed requests to conform to his maximum; but a request may be accompanied with a supplemental statement showing the additional amount believed to be required. Hearings continuing until November are then held before the bureau, and upon the basis of these the final judgment is made. Amounts requested may be decreased, increased, or stricken out altogether. The estimates are then bound together by departments, independent establishments, and their bureaus and other subdivisions, all together making up the book of estimates. Revenue estimates come chiefly from the Treasury Department, except for the miscellaneous fees, charges, and sales which originate in the various departments.

The act of 1921 set up a list of minimum requirements for the President's budget.[7] First are the estimates of expenditures and of revenues for the three fiscal years: the one which has elapsed, the one current, and the one which lies entirely ahead. For instance, the budget for 1940 contained these estimates in three parallel columns: for the year ending June 30, 1938, the year ending June 30, 1939, and the year ending June 30, 1940, which was the year for which the new budget had been made. The appropriations which are permanent or continuing are to be distinguished

[7] W. F. Willoughby, *The National Budget System* (1927), chap. vii.

from those which are voted annually. Other required matters are balanced statements of the condition of the treasury at the end of each of the three fiscal years, and all the essential facts regarding the bonded and other indebtedness of the United States.

The arrangement of the eleven-hundred-page budget is so designed as to make it understandable to the layman who will devote a little time to its study, as well as to government officers, members of Congress, and students of finance. It is composed of three main parts, the first of which is the President's budget message, which reviews in general the expenditures and income of the current year and makes recommendations for the next year. This is accompanied by brief statements of income and expenditures, giving lump sums for departments, and by somewhat more detailed "supporting schedules." These together comprise about thirty-five pages of the document and are sufficient to give an intelligible view of the government's financial situation. The second part, covering about a hundred pages, is a still more detailed set of tables, accompanied with text which explains the more important changes in the proposed expenditures and revenues. Part three is the budget proper, consisting of detailed and itemized estimates and expenditures by departments, commissions, boards, and their constituent services and bureaus, which constitutes perhaps the world's greatest and most varied pay roll. In the very first section, entitled "The Executive Office," one sees two such sharply contrasting items as "For compensation of the President of the United States, $75,000" and, for personal services, "laborer, $1260."

3. *Appropriations.*[8] The President's budget and budget message are delivered to the House of Representatives upon the second day after the beginning of the regular session. The next problem is to translate them into concrete acts of appropriation according to the plan laid down. Obviously this would be impossible of achievement if several committees exercised the power to recommend bills carrying appropriations or if individual members could get the right of way for such bills of their own. In anticipation of the establishment of a budgetary system, the House in 1919 amended its rules to constitute a single committee on appropriations, and the Senate later followed suit. This House committee of thirty-five members resolves itself into ten subcommittees, of five members each, except those for the Treasury and Post Office Departments, which have ten members each. To each of the subcommittees is submitted that portion of the budget over which it has been given jurisdiction; for instance, the estimates for the War Department go to the subcommittee on the War Department. Hearings are arranged at which the head of the department, bureau chiefs, and other responsible administrative officers are asked to explain the various items, particularly those which call for increases over

[8] A. E. Buck, op. cit. chaps. iv and vii; W. F. Willoughby, *The National Budget System* (1927), chap. x; D. T. Selko, *The Federal Financial System* (1940), chaps. vii and x.

the preceding fiscal year. After all the testimony is in, the subcommittee makes its recommendations to the whole committee, which may alter them in any particular. These are now reported out in the form of an appropriation bill to the whole House, where it is considered in the Committee of the Whole on the State of the Union. The bill first is debated in general and then taken up item by item under the five-minute rule. The Committee of the Whole reports the bill to the House with such amendments as may have been made. When the bill goes over to the Senate, it is referred to the committee on appropriations, of eighteen members, where it is divided among ten subcommittees corresponding to those of the House committee. A wise arrangement is the rule which provides that when a subcommittee is considering its portion of the estimates, three members of the corresponding standing committee shall be called in to sit with it as members ex officio. The procedure thereafter parallels that in the House, except that the Senate rules forbid the reception of any motion by an individual member in the Committee of the Whole increasing an appropriation already in the bill or inserting a new item. Even amendments proposed by a standing committee which provide for increases must be referred to the committee on appropriations one day before they are considered in the House. Should the Senate adopt amendments to the bill as it comes from the House, the usual procedure of reference to a conference committee must be followed. After the bill has passed both houses, the President must approve or disapprove it as a whole, since he has no item veto.

The budgetary system has made necessary the drawing of a sharper line between the functions of the regular standing committees and those of the committee on appropriations. It is generally stated that the greater portion of the work of Congress is done in the various standing committees, which throughout the session are engaged in considering the needs of the various services assigned to them. How is this to be reconciled with the control of the estimates by the committee on appropriations? This may be done by pointing out the distinction between the bill authorizing certain services and the one granting an appropriation for it. For instance, the committee on naval affairs may report out a bill for the building of three new battleships, specifying their size and cost; but the expenditure has not formally been recommended until it has been placed in an appropriation act brought out by the committee on appropriations. That is to say, the standing committee passes upon the merits of a proposition, whereas the committee on appropriations passes upon its agreement with the financial plans of the year.

*Supplemental Estimates and Deficiency Appropriations.* An administrative agency is forbidden by law to expend in any fiscal year a sum greater than that appropriated to it or to make contracts for the future payment of money in excess of such appropriation. Often, however, the President is confronted with a fait accompli by an exhaustion of funds long before the

year is out. This always had been taken care of by so-called "deficiency appropriations," which incidentally served to throw the financial plans of the year into still greater confusion. The act of 1921 regularized such practice by authorizing the President to transmit to Congress from time to time such supplementary and deficiency estimates as in his judgment were necessary because of bills passed after the transmission of the budget or because otherwise required in the public interest.

4. *Disbursement.* Like all other acts of Congress, the appropriation act is sent to the Department of State for filing; but certified copies go also to the administrative agencies for which, respectively, the appropriations have been made, and to the Department of the Treasury.[9] Here the Commissioner of Accounts and Deposits maintains the appropriation accounts of all the departments. Each head is required by the Bureau of the Budget to submit a schedule showing how much of the appropriation he expects to spend each month, and a designated part is then set aside as a reserve fund. As a further check, each department is required to give the treasury at the end of each month a report on its apportionments, reserves, and unobligated balance. The actual expenditure of the money is made by disbursing officers of the Treasury Department, who draw checks on the Treasurer of the United States, or by departmental disbursing officers. Some of the latter, for purposes of convenience and speed, are located in the field and have funds advanced to their accounts. Payments are made by checks drawn on the Federal reserve banks, which act as Federal fiscal agents. The paid checks are routed back to the treasury, after which they take one more journey, namely, to the office of the Comptroller-General of the United States.

5. *Audit.* The auditing of the payments made out of the United States Treasury constitutes the fifth and last step in the Federal expenditures system. The cycle has been completed. The creditor has received his money from the government and must soon begin another cycle by paying part of it back for next year's taxes. The duty of auditing falls to the General Accounting Office, which is headed by the Comptroller-General.[10] This officer is the agent of Congress to see that funds appropriated are expended only for the purpose designated. His function therefore partakes somewhat of a judicial character. No account is closed until it has been audited and a settlement made in accordance with the law. Although most of the work of auditing is done after the money has been expended, department heads, to avoid risk, usually submit those bills about which there may be some question for a preaudit. Otherwise, the bills, vouchers, and canceled checks go to the Comptroller-General, who determines whether the payments have been made for the purposes specified by Congress. If this is found to have been the case, he settles the disbursing officer's

[9]D. T. Selko, op. cit. chap. xxi.

[10]H. C. Mansfield, *The Comptroller General* (1939), pp. 178–192.

accounts by giving them his approval and crediting him with an amount found by deducting the total disbursements from his original credit. Some spending agencies, notably the TVA, have clashed with the Comptroller-General, contending that his preaudit, by occasioning delays, has been productive of inefficiency. The weight of expert opinion seems to favor confining the function to a postaudit, which was the proposal made by the President's Commission on Administrative Management.

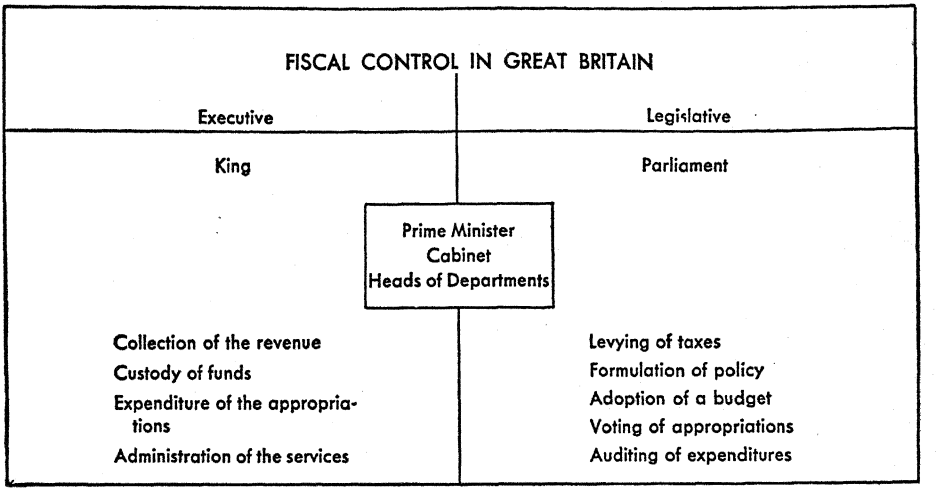
## *HOW THE FEDERAL BUDGETARY SYSTEM HAS WORKED*

EARLY SUCCESS · For about ten years the new budgetary system gave many evidences of soundness. Presidents Harding, Coolidge, and Hoover gave it substantial support, and Congress in general obeyed its spirit.[11] Not only were expenditures and receipts balanced but in one decade the principal of the national debt was reduced from about twenty-four billion dollars to seventeen billions. These, however, were years of great industrial expansion and general prosperity. The depression came in the first year of the Hoover administration; but receipts of taxes from past profits kept the budget in balance during his first two years. In his third and fourth years the deficits were nearly three billion dollars annually. Political leaders, expecting the depression to be short, argued that to raise tax rates at the moment of the crash to balance the budget would delay recovery for a year or two; and so the unbalanced budget was chosen as the lesser of two evils. President Roosevelt's policy of spending as a means of recovery, later continued as a war necessity, resulted in a perpetual state of budgetary unbalance. Perhaps no budgetary procedure could have given a balance of income and outgo during those years, but an examination of the relation of the basic features of the present scheme to the executive and the legislative departments will reveal some inherent weaknesses.

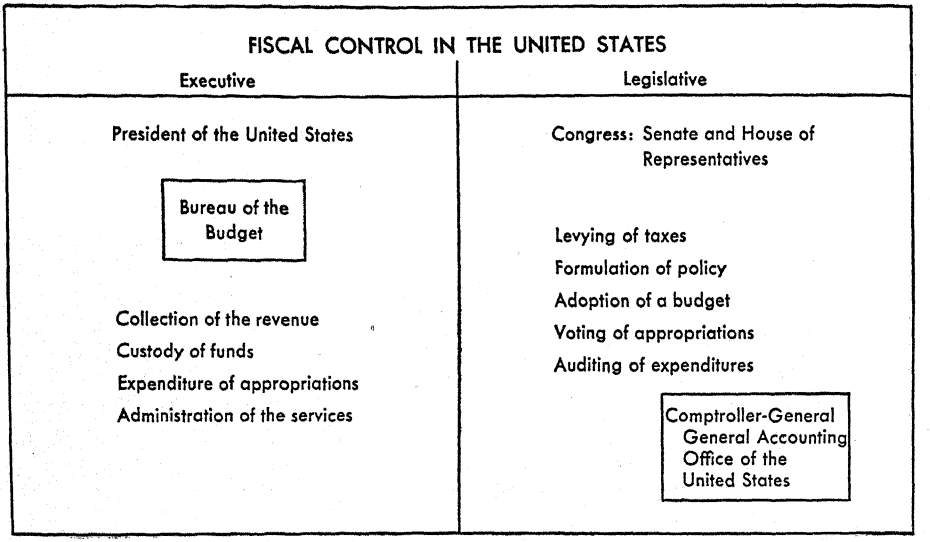
THE BUDGET IN A PARLIAMENTARY GOVERNMENT · The idea of the control of taxation and public expenditures by the people's representatives grew out of the experience with parliamentary government in England.[12] In attempting to discover the sources of the weaknesses in the American budget it is worth while to observe what there is in the parliamentary form which is favorable to an effective control of finances. The diagram at the top of page 809 shows the distribution of the fiscal powers in the English government. It may be summarized thus: (1) The prime minister and his colleagues are in effect a governing committee of men who belong to both the executive and the legislative branch of the government. As the chosen leaders of the majority in Parliament they control its proceedings

[11]For an interesting account of the beginning of the new budgetary system cf. C. G. Dawes, *The First Year of the Budget of the United States* (1923). For an appraisal of the system cf. A. E. Buck, op. cit. chap. x.

[12]Ibid. pp. 46–54 et passim.




and its legislative program; no bill can be passed without their consent. As executives they are individually heads of the various administrative departments, and the prime minister, to all intents and purposes, is the country's chief executive. (2) It follows that they are responsible for the discharge of the fiscal functions of both the executive and legislative departments, as listed above. There can never be a conflict between the two. (3) They retain the functions of leadership only so long as they can command the support of a majority in the House of Commons. An adverse vote upon one of the government bills immediately terminates their offices unless, upon a prorogation of Parliament and a new election, a majority is returned in their favor. (4) More to the point is their complete control of the budget as a whole. There is extensive debate, and the rules permit the submission of amendments decreasing but not increasing items. The party member from Liverpool who is piqued because no funds are forthcoming for a pet project in his home district must consider, before he votes against the budget, whether he is prepared at the same time to vote to end the life of the existing government. In the course of the debate the cabinet may voluntarily change certain items, but in general the budget must be accepted or rejected as a whole. It cannot be changed piecemeal. Attempts to pad the appropriations or indulge in logrolling are stopped by a standing rule of the House which declares out of order any motion or bill which would involve a charge or burden upon the public revenue "unless recommended by the crown," which means by a member of the cabinet. Out of the twelve hundred or more members of the two houses only a dozen, more or less, may introduce a bill for the spending of money. (5) The last salient point is that the British Parliament is, in effect, unicameral, since the House of Commons, by rule and custom, has complete control of fiscal matters.




THE BUDGET AND THE SEPARATION-OF-POWERS PRINCIPLE · The respective fiscal functions of the two departments under the American scheme of government and how these relate to the scheme of budgetary control are shown in the diagram above. This reveals several things of pertinence: (1) The policy-making function is divided between two theoretically independent departments of co-ordinate rank, the President and Congress. (2) By statute the task of writing the budget, the plan of expenditures, is placed in the hands of the President with the aid of the Bureau of the Budget; but the constitutional duties of levying taxes and of making appropriations are with the two houses of Congress. (3) There is no single person or body responsible to the people for the proper making and execution of a budget. Should the President step forward to assume such responsibility, Congress would have power to flout his proposals for revenue and expenditure. If, on the other hand, Congress should resign its fiscal powers to his leadership, as Parliament resigns its fiscal powers to the English prime minister, there is no means by which he might be held responsible for the proper discharge of this function. He might, for instance, ask for appropriations in the budget, or, more likely, in supplemental estimates, which would involve great deficits, telling the Congress that it was up to them to find the revenues. (4) Still more objectionable to the cause of sound practice, the budget may be attacked in detail in Congress, in such ways as greatly to increase items and upset the whole fiscal plan of the year. Members of the President's party, even responsible party leaders, know that in voting to overturn his budget they are not voting to end either his term of office or their own. (5) Finally, ours is a truly bicameral legislature, each house possessing power to vote changes in the budget requests. This makes it unlikely that a single leadership can arise in Congress competent to act with

the President in carrying through his budget. The conclusion to be drawn from this analysis is that the division of the fiscal power among three partially independent agencies, the President, the Senate, and the House of Representatives, makes the establishment of an efficient, sound, and at the same time responsible system of national fiscal administration very difficult. However, that considerable improvement cannot still be made without the aid of a constitutional amendment, one would not yet be justified in asserting.

SUGGESTED CHANGES · The President's Committee on Administrative Management, appointed in 1935, after a careful study of the entire Federal fiscal system, made several recommendations, some merely to strengthen parts of the existing budgetary machinery, others embodying basic changes.[13] The position of the Bureau of the Budget as an agency of assistance to the President was emphasized. The bureau should be given the power and the means to study questions of fiscal policy, carry on investigations of the administrative organization of the government, aid the departments in setting up their internal organization, and more effectively supervise the execution of the budget. To accomplish this, a larger staff should be provided, the Director of the Budget should be released from routine duties and made a sort of financial adviser to the President, and the Assistant Director should be given greater powers of direction and placed on the permanent civil service.

It was recommended also that the duties of the office of Comptroller-General be divided. The old title would disappear and the auditing of accounts be given to a new Auditor-General and his General Auditing Office. The functions of control would go chiefly to the Treasury Department. These include the accounting by which the appropriation accounts of the various spending agencies are checked day by day for the amounts paid out and remaining available, the settlement of claims for and against the United States government, and the duty to prescribe uniform accounting methods for all the services. The quasi-judicial function of ruling on the legality of an expenditure would be performed in the first instance by the Secretary of the Treasury, subject to an appeal by the department affected to the Attorney-General. When the general administrative reorganization act was passed in 1939, that part of the original proposal calling for changes in the fiscal system was not included. Congress was not willing to transfer, from an independent officer serving for a fifteen-year term to two officers serving at the pleasure of the President, the duty of controlling the expenditure and passing on the legality of the funds which it had appropriated.

[13]President's Committee on Administrative Management, *Administrative Management in the United States* (1937), chap. iii.

## *THE SYSTEM OF STATE EXPENDITURES*

State spending increased at a greater pace in the four decades from 1890 to 1931 than did that of the Federal government, except for the period of the First World War. The two items chiefly responsible for the accelerated rate were highways and education. The increase in dollars is shown by the State totals in selected years: 1890, 77 million; 1903, 182 million; 1913, 383 million; 1923, 1242 million; 1925, 1532 million; 1926, 1539 million; 1927, 1656 million; 1928, 1826 million; and 1929, 1990 million. In 1941, with the new item of social security added, the expenditures had reached $5,655,318,000. Some of the principal expenditures by functions were these: over one billion dollars each for highways, education, and social security; $891,856 for welfare; $140,110,000 for protection, including military, fire, and police services; $261,734,000 for hospitals; and $113,999,000 for agriculture, forests, and reclamation. The sum of $189,704,000 was used for the expenses of the central governments, and $125,359,000 for "dead horses," or interest on the public debt and debt retirement.[14]

THE OLD SYSTEM OF STATE EXPENDITURES · State systems of expenditures in most cases were even less orderly, until recent reforms, than the Federal system before 1921.[15] There was no officer empowered to cut down and revise estimates. Some officer, usually the State treasurer or auditor, merely compiled the estimates and sent them on to the legislature. Weak party control within that body only served to make more flagrant the abuses of logrolling for local expenditures and the introduction of bills for expenditures by members upon their own responsibility. Heads of State departments and institutions appeared before the various standing committees, presenting their estimates in person and exerting all possible political influence in their behalf. Not only did the appropriations originate in many committees but the revenue bills were prepared in others with little reference to what might be appropriated. The result was too often an allocation of State funds which failed to give due weight to the needs of the respective services. The chief saving element in the situation for many years lay in the relatively small range of the services undertaken by the central State governments. Later the need for much greater outlays for highways, higher education, and relief brought pressure for an improved system of expenditures.

MOVEMENT FOR STATE BUDGETARY REFORM · Wisconsin pioneered in 1911 with a statute establishing a Board of Public Affairs whose duty it was to formulate according to a uniform plan the estimates of expenditures for the next biennium.[16] Two years later the board's powers were enlarged

[14]Bureau of the Census, *Financing Federal, State, and Local Governments, 1941*, p. 48.

[15]F. A. Cleveland and A. E. Buck, *The Budget and Responsible Government* (1920), chap. iv; W. F. Willoughby, *The Movement for Budgetary Reform in the States* (1918), pp. 8–15.

[16]Ibid. chap. i; A. E. Buck, *Public Budgeting* (1929), pp. 10–24.

to include the prescribing of methods for the efficient conduct of State business. The board was composed of the governor as chairman, the secretary of state, the chairmen of the finance committees of the two houses, the president pro tempore of the senate, the Speaker of the assembly, and two other members. About a dozen States later adopted similar plans. The State of Arkansas has the "legislative budget" system, under which the budget is made up and presented by a joint legislative committee. The remaining States have executive budgets similar in plan to that of the Federal government, but with wide divergences among them in effectiveness.

STATE EXECUTIVE BUDGETS · In most of the States with executive budgets there is a procedure similar to that of the Federal government.[17] A director of the budget gathers the estimates and may or may not have authority to revise them. These are organized into the biennial budget, which the governor presents to the legislature at its opening, along with a budget message. Parallel columns show the expenditures of the past biennium and the estimates for the new one. Only in a few of the States is there a summarized balanced statement of estimates and receipts after the Federal form. In a few the budget is considered by a joint committee of the two houses. New York does not permit the legislature to increase the governor's budget, but permits it to add separate items, which are subject individually to the governor's veto. The general right of individual members to introduce bills for the spending of money, coupled with the lack of party discipline in the State legislature, makes the enforcement of the budget difficult. Sometimes the governor's budget is brushed aside, and legislative committee hearings on the estimates are held just as though no budget had ever been presented. Constitutional amendments restricting the freedom of the legislature in dealing with appropriation bills have been adopted in a few States, including California, Maryland, Massachusetts, and New York.

THE MARYLAND BUDGET SYSTEM · Maryland in 1916 adopted a constitutional amendment which gave that State a basis for an effective budgetary system still unexcelled by that of any other State.[18] The governor presents to each house a budget and a budget bill, which is immediately introduced. Before final action is taken, the governor may amend or supplement it, to correct oversights or provide for emergency needs. With certain exceptions the legislature may not amend the bill except to decrease items. There are safeguarding provisions to prevent the sabotaging of the program of expenditures by the use of deficiency-appropriation bills. No other appropriations may be considered until the budget bill is disposed of by the two houses. Thereafter each supplemental appropriation

[17] *Book of the States, 1943–1944*, p. 144; J. W. Sundelson, *Budgetary Methods in National and State Governments* (1938), *Special Report to the State Tax Commission of New York*, No. 14, chap. xxiv.

[18] A. E. Buck, *The Budget in Governments Today*, pp. 90–91, 103–104, 213–214; J. W. Sundelson, op. cit. pp. 418, 419.

must be embodied in a separate bill limited to a single purpose or piece of work or service. Each must provide new revenue to balance the extra expense so incurred, requires a majority vote of all members elected, and is subject to the veto of the governor. If the legislature has not finally acted upon the budget bill three days before the expiration of its term, the governor is empowered to issue a proclamation extending the term. The scheme has been productive of much friction between the governor and legislature, sometimes resulting in the former's modification of his original estimates.

## *PUBLIC DEBTS OF THE UNITED STATES*

Kings and princes in late medieval and early modern times often were forced to go to the money-lenders before they could undertake a costly new venture such as a foreign war. The student may wonder, since the monarch of that day was absolute, why he did not, without formalities, take over such private funds by force under the guise of a "gift," an "impost," or a "sequestration." The answer is that movable wealth then was scarce and the currency confined to gold and silver coins, often privately minted, which fled to cover at the first signs of trouble. A government, in order to borrow advantageously or at all, must possess the strength to tax its people to the degree needed and make good the collection. The condition of Washington's army at Valley Forge was due not to the poverty of the country but to the weakness of the government, particularly its taxing powers. The government of the Civil War period was much stronger, but in order to raise needed funds was forced to the expedients of chartering a new series of banks as lending agencies and of issuing nearly half a billion dollars in irredeemable paper money. There was no other period of serious financial strain until the First World War, when the Federal control of banks and currency and adequate taxation made borrowing no great problem. The greatly increased control over these agencies, as well as over the economic life of the nation as a whole, placed the government in a still more advantageous position for the borrowing of funds for its needs in the Second World War.

BEGINNING AND DEVELOPMENT OF AMERICAN PUBLIC DEBT[19] · During the course of the Revolution the Continental Congress borrowed money at home and abroad, and the States incurred internal debts. The national borrowings were $13,000,000 abroad and $42,000,000 at home. Under Alexander Hamilton's leadership, State debts to the amount of $21,000,000 were assumed, merged with the Federal debt, and funded. By 1796 the United States possessed the respectable debt of close to $83,800,000. Thereafter for nearly a century and a half the debt had its ups and downs.

[19] P. Studenski, *Public Borrowing* (1930), chap. i; Twentieth-Century Fund, *The National Debt and Government Credit*, pp. 59–62.

Swollen by the Louisiana Purchase, it was nevertheless down to $45,200,000 in 1812. The multiplying population and wealth of the country were responsible for the sharp downward trend until President Andrew Jackson, in 1835, could triumphantly announce that "all the remains of the public debt have been redeemed."[20] Never since has that happy situation recurred, although it is probably true that at any time between 1890 and 1917 the Federal debt could have been wiped out speedily if the people and their leaders had so desired. As to the States, many of them in the two decades preceding the Civil War incurred large debts which in some cases were in part repudiated. Then, after nearly half a century of relatively light spending, they and their local governments entered upon building programs for school, health, recreation, highway, and other facilities, which continued to the Second World War. Their indebtedness maintained a steadily increasing pace even in those periods when the Federal debt was decreasing.

REASONS FOR PUBLIC BORROWING · Governments resort to borrowing when the amount needed is so great that, if it were raised by taxation, business and production would be seriously disrupted, or when time is the most important consideration.[21] Borrowing is a method of smoothing out the bumps in the curve of expenditures so that in times of great financial stress the tax levy need not shoot up too high, and in times of prosperity the surplus from taxes may be used to lessen the public debt. Borrowing is employed in the United States chiefly for the following purposes and occasions: (1) For the construction of public buildings and other public works whose usefulness extends over a long period of years, thus making it logical that the cost should be spread over the generation which uses them. A notable exception to this rule was the financing of the Nebraska State capitol from the taxes of the same five years which were employed in its construction. (2) For structures or enterprises of a commercial character, which may be partly or entirely self-liquidating over a number of years. Borrowing for such purposes is chiefly in the nature of an investment. Gas, electric-light, and power plants, warehouses, docks, airports, and transportation lines fall in this class. The Panama Canal, Boulder Dam, Grand Coulee Dam, and the Tennessee Valley projects are conspicuous examples. Even the forests and wild-life preserves are of this general character. (3) For occasions of unusual stress, such as war, flood, fire, and pestilence or extraordinary economic dislocation, when the expense is overwhelming and production is greatly diminished or diverted to abnormal ends. On the negative side sound fiscal practice does not countenance, nor justice to succeeding generations permit, borrowing for the payment of current expenses or for improvements which are designed to last for a shorter time than the term of the bonds.

[20]J. D. Richardson, *Messages and Papers of the Presidents*, Vol. III, p. 160.
[21]H. L. Lutz, *Public Finance* (1924), pp. 513–525.

METHODS OF BORROWING[22] · The ordinary method by which the government borrows money is the sale of bonds. A bond is the paper evidence of money borrowed, a written promise to pay a stated sum of money at a specified date and rate of interest. Federal bonds have never been issued for a shorter maturity period than eight years or longer than fifty, but an earlier date at which they may be called for redemption is usually provided. Loans are classified, according to the length of their maturity period, as short-term, intermediate, and long-term obligations. The short-term notes are usually for the purpose of securing working funds for the period just preceding the collection of taxes and are called tax-anticipation loans. These are not true bonds but short-term notes or certificates of indebtedness, which are retired as soon as the tax receipts come in. Sometimes short-term borrowings are made for emergency purposes and later converted into long-term bonds. Bonds with maturity periods of from one to five years come in the classification of intermediate loans. These may be used in emergencies or as a stopgap before the beginning of a general refunding program. The long-term bonds represent the major part of the funded debt. With a long-deferred maturity date and a much shorter "call" date, the government may choose the most favorable time for paying or refunding its debt.

DEBT PAYMENT · In general the bonds of a government are only as good as its willingness and ability to pay. Suits to recover debts may not be filed against the government without its own consent; and even though such consent is given, the attitude of government toward its debts and not the available legal remedies are what determine its credit. "Credit bond" is the name given those bonds for whose redemption no provisions have been made in the act authorizing their issue. Their soundness rests upon the credit of the government. Federal bonds have always been of this character. "Sinking-fund bonds" are those for which funds are set aside annually, to accumulate until the day of their maturity, when they will be redeemed and the debt wiped off. This is a sound method of maintaining credit; but the care of the sinking fund is frequently a problem, since it may be raided to meet emergency treasury needs or may be invested badly, with consequent losses. Serial bonds are those whose dates of retirement are so spaced by years that at the end of a stated period all will have been retired, as when an issue of twenty million dollars is set to run for a maximum of twenty years, with about one million dollars' worth coming due each year. Usually the repayment of principal begins at a proportionately lower amount and increases as the annual interest payment decreases, thus making the annual payments fairly even throughout the term of years.

DEFALCATIONS IN DEBT PAYMENTS · The Federal Treasury has the record of never having failed to pay any portion of the principal and the interest of its debt when due. No other level of our governmental system

[22] W. J. Shultz, *American Public Finance* (1931), p. 605.

holds such a record.[23] In the period following the depression of 1837 Mississippi and Florida repudiated outright portions of their debts, and seven other States fell in arrears in their interest payments. At the end of the reconstruction period eight Southern States repudiated debts, totaling $150,000,000, which had been incurred wantonly by carpetbag governments. Three States fell behind in their interest payments in the period following the depression of 1929, but shortly retrieved their position. The record of municipalities and other local governments is not nearly so good. Every period of depression has forced many to delay the payment of principal or interest or openly to repudiate their bonds. For this reason the legal requirements for the issuance of such bonds have become increasingly stringent. Bondholders are given the right to enforce their claims in court, even to the extreme of forcing the levy of taxes and the taking of funds needed for the maintenance of the ordinary functions of government. In some New England States even the real property of the taxpayers can be levied upon.

THE FEDERAL MUNICIPAL BANKRUPTCY ACT · The large number of local-government defalcations during the depression of 1929 led several States to establish receivership machinery for such communities. Some States attempted to aid local-government solvency by granting subsidies to the localities for specific purposes, such as schools, highways, or relief. The most ambitious attempt to aid the defaulting governments, however, was the Municipal Bankruptcy Act of May 24, 1934.[24] The Federal bankruptcy power was then extended to any subdivision of the State possessing taxing powers, such as cities, villages, counties, and school districts. The unit desiring the benefit of the law must first file a petition in a Federal court, setting forth its insolvency and inability to pay its debts and asking for a plan for their readjustment. The courts were authorized to confirm any such plan agreed to by the persons owning from two thirds to three fourths of the full amount of the debt, if found to be "fair, equitable, and for the best interests of the creditors" and if it otherwise met the conditions of the law. In form the law was an amendment to the Bankruptcy Act of 1898, passed under the constitutional authorization "to establish . . . uniform laws on the subject of bankruptcies throughout the United States," which had always been interpreted to apply only to private individuals and corporations. A Texas water-improvement district's attempt to take advantage of the act brought it before the United States Supreme Court. Here it was pointed out that the district was a mere agency or instrumentality of the State, and that its fiscal affairs were not subject to control or interference by the national government. With or without the consent of the parent State the bankruptcy clause could not be used by Congress "to impose its will and impair State powers."[25]

[23] B. U. Ratchford, *American State Debts* (1941), pp. 183–192.
[24] 48 Stat. 798, as amended April 10 and 11, 1936; 49 Stat. 1198 and 1203.
[25] *Ashton* v. *Cameron County Water Improvement Dist. No. 1*, 298 U. S. 513 (1936).

CONSTITUTIONAL AND LEGAL BASES FOR FEDERAL BORROWING · Among the enumerated powers of Congress is the one "to borrow money on the credit of the United States." Under a previous heading the question of limitations upon the taxing and spending powers of the Federal government was examined and the conclusion reached that in the light of Supreme Court decisions none exists in law.[26] It is clear that whatever rule applies in this respect to taxing and spending applies to borrowing also. The only limit is that which good sense and expediency may dictate to Congress. Nor does the national constitution impose any direct limitation upon the borrowing of the States and their political subdivisions. These are to be sought in their own constitutions and laws.

THE STATES · Disastrous ventures in expenditures for internal improvements and other doubtful enterprises before the Civil War led generally to the establishment of debt and credit limitations in State constitutions.[27] About one fourth of the States specify the purposes for which debt may be incurred. A few require a popular referendum for the issuance of bonds. More commonly a maximum State debt is set, fixed as a sum of money or a percentage of the assessed valuation of all property within the State. The Texas provision is typical for this group of States:

> No debt shall be created by or on behalf of the State except to supply casual deficiencies of revenue, repel invasion, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed in the aggregate at any one time two hundred thousand dollars.[28]

A succeeding section forbids the pledging of the State's credit in aid of "any person, association or corporation, whether municipal or other." The Pennsylvania constitution provides that all laws authorizing the borrowing of money shall specify the purpose for which the money is to be used and that it shall be used for no other purpose. A section forbidding debt above one million dollars was later changed by constitutional amendment to permit the issuance of bonds for the building of highways up to one hundred million dollars.[29] Kansas permits no debt to be contracted unless the question shall have been first submitted to a direct vote of the electors of the State.[30] A majority vote of all members elected to both houses, respectively, is then required for the passage of such a law, which must be accompanied by another imposing a tax sufficient to pay the annual interest and principal of the debt when due and appropriating the proceeds of the tax for that purpose.

[26]Chap. XVII.

[27]B. U. Ratchford, *American State Debts* (1941), covers in detail the matter of State debts, past and present.

[28]*Constitution of the State of Texas*, Art. III, sect. 49.

[29]*Constitution of the Commonwealth of Pennsylvania*, Art. IX, sect. 4.

[30]*Constitution of the State of Kansas*, Art. II, sect. 7. For constitutional limitations in other States cf. B. U. Ratchford, op. cit. chap. xvii.

THE LOCALITIES · Local governments have only such borrowing powers as are delegated to them by the State constitution or laws. For several reasons these powers are severely circumscribed. The limitations usually are similar to those of the States, setting a ratio which the total indebtedness may bear to the assessed valuation of property in the locality or an arbitrary sum.[31] Some local subdivisions of small powers are entirely without the power to borrow. Kentucky limits the amount to 10 per cent of the assessed valuation for the larger municipalities, 5 per cent for the middle-sized, 3 per cent for the villages, and 2 per cent for counties and special districts. The methods and procedure used in borrowing are usually specified in considerable detail, including such matters as the rate, the form of the debt issues, the term, retirement and refunding, and sinking funds. Generally the State constitutions forbid the States to assume the debts of any city, county, or other political subdivision. In February, 1933, more than eleven hundred local governments were in default on debt payments, three States having over one hundred such cases each. Obviously a greater amount of central State control over local borrowing and debt administration is needed. Half a dozen States by 1941 had provided substantial degrees of such supervision, with North Carolina and Indiana carrying supervision the furthest.[32] In the former the approval of a local-government commission is required before the bonds may be issued or the question presented at an election, but a favorable popular vote will overrule the decision of the commission. Under the Indiana plan, upon the petition of ten or more taxpayers the state tax board acquires complete power to decide whether any bond issue in excess of five thousand dollars shall be issued. All the States have some sort of supervision of local finances, which may include one or more of the features of auditing, uniform reports and accounts, budgetary supervision, provision for administration of bankrupts, and mere advice and co-operation.

## *AMOUNT OF THE PUBLIC DEBT*

THE FEDERAL DEBT · As was stated above, the Federal debt was incurred in periods of crisis and underwent a decrease in periods of calm.[33] The periods of extraordinary expenditure and accumulation of debt, in chronological order, were those of the Mexican War, the Civil War, the Spanish-American War, the building of the Panama Canal, the First World War, and the depression of the decade following 1929, which

[31]P. Studenski, op. cit. chap. iv.

[32]W. Kilpatrick, *State Supervision of Local Finance* (Public Administration Service, No. 79, 1941), pp. 36–40, 46–52.

[33]An account of the Federal debt from 1936 to 1937 is given in Twentieth-Century Fund, op. cit. pp. 55–65. For the period since, see the annual reports of the Secretary of the Treasury; Bureau of the Census, *Governmental Debt in the United States: 1944*; and Bureau of Foreign and Domestic Commerce, *Current Business* (monthly), 1944.

merged with the period of re-armament and the Second World War. Because of the size of the increase in 1917 and after 1940 the accompanying

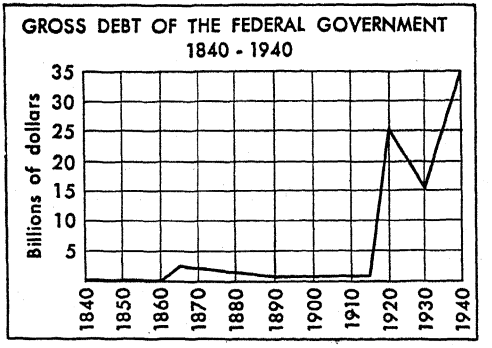
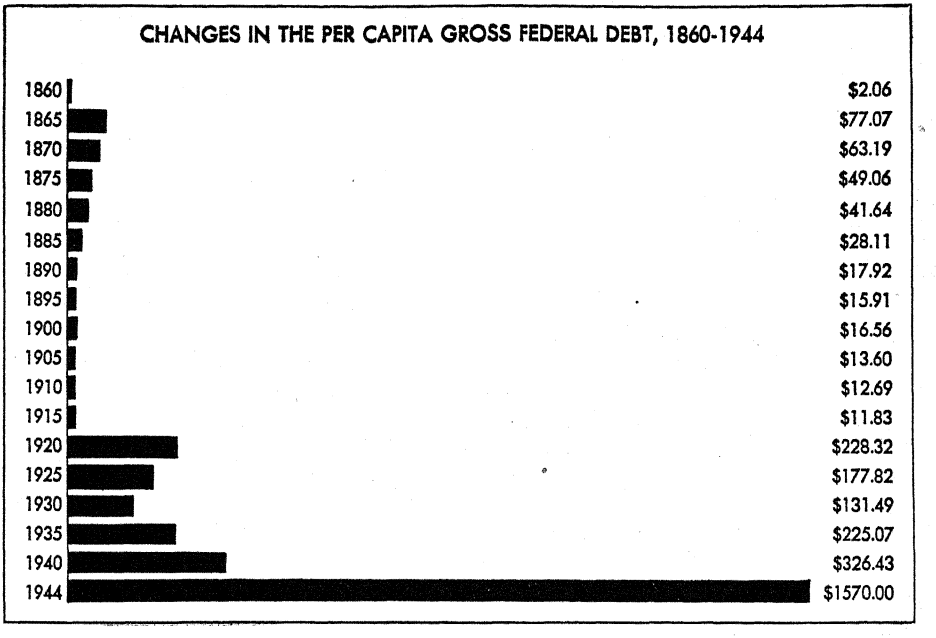



diagram shows these fluctuations imperfectly. The depression of 1837 and the Mexican War made the first marks on the clean slate left by Andrew Jackson. At the outbreak of the Civil War the debt had risen to $64,844,000 (1860), and it was increased by the four years of that struggle to $2,756,000,000. By 1893 it had fallen to $961,432,000, and all available outstanding bonds had been called in and redeemed. Never since then has the debt been at so low a point. The depression of the early and middle 1890's brought about increases because of the falling off in revenues. In 1900 the debt was $1,263,417,000, and it varied little from that point until 1916. Our entrance into the First World War, in 1917, brought about a greater proportionate increase than had occurred in any other three-year period. In 1919 it had reached the high point of $25,482,034,000, the size of which was caused by our own war expenditures, the loans made our allies, and the inflated prices of the time. From 1920 there were eleven consecutive years in each of which large reductions in the debt were made, amounting to well over one billion dollars in each of four years. Since 1931 each year has witnessed a large increase in the debt. The gross amount stood in 1937 at thirty-five billion dollars, against which should be set off an estimate of $3,862,083,428 of Federal assets invested in various banks and commercial enterprises. The gross debt as of June 30, 1940, was $43,127,083,386.85; of June 30, 1943, $136,606,000,000; of June 30, 1944, $201,003,000,000; and of December 31, 1944, $231,400,025,751. In his budget message of January 3, 1945, President Roosevelt estimated that by June 30, 1945, the Federal debt would have risen to $252,000,000,000, and by June 30, 1946, to $292,000,000,000.[34]

BURDEN OF THE FEDERAL DEBT · Taxes operate to reduce the standard of living and diminish the possible savings of the taxpayers. The amounts needed for interest and principal payments on the public debt are important

[34]*Congressional Record*, 78th Cong., 1st Sess., January 9, 1945, pp. 133–139; *New York Times*, January 7, 1945, Sect. C, p. 27.



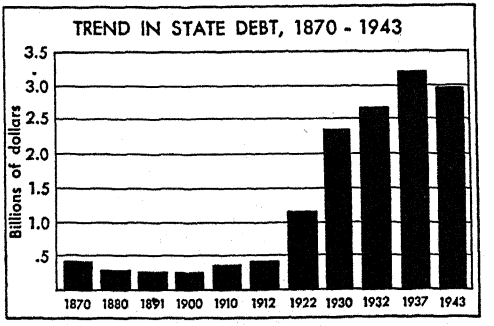

parts of the individual's annual tax burden. Were these large enough in 1940, the last peacetime year, to be a serious drag on our peacetime economy? In that year the interest charge on the Federal debt was $1,041,448,261.64. This makes an interesting comparison with the situation in 1913, the last year before the First World War, when the total outlay of the Federal government for running expenses, interest on the public debt, and its refunding, was only $692,000,000. The first "billion dollar" Congress came in 1915. Curiously enough, the interest burden of the 1940 debt was only slightly higher than that of the early 1920's, because of the difference in the average rates, which were 4 per cent and 2.583 per cent respectively. However, for the fiscal year 1945 the interest charges had risen to 7.2 billion dollars, or 50 per cent more than the entire annual cost of government in the decade of the 1920's.

Another gauge of the burden of the Federal debt is its per capita amount. Beginning with $2.06 in 1860, it amounted to $77.07 in 1865; was down to $12.69 in 1915; rose to $228.32 in 1920; to $326.43 in 1940; to $1024 in 1943; and to $1500 in 1944. The bar chart above shows the per capita amount by five-year periods from 1860 to 1940. A further test of the weight of the public debt is its relation to the total national wealth. Estimates by competent authorities placed this at 4 per cent in 1860, 8.1 in 1870, 1.7 in 1890, one half of 1 per cent in 1913, 5 per cent in 1920, 7.9 per cent in 1932, and 11.2 per cent in 1936.[35] To put it in another

[35]Twentieth-Century Fund, op. cit. pp. 65, 66.

way, in 1936 one dollar in nine of the country's wealth would have had to be requisitioned by the government if the entire Federal debt were to be paid off in that year.

STATE AND LOCAL DEBTS · State indebtedness likewise was given an impetus by the Civil War, and then began a decline which lasted until




near the end of the first decade of the new century. The table above shows the sharp upward trend which began about half a dozen years before that of the Federal government. Naturally, great disparities exist among the States in the size of their debts. New York is far in the lead with $616,488,000, which, combined with that of five other heavy borrowers, accounts for more than one fifth of the total.[36] About one fourth of the States have little debt except that backed by the earnings of public-service enterprises. Nevada has no debt. Nineteen States have per capita debts of less than ten dollars; nine, between ten and twenty dollars; eighteen, between thirty and fifty; and two, Arkansas and Louisiana, of more than fifty dollars. In 1944 the gross debt of the States amounted to $2,787,298,000, or a per capita of slightly less than twenty-one dollars.

Meanwhile the local governments had embarked upon programs of expenditures which led them swiftly along the road of debt, the movement beginning in the cities and extending to the counties and to the school and other districts. In 1944 the total gross debt of the local governments stood at $14,703,000,000, a decrease of 12 per cent since the peak year of 1940. Sinking-fund offsets against the gross debt totaled more than two billion dollars. Trull estimated that about 20.7 per cent of the 1932 gross local debt was supported by public-service enterprises, that is, invested capital which pays a return.[37] Borrowing for relief purposes was a large

[36]Bureau of the Census, *State Finances: 1944*, Vol. 2, *Topical Reports*, No. 2, pp. 4–7. Federal, State, and local debt are given for selected years from 1902 to 1944 in Bureau of the Census, *Governmental Debt: 1944, Governmental Debt in the United States* (December, 1944), pp. 2–3. Cf. also B. U. Ratchford, op. cit. chap. xxii, and Edna Trull, *Resources and Debts of the Forty-eight States* (1937), chap. i. The statistics of the above chart are based on the study by Trull. The wartime increase in State revenues under existing taxes has generally led to the accumulation of surpluses which have been used to reduce State indebtedness.

[37]E. Trull, op. cit. pp. 20–22.

factor in the increase of local debts in the early 1930's, after which they were stabilized or decreased by Federal assumption of relief and other normal State expenses and the halting of building and highway construction owing to the exigencies of the Second World War.

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# V

## THE BASIC FUNCTIONS

*Obviously the only excuse for the existence of government is the services which it performs for the people of the community. How much it should attempt is the subject of perhaps the most ancient and continuous debate in mankind's history. It is difficult now to visualize any stage in the social evolution of the future when this question will cease to be an issue. Essentially it resolves itself into the question of how much the people should attempt to do collectively through the government as their common agent and how much should be left to the individual. The earliest political philosophers of which we have account, those of Greece and Rome, agreed that the state existed for the sake of the "good life"; but exactly how the good life should be translated into government functions was something on which they disagreed as sharply as the statesmen of today. The reasons for the disagreements are as perpetual as the question itself. It can hardly be otherwise than that the functions which a government should undertake at any given time must depend upon such attendant circumstances as the density and character of population, the natural resources, and the technology of production, trade, and commerce.*

*The chapters of this section deal with those functions of the American government which may properly be termed basic, those without which the existence of the community could hardly be maintained. These include, as a minimum, those mentioned in the preamble to the Constitution. "To form a more perfect union" is a flexible phrase which would justify varied functions to bind together in harmonious co-operation not only*

*the States but the entire people. "Establish justice," "insure domestic tranquillity" (the maintenance of peace and order), and "provide for the common defense" are three functions assumed in some form by the most primitive of political societies. "Promote the general welfare" is a function which all civilized states today profess to undertake, each according to its own lights. The provision of free elementary education, the safeguarding of the public health, and the care of the poor and the unfortunate certainly fall within the minimum of this category. "Secure the blessing of liberty," concretely, the definition and protection of the rights of the individual, is something belonging in a more rarefied atmosphere, but nevertheless is regarded in the United States as a basic function.*

*Jefferson, fourteen years later in his First Inaugural, was explicit enough in his statement of principles of government, but added little to the list of the functions to be performed. Justice was to be "equal and exact" to all men; foreign relations were to be administered on the basis of "peace, commerce, and honest friendship with all nations, entangling alliances with none"; peace and security were to be maintained, with the chief reliance on a "well-disciplined militia"; agriculture, commerce, and "the diffusion of information," namely, education, were to be encouraged; and the civil liberties of freedom of religion, of the press, and of the person were to be protected.*

*The selection for this section of functions of government as basic represents no attempt to pass judgment on the current controversy here and abroad, but is chiefly traditional. Soviet Union, Nazi, and Fascist leaders, and possibly those of postwar France and England, would sharply disagree. If survival is the first law of life, then the functions of foreign affairs and defense should head this list. Those of currency and banking, however, are placed first, because of their connection with the immediately preceding subject of government finance.*

CHAPTER XXXIV

# *Money, Credit, and Banking*

MONEY AND ITS CHARACTERISTICS · Money is an article or instrument which the people of a country generally are willing to take as final payment for goods or services. Historically some valuable material, usually a metal, has been chosen to serve the purpose. The qualities which it should possess number about half a dozen *portability*, so that the pieces of all denominations will be of such weight and size that they are easily carried; *durability*, so that it may pass from hand to hand without impairment; *cognizability*, so that it may be easily identified by all people; *divisibility*, so that it is capable of being issued in different sizes and denominations; and *stability of value*, that is, such constancy in supply and utility that its value with respect to other goods shows little fluctuation.[1]

THE FUNCTIONS OF MONEY · The chief function of money is to serve as a *medium of exchange*, subordinate to which is that of serving as a *standard of value*. Since money itself is or represents a unit of value (for instance, the gold dollar contains 23.22 grains of pure gold), all other commodities may be rated in terms of this unit; and so a standard is set in terms of which they may be exchanged. For example, two farmers living remote from each other may wish to exchange farms and their equipment. How may this equitably be carried through? The tracts of land may vary considerably in size and in productivity and the respective equipments be disparate in amount. The solution is to ascertain the money value placed on each property in its own neighborhood, which may be done by comparing it with similar properties. If these are $10,000 and $12,000, respectively, the properties are exchanged, and the sum of $2000 is paid by one owner to the other. The dollar has served as both a medium of exchange and a standard of value. Since production today is mostly specialized, large-scale, and for others than those doing the producing, the barter of goods for goods has almost entirely ceased and the need for a medium of exchange has greatly increased. The function of money as a *standard of deferred payments* is incidental to those already mentioned. This means that money is a standard of value not only for current transactions but also for those of long-term credit.

CREDIT AND BANKING · Credit is a means of getting goods by giving a promise to pay for them at some future time.[2] It exists today in many forms, from the simplest transaction, where the village grocer trusts a

[1] F. A. Bradford, *Money and Banking* (1937), chap. i; R. B. Westerfield, *Money, Credit, and Banking* (1938), chap. i.

[2] Ibid. chap. xii.

customer for purchases until the end of the month, to the great transactions between corporations and the borrowing of huge sums by the United States government. Documentary evidences of credit are numerous and technical, such as checks, promissory notes, bonds, bank notes, drafts. When these are in such form and are issued by such responsible agencies (for instance, governments or banks) that they may circulate freely, they are money, or, more properly speaking, "credit money." Without an adequate credit system our present-day economic system could not operate. The bank is primarily a credit institution. As such it possesses something of a social and quasi-public character; for it receives deposits of money from the numerous people of the community, and it lends this money, together with its own, to individuals in the community. By combining community cash the bank creates a pool of credit for the benefit of those who are able to use it. Loans are made to such persons as can give adequate security for their repayment; the bulk of the loans are for the purpose of financing industry, commerce, and other economic enterprises. Thus money, credit, and banking are tied together as instruments necessary to the carrying on of the routine daily affairs of our existence.

THE RELATION OF GOVERNMENT TO MONEY, CREDIT, AND BANKING · These instrumentalities conceivably could exist without other aid from government than its legal protection, but only on a meager scale. A few well-known individuals, corporations, or banking houses might issue, upon their sole responsibility, coins or notes which would be widely accepted. Banking and credit, in fact, until recently, have been almost exclusively in private hands, but subject to rigid government regulation. The maintenance of an adequate system of money, however, requires activities which no private agency could perform or should be trusted to perform. The chief of these are to establish a unit of value and see that it is maintained; to manufacture the coins and circulating notes; to protect the currency against counterfeiting and mutilation; to safeguard its interests with respect to exchange with foreign countries; and to take measures to maintain relatively constant purchasing power. That government traditionally has been considered the proper body to perform these functions is known by the names used for coins, as "crown," "sovereign," "eagle." While government ownership and operation may not be necessary to the proper performance of the credit and banking functions, its closest co-operation with such privately owned agencies is always necessary. This may consist in specifying the form of the corporation and the amount of reserves, requiring periodical audits and reports, giving authorization for the issuance of bank notes to circulate as money, regulating the kinds of investment which may be made with the bank's deposits, and requiring special credit accommodations for special classes of borrowers.

CONSTITUTIONAL AND LEGAL BASES OF AMERICA'S CURRENCY SYSTEM · The States both before and after independence exercised the right to

provide a currency. They retained this power under the Articles of Confederation, although Congress was empowered to regulate the value of coins. The framers of the national constitution seem not to have visualized this problem with their usual clarity; for the omissions of that instrument have been the cause of much uncertainty and confusion. In two short clauses they gave Congress the power "to coin money, regulate the value thereof, and of foreign coin," and "to provide for the punishment of counterfeiting the securities and current coin of the United States."[3] There is no mention of circulating notes of any kind. There is negative support for Congress in the next section, which forbids the States to "coin money," "emit bills of credit," or "make anything but gold and silver coin a tender in payment of debts." This is the full textual basis for the complete power which Congress now exercises with respect to the currency. Judicial decisions have supplied the missing foundation stones for a national currency to compensate for the omissions of the original builders.

JUDICIAL DECISIONS · A decision of a States'-rights court in 1837 presided over by Chief Justice Taney complicated the prospects for a national currency. This decision, in the case of *Briscoe* v. *Bank of Kentucky*,[4] held that even though all the stock of the Bank of Kentucky was owned by the State, this bank's issuance of circulating bank notes did not amount to an emission of bills of credit, since the notes were backed by the ordinary commercial assets of the bank instead of by the State treasury. This decision left the road wide open for the flood of notes of the State-chartered banks, with their varying degrees of soundness. The situation was not remedied until 1869, when another decision upheld a Federal tax of 10 per cent annually on these circulating notes on the ground that Congress might protect its own authorized currency by restraining "the circulation of any notes not issued under its own authority."[5] This ended the dual control of our currency. The same emergency moved Congress to authorize the issuance of treasury notes, which were declared to be "lawful money and a legal tender in payment of all debts, public and private, within the United States," except duties on imports and interest on the public debt. After a period of considerable uncertainty the Supreme Court upheld the validity of this first venture of the Federal government in the field of paper money.[6] The power was deduced from the aggregate of the powers given to Congress, namely, coinage and the regulation of the value of coin, protection against counterfeiting, the borrowing of money, the regulation of foreign and interstate commerce, and the levy and collection of taxes; from the power forbidden to the States in the same field; and from the fact that such a power was "universally understood to belong to sovereignty." The sum total of

[3] *United States Constitution*, Art. I, sect. 8, clauses 5 and 6.
[4] 11 Pet. 257 (1837).
[5] *Veazie State Bank* v. *Fenno*, 8 Wall. 533 (1869).
[6] *Legal Tender Cases*, 12 Wall. 457 (1871); *Juillard* v. *Greenman*, 110 U. S. 421 (1884).

all this amounted substantially to an unwritten power of Congress "to establish and maintain a national currency." In furtherance of this "currency power" Congress may call in all gold coin and gold certificates privately held and substitute for them a paper currency not redeemable in coin; and it may invalidate without liability all private contracts calling for payments in gold coin, and all such contracts of its own with private citizens, unless such citizens can show substantial damage.[7] By virtue of this currency power "there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange."

CONSTITUTIONAL BASES OF THE FEDERAL CREDIT AND BANKING SYSTEMS · The word *bank* is not used in the United States Constitution, an omission which can mean only that the subject lies within the reserved powers of the States. Nevertheless, the Federal government has incorporated a vast system of privately owned banks and operates many banking and credit agencies of its own. The forerunners of these were the First Bank of the United States, 1791 to 1811, and the Second Bank of the United States, 1816–1836, both of which were bitterly opposed upon both constitutional and political grounds. One of John Marshall's most famous decisions, that of *McCulloch* v. *Maryland*[8] (1819), upheld the validity of the Federal incorporation of the second of these banks, and it is upon the slender thread of this decision that the whole national banking and credit structure depends. Marshall said that the incorporation of a bank was "a necessary and proper means" for carrying out the enumerated power "to borrow money on the credit of the United States," as well as that "to lay and collect taxes." A bank was a means of rendering these operations less "difficult, hazardous, and expensive." Although politics turned thumbs down on Federal banks for nearly a quarter of a century thereafter, the constitutional basis was never again seriously questioned before a court.

## *THE UNITED STATES CURRENCY SYSTEM*

THE COINAGE SYSTEM · In later colonial times and during the Revolution there were in existence several kinds of money, including English, French, Portuguese, and Spanish coins of various denominations. The chief unit of exchange was the Spanish dollar, in terms of which all other coins were expressed. In January, 1791, the Secretary of the Treasury, Alexander Hamilton, submitted a report to Congress embodying a plan for a coinage system and a mint, substantial parts of which had previously been recommended to the Congress of the Confederation by Robert Morris

[7] *Nortz* v. *United States*, 294 U. S. 317 (1935); *Norman* v. *Baltimore and Ohio Railway Company*, 294 U. S. 240 (1935).

[8] 4 Wheat. 316 (1819).

and Thomas Jefferson.[9] With only slight changes this plan became law April 2, 1792. A bimetallic standard was established: the silver dollar of $371\frac{4}{16}$ grains pure and the gold dollar of 24 grains pure, a ratio of $15\frac{1}{2}$ to 1, was adopted as the units of value. A striking and wise feature was the decimal system, which has proved a boon to all succeeding generations. Gold eagles ($10), half eagles ($5), quarter eagles ($2\frac{1}{2}$), and silver dollars were authorized, as well as the subsidiary pieces: half dollars, quarter dollars, dimes, half dimes, cents, and half cents. Not until 1849, however, were any gold dollars coined. The first basic change in this system was made by the act of 1834 which lightened the gold dollar to the ratio of 16 to 1. In 1837, when both the gold and the silver dollar were ordered minted at 90 per cent fine, the gold eagle weighed 258 grains and the gold dollar 25.8 grains, weights which remained unchanged until 1933. Because silver was undervalued at this rate, silver coins were driven from circulation, and the country was stripped of dollars and small pieces. When the act of 1873 omitted the silver dollar from the list to be coined, it signified no change in practice.

Large silver discoveries in the West in the middle 1870's, however, completely upset the market ratio between the two metals and led to a demand by the silver-mining interests and those desiring inflation, chiefly the debtor class, for the free coinage of silver at the old ratio.[10] As a compromise, the Bland-Allison Act of 1878 provided that the government should purchase between two and three million ounces of silver bullion monthly, to be coined at the listed rate. In 1888 Secretary of the Treasury Sherman reported that out of about 73,000,000 silver dollars coined, only 26,000,000 were in circulation, while the market value of the silver dollar was only $88\frac{1}{2}$ cents. In 1890 another silver act was adopted which required the monthly purchase, at the market price, of 4,500,000 ounces of silver, from which dollars were to be coined for one year, and after that only so far as might be necessary to redeem the treasury notes used in the purchase of the silver. As a result, gold steadily flowed from the treasury, a money panic struck the country, and in the summer of 1893, at President Cleveland's request, Congress repealed the silver-purchase act. Finally, after nearly a quarter of a century of silver agitation, the Gold Standard Act of 1900 was passed, which declared the gold dollar, of 25.8 grains 90 per cent pure, to be the standard of value and made all other coins and paper money redeemable in gold. This settled the coinage problem until the depression unsettled it again in 1933.

THE SYSTEM OF PAPER MONEY · The paper, or "credit," money employed in the United States has been of several kinds. One is fiat money, or circulating notes based upon the credit of the United States without any specific provision for redemption. Such was the nature of the Con-

[9]A. B. Hepburn, *A History of Currency in the United States* (1924), chaps. v, vi.
[10]Ibid. chaps. xx, xxi.

tinental currency authorized by Congress more than a year before the Declaration of Independence and several times subsequently.[11] Before the end of the war this had depreciated to the point of no value. "Not worth a Continental" became an expression for worthlessness. After the adoption of the Constitution it was generally believed that Congress no longer had power to issue such money. Not until 1862 did Congress again make the venture, with an authorization of $150,000,000 to be followed later during the war with other issues which brought the total to $450,000,000. By July, 1864, these "greenbacks," as they have been called ever since, were worth only thirty-five cents in gold on the dollar. Treasury notes are notes issued in convenient form for circulation usually for a short period. They were first used during the War of 1812 and have been used many times since. Those of 1890 were used to purchase silver bullion and were backed by the deposit of bullion in the treasury. Gold certificates and silver certificates are simply receipts for those metals deposited in the treasury in the amount of their face. Issued in convenient denominations, they utilize those metals as monetary agents in spite of their natural handicaps. The circulating notes of banks have constituted the greater part of the national currency. These are based upon gold, silver, commercial paper, or United States bonds.

DEVELOPMENT OF BANK-NOTE CURRENCY · The first incorporated bank in the United States, the Bank of North America, in 1781 gave the country its first circulating bank notes. The First and Second Banks of the United States, so long as they existed, not only provided issues but contributed to the soundness of the currency by refusing to accept the notes of weak State banks.[12] Thereafter, until the time of the Civil War, the numerous State banks furnished a large portion of the nation's circulating medium. Uncertainty as to the reliability of many State banks made the value of their notes questionable. A businessman needed to subscribe to a weekly "bank detector" to ascertain the value to be allowed the notes presented to him, which often must be discounted all the way from 1 to 50 per cent. An act of March 3, 1865, taxing State bank-note issues, then in circulation to the amount of $239,000,000, doomed these issues to extinction and so secured to Congress the exclusive control over the currency. An act of 1863, amended in 1864, provided for the organization of privately owned national banks under Federal charter. These were authorized to issue circulating notes in an amount equal to 90 per cent of the face value of the Federal bonds which they held. These issues constituted the bulk of the paper money in circulation until the inception of the Federal Reserve System, in 1913.

CURRENCY CHANGES SINCE 1933 · The coming of the F. D. Roosevelt administration in 1933 signalized the beginning of the most sweeping

[11]Ibid. chaps. vii–xiii; R. B. Westerfield, op. cit. chap. x.
[12]A. B. Hepburn, op. cit. chaps. viii, xvii, xxiii.

currency changes since the Civil War.[13] The three-and-a-half-year-old depression had culminated by inauguration time in the closing of most banks. As had happened in every other period of depression, a demand arose in various quarters for changes in the monetary system, chiefly for a great increase in the amount of the circulating medium. In May of that year an amendment to the Agricultural Adjustment Administration Act was adopted which authorized the President to issue up to three billion dollars in greenbacks or inconvertible paper money. No time limit was set on the President's power, but it was never used. Previously, on March 10, Congress had liberalized the currency power of the Federal reserve banks by authorizing them to issue circulating notes backed by a wider variety of commercial paper, such as notes, drafts, and bills of exchange. This measure led to a considerable increase in the circulation of these notes, which since 1913 had already become large. A series of steps was then taken which led to a radical change in the character of our metallic currency and the standard of value.

THE END OF THE GOLD STANDARD · On March 6, by Presidential proclamation, the export of gold was forbidden. On April 5 another proclamation ordered all holders of gold or of gold certificates to deliver them up to the government by May 1.[14] An executive order of April 20 further broadened the former actions against the holding and exporting of gold. It was now clear that the United States had gone off the gold standard, and the result was quickly seen in a depreciation of the paper dollar in terms of foreign currencies. The Agricultural Adjustment Administration Act amendments further provided that the President could fix the weight of the gold dollar at any point not less than 50 per cent of its existing weight of 25.8 grains and establish a bimetallic currency, with the free and unlimited coinage of both metals at the rate he should determine.

A MANAGED CURRENCY · With these and other powers lodged in his hands, the President had it within his power in May, 1933, to increase the currency to a degree never before thought of, and consequently to depreciate its value and inflate the price level. The avowed purpose of this legislation was to raise commodity prices in general. The President, in his radio speech of May 7, said, "The administration has the definite objective of raising commodity prices to such an extent that those who have borrowed money will, on the average, be able to repay that money in the same kind of dollar they borrowed."[15] This policy was based upon the theory of certain economists who held that the price level of goods follows automatically up and down the increases and decreases in the amount of currency issued by the government. Some economists pointed to experience at

[13]T. S. Gregory, *The Gold Standard and Its Future* (2d ed., 1935); Editors of the London *Economist*, *The New Deal* (1937), chap. viii.

[14]Collectors' coins and gold to the amount of one hundred dollars a person were exempted.

[15]*The Public Papers and Addresses of Franklin D. Roosevelt* (1938), Vol. II, p. 166.

variance with the theory: that the entire stock of money of March, 1933, was 59 per cent greater than in 1926, whose high price level the President wished to regain. Late in the year the President inaugurated two other measures in the direction of inflation: the purchase of gold at a price set by the government well beyond the market price; and the purchase of silver on the same plan, the government paying 64½ cents per ounce, whereas the market price was 43½ cents.[16] This again was on the theory that the price level of commodities would respond automatically to a change in ratio between gold or silver bullion and the dollar.

THE DEVALUATION OF THE DOLLAR · The Gold Reserve Act of January 30, 1934, ratified and fixed the monetary policies of the preceding months.[17] The President's power to devalue the dollar was continued for two more years, and the weight of the dollar might not be fixed at more than 60 per cent of the weight it then had. Title to all the gold which had been called in and deposited in the Federal reserve banks was vested in the United States. The book profits which should accrue from any devaluation of the dollar, to the amount of two billion dollars, were to be kept in a separate account known as the "stabilization fund," which was to be used to steady the value of the dollar by purchasing United States securities or foreign exchange in the open market. The next day the President by proclamation reduced the dollar from its historic weight of 25.8 grains (90 per cent pure) to 15.5 grains, which was a devaluation to 59.06 per cent. At the end of the year the treasury was able to announce a profit from this transaction of $2,800,000,000 because of the increased dollar value of the gold which it held. Another step in the direction of inflation was the Silver Purchase Act of June 19, 1934, which declared it to be the policy to maintain the proportion of silver in the gold and silver stock of the United States at 25 per cent by value.[18] To accomplish this, the treasury was authorized to purchase silver bullion at home and abroad; but the price was not to be in excess of its monetary value if purchased abroad, or in excess of 50 cents an ounce if produced in the United States. Against the stocks of silver so acquired silver certificates were to be issued and placed in circulation in such amounts as would not be less than the cost of all silver purchased.

SUMMARY · These measures constitute the chief monetary changes of the 1930's. At the time of devaluation our monetary stock of gold was four billion dollars. Thereafter it increased at a rapid rate and by 1943 had reached $22,387,455,751.05, while the silver stock had reached $1,519,745,773.72.[19] In the year ending 1939 the government acquired $3,224,890,527.63 in gold.

[16]See the views of E. W. Kemmerer in his *Kemmerer on Money* (1934), pp. 54–56.
[17]48 Stat. 337.
[18]48 Stat. 1178.
[19]*Annual Report of the Secretary of the Treasury, 1943*, p. 666.

What is the system which has resulted from these acts and orders? Certainly it is no longer the gold standard. The currency is no longer redeemable in any valuable metal, although the dollar is defined in terms of so much gold. The name "managed currency" has been applied to it by the President and his officers, which means that, by virtue of the powers to issue more currency, to purchase gold and silver bullion, to make purchases of United States securities in the open market, and to purchase foreign exchange, the value of the dollar may be raised or lowered or kept stable. Although none of the great stores of gold or silver are placed in circulation, except for subsidiary coins, it is argued that their possession by the government serves to allay any feelings of suspicion which might lead to a runaway panic. Whether in a period of peace and world-wide trade involving the normal problems of exchange a managed currency could survive is a question about which there are sharp differences of opinion. That eventually the world will be forced to go back to the gold standard is the belief of many students of the problem.

UNITED STATES MONEY IN 1933 · On March 4, 1933, there were eight kinds of money in circulation in addition to the subsidiary coins of copper, nickel, and silver and the few outstanding treasury notes of 1890. These were as follows: (1) Gold coins, the first of which had been authorized in 1792. Though the quantity in circulation was not large, all other money was redeemable in them. (2) Gold certificates, which were in the nature of warehouse receipts for gold in the treasury and were used as a convenient means of circulation. (3) Silver dollars, the pure silver content of which had never been changed since their authorization in 1792. Because of weight and bulk, they were unpopular as currency. (4) Silver certificates, which were of the same character as the gold certificates and were issued for the same reasons. (5) Greenbacks, which were the contribution of the Civil War period to our paper currency. As issued they were irredeemable and therefore fiat money. After January 1, 1879, they were redeemable and thereafter circulated freely on a parity with all other money. (6) National-bank notes, authorized in 1863 and based upon the banks' holding of United States bonds. They constituted the greater part of our circulating medium for fifty years. (7) Federal reserve notes, authorized under the act of 1913. They were backed by commercial paper, and a gold reserve of 40 per cent of the notes in circulation. (8) Federal reserve bank notes, also authorized by the act of 1913. They were issued on the basis of United States bonds held by the Federal reserve banks. The total amount in circulation was never at any time large until after March, 1933, when new legislation accelerated their use. In 1943 the total stock of United States money was nearly $41,000,000,000, as compared with $8,538,796,000 in 1929 and $10,078,417,000 in 1933.[20] In 1943 all these forms of money except gold coins were in circulation. In spite of the great silver

[20] *Annual Report of the Secretary of the Treasury, 1943*, p. 712.

purchases, the money in circulation included only $83,701,000 silver dollars as compared with $72,127,000 in 1913. But the circulation of silver certificates had increased in those years from $469,129,000 to $1,648,571,000, a fact which reflected personal tastes and habits rather than financial policy.[21]

## *BANKING AND CREDIT*

FUNCTIONS OF BANKS[22] · (1) A bank serves the people of the community as a receptacle for the deposit of their surplus funds. The service to depositors consists in the safeguarding of their funds; in the paying of interest if the sums deposited are large enough or for a sufficient length of time; and in disbursing the funds for them by means of checks. (2) By accepting deposits a bank creates a reservoir of credit for the accommodation of the commercial and other needs of the people in the community. Credit is extended by the making of loans or the discounting of notes and commercial paper. In restricting credit to those who are good risks, the bank helps to ensure that the community's funds are used for productive purposes. (3) A bank is a medium for the transfer of funds between one part of the country and another or between one country and another. Checks drawn on one bank are canceled against those drawn on others, thus making unnecessary the transportation of money from one region to another except in small amounts. (4) A bank acts incidentally as a collecting agency when it receives payment for notes and drafts as they mature. (5) Banks may or may not have the privilege of issuing circulating notes, but this has been one of their important functions in the United States from the beginning. Since the Civil War it has been confined to banks with national charters. (6) Finally, banks often serve as fiscal agents for the government, making unnecessary the keeping of large amounts of funds in the vaults of the treasury. The Federal reserve banks are the chief fiscal agencies of the United States government, and the State and local governments in general designate various banks as their depositories and fiscal agents.

STATE BANKS: DEVELOPMENT · At the time of Washington's inauguration there were only three banks in the United States, all operating under State laws.[23] These were the Bank of North America, in Philadelphia, founded in 1781, and the Bank of Massachusetts, in Boston, and the Bank of New York, in New York City, both founded in 1784. The State banking systems expanded very little until about 1811, when the discontinuance of the First Bank of the United States brought many State banks into existence. Lax State laws and poor and inexperienced management were responsible

[21]Ibid. p. 713.

[22]R. B. Westerfield, op. cit. chap. xiv; A. K. Fiske, *The Modern Bank* (Rev. Ed., 1919), chap. ii.

[23]F. A. Bradford, op. cit. chap. xiv.

for many failures and great losses to the people. Insufficient capital, little or no government inspection, the privilege of issuing circulating notes without adequate guarantees for their redemption, favoritism in the granting of charters, disorganization, and disunity generally characterized the various systems. In a few States, such as Kentucky, Indiana, South Carolina, and Alabama, the State owned and operated central banks, which had the privilege of issuing circulating notes. In the test case of the Kentucky bank the Supreme Court held these notes not to be an unconstitutional emission of "bills of credit."[24] The banking systems of New England, Louisiana, and to a less degree Pennsylvania and Indiana were of good quality.[25] The demise of the Second Bank of the United States removed a restraining influence over State banks. These increased their note issues, adding to the speculative boom of the period; but after the panic of 1837 many of them suspended specie payments or failed altogether. This situation was reflected in their decline in number from 901 in 1840 to 691 in 1843. The number of State banks by 1861 has been estimated at 1600, with an aggregate capital stock of $697,000,000.[26] The State banking systems, in accord with the spirit of the times, were based upon free individual enterprise, were little restrained by government, and lacked unity, thus leaving the citizen and the public to assume the risks in dealing with them. Attempts to centralize banking and set high standards ran squarely into the democratic prejudices against big business and special privilege.

LATER STATE BANKING SYSTEMS · The promotion of State banks was greatly discouraged by the Federal tax on State bank-note issues, which effectively ended that privilege, and by the organization of the national banking system. By 1869 the number of State banks had fallen to the low point of 247, after which they began again to increase. Ten years later their number was 813; in 1889 it was 2097; in 1899, 4253; in 1909, 11,292; and in 1914, 14,512.[27] These are the banks of general banking powers. If all banks operating under State laws are counted, including trust companies, savings banks, and private banks, the totals are much larger: in 1879, 4034; in 1889, 7224; in 1899, 9684; in 1909, 18,481; and in 1914, 19,240. During this period of half a century the States progressively improved their laws with respect to the conduct and organization of banks. At first banks were organized under the general laws concerning the incorporation of business; then legislation for the banks alone was enacted. Regulations include the setting of the minimum of paid-in capital and of cash reserves; the composition of the reserves, whether of cash or bonds or both; and restrictions on the kinds of loans which may be

[24] *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257 (1837).

[25] F. A. Bradford, op. cit. pp. 282–284; C. A. Conant, *History of Modern Banks of Issue* (4th ed., 1901), chap. xiv.

[26] A. B. Hepburn, op. cit. p. 173.

[27] *Annual Report of the Comptroller of the Currency, 1915*, Vol. II, p. 958; G. E. Barnett, *State Banks and Trust Companies* (1911), p. 201.

made and a specification of the security which must be given. In more recent times loans to officers of the banks are generally forbidden. Branch banking is permitted in about a dozen of the States. The administration of the banking laws is placed in one of the State departments, such as that of a commissioner of banks, whose office maintains a corps of inspectors who make regular rounds. This agency usually requires periodical reports and is in charge of the liquidation of all banks which fail, and in some States its consent is necessary for the establishment of a new bank in any community. At the close of the year 1942 the total number of banks in the United States and its possessions was 14,815, of which 9714 were operating under State laws and 5101 under Federal laws.[28] This is in contrast to the 30,000 banks, including 1200 branches, in the United States in 1920.

## *THE FEDERAL BANKING SYSTEM*

THE NATIONAL BANKS · Our present system of banks based on national law dates to the financial exigencies of the Civil War, which the chaotic State systems had been unable to meet.[29] Under the leadership of the Secretary of the Treasury, Salmon P. Chase, an act based somewhat on the State system of New York was drawn and passed February 25, 1863. Because of certain defects the organization of banks under its terms was slow, and it was repealed and supplanted by another act of June 3, 1864. The essential feature of the latter act was the principle of free banking, meaning that any group of at least five persons who were able to comply with the terms of the act were free to organize a bank. The amount of capital needed was set on a sliding scale proportioned to the size of the city in which the bank was to be located. Those in certain designated large cities were required to maintain reserves of not less than 25 per cent of their liabilities; those in a secondary group of cities were allowed to keep half of their reserves on deposit in the reserve cities; while all other banks were required to maintain reserves of 15 per cent of their notes and deposits. The banks were authorized to conduct a general banking business. The major reasons for their founding were to provide a medium of circulating notes and a market for United States bonds. It was required that these bonds, to the amount of one third of the bank's capital stock should be deposited with the Secretary of the Treasury, after which circulating notes up to 90 per cent of their face value could be issued against them. A new officer, the Comptroller of the Currency, was created and was charged with the enforcement of the act. He furnishes the circulating notes to the banks, carries out inspections, and takes over banks which have failed, declaring the deposited bonds forfeited and redeeming all the circulating

[28] *Eightieth Annual Report of the Comptroller of the Currency, 1942*, pp. 7, 8. The national banks operated 1603 branches.

[29] F. A. Bradford, op. cit. pp. 286–293.

notes. Subsequent amendments changed the act in details, but left its basic features untouched. The system prospered: the resources of the member banks rose from $1,500,000,000 in 1866 to $11,000,000,000 in 1913, and their total assets in 1942 were placed at $44,718,965,000.[30]

DEFECTS OF THE NATIONAL BANKING SYSTEM · The national banking system was a great improvement over what had preceded it, but the increasingly great part played by money and credit agencies in the new industrial age demanded still other improvements.[31] The currency which the banks issued lacked elasticity. Its maximum amount was rigidly set by the amount of bonds which the banks owned. In periods of extraordinary business activity, when the demand for ready cash was heavy, to secure cash a bank might find it expedient to sell bonds, and the sale automatically decreased the amount of notes which it might issue. The failure of a considerable number of banks entailed serious consequences because their notes would be called in, and their bonds be thrown on the market, thereby decreasing the general market value of the bonds. A sharp increase in the price of government bonds was an incentive to sell such bonds and take the profit; but again the sale required a decrease in circulating notes. Treasury surpluses, if used to retire bonds in the same way, would lead to an artificial decrease in the amount of the circulating medium. A further weakness was that the reserves of the banks were scattered about the country in many places rather than centralized in the hands of one bank. Because of New York's commercial importance, the banks there in practice held large reserves from banks of the interior, but did not carry reserves of cash sufficient to meet the demands of a crisis. Next, the rigid reserve requirements of the banks in general prevented them, in a time of crisis, from extending credit to solvent business concerns or individuals, thus often accelerating business and financial panics. Lastly, the working relations with the United States Treasury were inadequate. While certain banks might be designated by the government as its fiscal agents, the bulk of the tax receipts were not deposited with them but placed in the independent treasury and subtreasuries, with corresponding tendencies to "tight" or "easy" money. Lack of any dominant Federal or private agency for central advice or control was a fundamental weakness.

THE FEDERAL RESERVE SYSTEM · Congress in 1908 created a body, the National Monetary Commission, to study banking questions in this and other countries and to bring in recommendations. An outgrowth of the study was the Aldrich Bill of 1912, introduced in the Senate, which provided for a central bank with branches in each of fifteen districts into which the country was to be divided. Owing to the impending change in administration, this bill never was fully discussed in Congress. With the

[30] *Eightieth Annual Report of the Comptroller of the Currency, 1942*, p. 2.

[31] F. A. Bradford, op. cit. chap. xvi; E. W. Kemmerer, *The ABC of the Federal Reserve System* (1938), chap. iii.

advent of the Woodrow Wilson administration another bill, embodying many of the recommendations of the commission, was introduced and on December 23, 1913, became law. Its chief features are as follows.

FEDERAL RESERVE BANKS[32] · The ancient fear of centralized banking power was strong enough to prevent the creation of one dominant bank. The country was divided into twelve districts, in each of which was located a Federal reserve bank. These were "bankers' banks." All national banks within the district were required to be members, while State banks might be members provided they met the requirements with respect to capital, reserves, and so on. Each member bank was required to subscribe to the stock of the Federal reserve bank in an amount equal to 6 per cent of its capital and surplus. The management of each bank was in the hands of a board of directors of nine men, of whom three must be bankers, three representatives of commerce and industry, and three representatives of the general public. Members of the last-named group were elected by the Federal Reserve Board; those of the first two groups, by the member banks, in such a way as to give fair weight to the banks of different sizes.

The business of the Federal reserve banks was confined largely to dealings with the member banks. From them they received money, notes, and checks for deposit, and from other Reserve banks notes and checks for clearance and collection. In addition to this they were authorized to deal in the open market in bills and other instruments of exchange, and in United States, State, and local government bonds. One of their most important powers was that of discounting for member banks notes and other instruments of commerce, and of fixing, subject to the review of the Federal Reserve Board, the rates of discount for various classes of commercial paper. They were also made fiscal agents of the treasury for various purposes, including the deposit of funds from which disbursements were made for the running expenses of the government.

FEDERAL RESERVE CURRENCY · The act added also two other kinds of paper money to those already existing, the Federal reserve note and the Federal reserve bank note.[33] The former was based on commercial paper rediscounted for the member banks; the latter was issued on the basis of the bonds which the law required to be purchased from the national banks. These notes were made legal tender and were redeemable in gold at the United States Treasury. The reserve requirements of these banks were gold to the amount of 40 per cent of the circulating notes, and gold or other lawful money equal to 35 per cent of the deposits.

THE FEDERAL RESERVE BOARD · The Federal Reserve Board was composed of eight members, including the Secretary of the Treasury and the Comptroller of the Currency ex officio.[34] The President appointed six

[32]38 Stat. 251; J. L. Laughlin, *The Federal Reserve Act: Its Origin and Problems*, chaps. i–viii.
[33]Ibid. chap. x; E. W. Kemmerer, *The ABC of the Federal Reserve System* (1938), pp. 61–82.
[34]F. A. Bradford, op. cit. pp. 335–337.

members, of whom only one might be from any one reserve district, upon the basis of a fair representation of the financial, agricultural, industrial, commercial, and geographical interests of the country. The board had a large number of enumerated powers, relating chiefly to co-ordination and regulation. It might suspend or remove officers of the member banks, suspend the operations of member banks or order their liquidation, waive reserve requirements in an emergency, make rules and regulations regarding the exchange and transfer of funds, require the writing off of doubtful or worthless assets of banks, supervise or regulate the issue and retirement of circulating notes, and review and determine the rate of rediscount to be employed by the reserve banks. A Federal Advisory Committee was set up, composed of one member from each district, chosen by the board of directors of its bank. Its functions were to advise the Federal Reserve Board on general business conditions and to make recommendations with respect to matters within the jurisdiction of the board, including discount rates and note issues.

### *MODIFICATIONS OF THE FEDERAL RESERVE BANKING SYSTEM*

THE COLLAPSE IN EARLY 1933 · In the period from 1921 to 1930 a total of 6987 banks, with a combined capital of $332,466,000 and deposits in the amount of $2,586,388,000, failed.[35] The stock-market crash of 1929 gave further impetus to the movement. Late in February, 1933, the Michigan banks were closed by order of the governor; other States rapidly followed; and by March 4 those of New York and all other States had been closed. President Roosevelt on March 6 proclaimed a national moratorium and made the closing of all banks mandatory. Three days later there was passed the Emergency Banking Act for the purpose of a prompt reopening. This and several other acts within the next two years greatly modified the existing system of banks operating under Federal authority.

CHANGES IN THE CENTRAL ORGANIZATION · The basic features of the system were left unchanged.[36] The Federal Reserve Board became the Board of Governors, and the Secretary of the Treasury and the Comptroller of the Currency were no longer associated with it ex officio. The seven members were appointed for terms of fourteen years by the President, who also designated which were to act as chairman and vice-chairman. As under the original law, this board was charged with the co-ordinating and controlling of the entire Federal Reserve System. It might now establish discount rates every two weeks or oftener, in its discretion. It might dis-

[35] F. A. Bradford, op. cit. pp. 343–353; S. C. Wallace, *The New Deal in Action* (1934), chap. iv.

[36] Acts of June 16, 1933 (48 Stat. 162), and August 23, 1935 (49 Stat. 704); F. A. Bradford, op. cit. pp. 461–471.

approve the rates of interest charged by the reserve banks and require their revision every two weeks; and upon the acquiescence of four members it might raise the reserve requirements, but not more than 100 per cent. It was also given the authority to approve the election of the presidents of the twelve reserve banks. The issuing of Federal reserve bank notes was liberalized so that these notes might be issued up to 100 per cent of the United States bonds held and up to 90 per cent of other commercial paper discounted or purchased; and no reserve was required for such issues. The reserve banks were permitted also to rediscount paper which previously had been held ineligible, and they might make loans directly to businessmen. An Open-Market Committee was created, composed of the members of the board and five others elected by the Federal reserve banks. Its purpose was to engage in open-market operations as to both the purchase and the sale of securities, which would set the policy to be followed by the reserve banks.

CHANGES FOR THE MEMBER BANKS · The Emergency Banking Act of March 9, 1933,[37] gave the administration full power to deal with the reopening of the member banks, and, with subsequent acts of that year and of 1935, instituted certain reforms. It was announced that only sound banks would be allowed to reopen, the test being whether the assets held were sufficient when discounted to pay all the deposits. In the three days of March 13 to 15, banks with 90 per cent of the credit resources of the country were reopened. State banks which were not members were reopened by the proper State authorities. Member banks were forbidden to engage in the investment business or to have investment affiliates. A half-hearted approval was given to branch banking, confining it to those localities where it was permitted to State banks and restricting it further to the city, town, village, or county in which the parent bank was located. Other restrictions related to the paying of interest on demand deposits, the making of loans to bank officers, and the amount of capital necessary for the organization of a national bank.

THE INSURANCE OF DEPOSITS · Several States had experimented with the compulsory insurance of bank deposits, but with indifferent success. Although in normal times state insurance was adequate, in times of stress the large losses of the weak banks had tended to pull down the stronger ones. Such a system applicable to the whole country, it was thought, would have adequate strength, and one was set up in the two banking acts of 1933 and 1935. A Federal Deposit Insurance Corporation was established, financed by a $150,000,000 contribution in stock by the Federal government.[38] Management was in the hands of a board of directors of three, consisting of the Comptroller of the Currency and two others appointed by the President. All members of the Federal Reserve System

[37] 48 Stat. 5; F. A. Bradford, op. cit. pp. 455–457.
[38] Ibid. pp. 467–484.

had to belong, and nonmembers might belong if they submitted to Federal examination and purchased stock. The insurance fund was derived from an assessment of the member banks at a rate stated as a percentage of their total deposits. Individual deposits up to five thousand dollars were insured in full; those in excess of that amount were partially insured, on a downward sliding scale ending at 50 per cent for all in excess of $50,000. When an insured bank fails, the corporation determines the amount due each depositor and gives him an account in a near-by bank.

### *THE FEDERAL GOVERNMENT AS A BANKER*

The legislation described above, both Federal and State, all related to privately owned banking and credit institutions. It included many requirements for the good of depositors, of the banks themselves, and of the general public. Among these were the methods for incorporation, the amount of paid-in capital, the reserves to be kept against deposits, the safeguarding of investments and loans, maximum interest rates, the basis for the issuance of circulating notes, and many other matters of banking practice. Beginning in a small way in 1911 with the Postal Savings System, after 1933 the Federal government itself entered the banking and credit business on a large scale. Its ventures were chiefly in specialized fields, such as farm and home financing, leaving the business of general and commercial banking about where it was. The various nationally owned and operated banking and credit facilities will be briefly explained.

POSTAL SAVINGS SYSTEM · The widespread distrust of banks, occasioned by the all-too-numerous failures, and the attitude of the foreign-born, who were accustomed to postal savings in Europe, were important factors in the passage of the Postal Savings Bank Act of 1910.[39] Certain post offices and their branches, numbering 8038 in 1941, are designated by the Postmaster-General as places at which deposits may be made. No account is opened for less than one dollar, and none for more than twenty-five hundred dollars may be credited to one person; but ten-cent savings stamps to be affixed to a card are sold. A low rate of interest is paid on the deposits. The system is administered by the Division of Postal Savings under the general supervision of the Third Assistant Postmaster-General. The custody and the investment of the funds are under the control of a board of trustees composed of the Postmaster-General, the Secretary of the Treasury, and the Attorney-General. In order to keep the money at home, the receipts are deposited at first in local banks. A fund of 5 per cent of the total deposits as a reserve is kept with the Treasurer of the United States, and at the discretion of the President of the United States the remainder may be invested in United States securities. On the whole the system has worked well. That it is regarded as a solid rock in time of trouble was

[39] E. W. Kemmerer, *Postal Savings* (1917), chaps. i and ii.

shown when the number of depositors rose from 770,859 in 1931 to 1,545,190 a year later. In 1943 the number had grown to 3,064,054, with a total of $1,577,525,610 to their credit, of which $1,481,821,932.79 had been invested in United States bonds and other Federal securities.[40]

THE RECONSTRUCTION FINANCE CORPORATION · The Reconstruction Finance Corporation, a superbank, was created by an act of Congress of January 22, 1932, for the purpose of making loans to banks and key industries, in the hope that the further progress of the depression might be stopped.[41] It was financed at the outset by an appropriation of five hundred million dollars from the treasury, with license to add triple that amount by borrowing on the credit of the corporation. With the objective of ultimate aid to agriculture, commerce, business, and industry, loans were made to all ranges of banks, trust companies, building and loan associations, and farm-credit corporations. Loans were also made directly to railroads, State workmen's compensation funds, and bank-insurance funds. The loans had an immediate and salutary effect, decreasing failures and increasing confidence. The corporation was empowered also to acquire stock in certain corporations as an encouragement to business. In later years it became the Federal government's agency for furnishing loans to a great variety of enterprises, including public works and housing, to the farm-credit agencies, to the Chinese government for the purchase of farm commodities, and to private concerns in order to finance the production of war materials. In June, 1940, its life was extended to 1947 and its power to make loans expanded to more than seven billion dollars. The total of its assets in 1943 was $7,639,090,000.[42]

FARM CREDIT · The loan practices of the ordinary commercial bank are in some respects not well adapted to farmers' needs. From the very settlement of the Middle West, farmers of ability and prudence have often suffered unduly from the harsh credit requirements of the banks. On the other hand, in many communities the country bank has taken care of the farmer's needs reasonably well. These needs vary somewhat from region to region, depending upon whether the type of agriculture is one-crop or diversified production, grazing, stock-raising, dairying, or fruit-raising. The kinds of credit needed are classified as long-term credit, of more than six years, for financing land and buildings; intermediate credit, of from six months to six years, for farm machinery and the less substantial buildings and improvements; and short-term credit, for financing the current operations of the farm, including the making of a crop and the fattening of livestock. Banks specialized for these various needs are better able to accommodate the farming region than the same number of banks which have general commercial and savings functions. Farming is carried on

[40] *Annual Report of the Postmaster General, 1943*, pp. 60, 61.
[41] R. B. Westerfield, op. cit. pp. 775, 776, 816–818.
[42] *Annual Report of the Secretary of the Treasury, 1943*, p. 694.

mostly in small individual units without corporate organization. It is attended also by unusual risks, because of a high degree of uncertainty in weather and market conditions, all of which are accentuated by the inelastic nature of the demand for agricultural products. These combine to make the farmer a poor credit risk. Owing to the close connection between his economic and living conditions it is difficult to make a purely business-like adjustment of his problems; for the farm is both a producing unit and a home. The need for specialized farm credit even in normal times was magnified by the dislocations at the end of the First World War and again by those following the stock-market crash of 1929. A great and intricate system of farm credit, with the Federal government as banker, was built up step by step.[43] The barest outline of this will be given.

THE FEDERAL FARM BOARD · Two measures for farmers' relief, a marketing act of 1929 and a bankruptcy act of 1934, which only incidentally or indirectly related to credit, will be considered first. The objects of the first were the stabilization of markets for farm products; the diffusion of information about the use of land, crop surpluses, and the expanding of markets; and the extending of aid in the organization of co-operatives. A Federal Farm Board of nine members, appointed by the President, was given a revolving fund of five hundred million dollars with which to carry on its work. The idea was to smooth out the price curve by purchasing produce at those times of the year when prices normally would be depressed and selling at those times when they normally would be higher. To fulfill its mission, the board not only bought directly but made loans for purchases to farm co-operatives and to wheat and cotton corporations which it had created. Large purchases of wheat and cotton were made in a generally falling market; prices went to an unprecedented low; and by the end of the Hoover administration the greater portion of the fund had been lost. The stocks were eventually disposed of variously, by sales on the open market, gifts to the Red Cross, trade with Brazil for coffee, and sale on credit to China and Germany. In 1933 the board was abolished, and its functions were merged with those of the Farm Credit Administration.

FARM BANKRUPTCY LEGISLATION · An act extending the benefits of the bankruptcy laws to farmers, known as the Farm Mortgage Moratorium Law, was passed in June, 1934, by means of a filibuster, which probably accounted for the one-sided character of some of its provisions.[44] A farmer declaring himself bankrupt was permitted to retain possession of his farm in the capacity of receiver for a period of five years, meanwhile paying a yearly rental based upon reappraisal of the value of the farm. At the end of that period he was permitted to secure full title to the land by paying the reappraised value. The gist of the matter was an arbitrary

[43] An excellent account of the Federal farm-credit agencies is given in F. A. Bradford, op. cit. chap. xxxviii; S. C. Wallace, op. cit. pp. 101–107; 46 Stat. 11.

[44] 48 Stat. 922.

reduction in the amount of the mortgage, enforced extension of credit, possession of the mortgaged property, and a final confirmation of title. The act was declared unconstitutional in a unanimous decision of the Supreme Court, on the ground that it was a taking of private property without just compensation.[45] Another farm bankruptcy law was enacted in August, 1935, which reasonably protected the rights of both parties.[46] A fair rental was required, and the court was given supervision over the property during the period of the moratorium. This act was unanimously upheld by the Supreme Court.[47]

THE FEDERAL LAND BANKS · An act of July 17, 1916, was the first legislation to provide credit for the special needs of the farmer.[48] Two sets of banks were authorized to extend long-term credit. The country was divided into twelve districts, in each of which was established a Federal Land Bank. These banks were to be co-operative agencies to make loans to farm-loan associations. The capital stock, at first advanced by the United States Treasury, was subscribed by the farm-loan associations. Individual loans to members, to run from five to forty years, were secured by mortgages on the farm lands and by promissory notes of the borrowers. All applications for loans were made through the loan associations and were repaid on the amortization principle. The banks derived the greater part of their capital from the sale of bonds based on the mortgages and promissory notes which they held. In 1923 the amount of their outstanding issues was slightly more than a billion dollars; in 1943, $1,489,450,000.[49] These banks were under the supervision of a Federal Farm Loan Board of seven members, consisting of the Secretary of the Treasury and six members appointed by the President of the United States.

THE JOINT-STOCK LAND BANKS · The second set of banks authorized in 1916 was the Joint-Stock Land Banks, created for the purpose of making loans on agricultural land. These were privately owned, privately financed, and run for individual profit. They also were authorized to obtain capital by issuing bonds secured by the mortgages which they held against the land.

THE FEDERAL INTERMEDIATE CREDIT BANKS · By acts of July 17, 1916, and March 4, 1923, there were authorized twelve Federal Intermediate Credit Banks, to be located in the same cities as the Federal Land Banks and to be under the administration of their boards of directors.[50] Each was to have a subscribed capital of stock of five million dollars. The primary purpose was to purchase directly or to discount intermediate-term paper from banks, agricultural-credit and livestock associations, or co-

[45] *Louisville Land Bank* v. *Radford*, 295 U. S. 555 (1935).
[46] 39 Stat. 360.
[47] *Wright* v. *Mountain Trust Bank*, 300 U. S. 440 (1937).
[48] F. A. Bradford, op. cit. pp. 747, 748.
[49] *Annual Report of the Secretary of the Treasury, 1943*, p. 694.
[50] 39 Stat. 360; 42 Stat. 1454. In 1943 they had assets of $382,974,000.

operative associations of agricultural producers. Or they might make loans directly to any co-operative association organized for the purposes of producing or marketing farm products or livestock. The maturity of such loans or discounts was not to exceed three years. These banks also had the authority to raise capital by the sale of obligations on the open market.

NATIONAL AGRICULTURAL CREDIT CORPORATIONS · Under an act of March 4, 1923, a series of National Agricultural Credit Corporations might be formed by individual farmers for the purpose of providing short-time credit facilities for the agricultural and livestock industries.[51] No more might be formed after June 16, 1933. A minimum of $250,000 paid-in capital was required. The chief purpose of these corporations was to discount or purchase notes and drafts which had been made for an agricultural purpose and which had a maturity at the time of discount of not more than nine months. Such paper must be secured by warehouse receipts or other documents giving title to nonperishable products or by livestock being fattened or crops being grown for the market. These corporations were authorized, too, to raise capital in the open market.

PRODUCTION CREDIT CORPORATIONS · An act of June 16, 1933, laid the basis for still another type of farm-credit agency.[52] Twelve production credit corporations, one for each of the land-bank districts, were to be established under the administration of the boards of directors of the Federal Land Banks. The initial capital of each was set at a minimum of $7,500,000, to be subscribed by the United States Treasury and to be used in subscribing for stock in production credit associations. Provision was made also for chartered associations of farmers incorporated by the governor of the Farm Credit Administration, whose chief purpose was to make loans to farmers for agricultural purposes or for home alterations.

REGIONAL BANKS FOR CO-OPERATIVE ASSOCIATIONS · The same act also authorized the establishment of a series of banks for farmers' co-operatives, one in each of the twelve land-bank cities and under their board of directors, and a central bank for co-operatives in the District of Columbia.[53] The purpose was to make loans to co-operative associations to aid in the merchandising of agricultural products and the construction or purchase of facilities for marketing. The central bank has a board of directors of seven members appointed by the governor of the Farm Credit Administration. Its capital is furnished by the co-operative associations and the United States Treasury, and may be augmented by the sale of securities. In 1943 the United States owned capital stock of the central bank and the regional banks in the amounts of $197,791,000 and $62,404,000 respectively.[54]

THE FEDERAL FARM MORTGAGE CORPORATION · This was created by act of January 31, 1934, and is governed by a board made up of the gover-

[51] 42 Stat. 1471. [52] 48 Stat. 983. [53] 48 Stat. 273.

[54] *Annual Report of the Secretary of the Treasury, 1943*, p. 704.

nor of the Farm Credit Administration, the Land Bank Commissioner, and a representative of the Treasury Department.[55] Its capital of $200,000,000 was subscribed by the United States Treasury; and it is authorized to issue bonds up to $2,000,000,000, guaranteed as to principal and interest by the United States. Its purpose is to make loans to farmers upon first or second mortgages on their land or crops. The rate at first was 4.5 per cent, but soon by political pressure was pushed down to 3.5 per cent, which amounts to a national subsidy. In 1943 the amount of its liabilities guaranteed by the United States was $1,143,085,000.[56]

THE FARM CREDIT ADMINISTRATION · President Roosevelt, by executive order in March, 1933, abolished the Federal Farm Board and turned over its functions and the general oversight of other farm-loan agencies to a new Farm Credit Administration, with powers exercised by a governor and a farm-loan commissioner subordinate to him, later known as the Land Bank Commissioner. The organization was given a legal basis and somewhat changed by an act of Congress in the following May.[57] Three new officers were created: a land-bank commissioner, a co-operative-bank commissioner, and an intermediate-credit commissioner. In the general Federal administrative reorganization of 1939 this agency, the Commodity Credit Corporation, and the Farm Mortgage Corporation were transferred to the Department of Agriculture, of which they in effect became a bureau.[58]

OTHER FEDERAL CREDIT AGENCIES. THE EXPORT-IMPORT BANK · Another Federal credit institution is the Export-Import Bank of Washington, D. C., which was organized in 1934 for the encouragement of foreign trade.[59] It is governed by a board chosen from the State, Commerce, Treasury, and Agriculture Departments and the Reconstruction Finance Corporation. The scope of its functions became truly grandiose in 1940, when an act of Congress authorized the Reconstruction Finance Corporation to supply it with funds, not to exceed $500,000,000 outstanding at any one time, "to assist in the development of the resources, the stabilization of the economies, and the orderly marketing of the products of the Western Hemisphere."[60] To this end it could make loans to any government, its central bank, and even a political subdivision or an individual. Late in the year it was permitted to make a loan of $100,000,000 to China.[61] Working in close co-operation with the Department of State, it became a prime instrument of American foreign policy. "Dollar diplomacy" had

[55]48 Stat. 344.

[56]*Annual Report of the Secretary of the Treasury, 1943*, p. 694.

[57]Executive Order No. 6084, March 27, 1933. *United States Code, 1940*, Title 12, Subchapter VIII, sect. 1148d; 48 Stat. 50.

[58]Reorganization Plan No. 1, sect. 401; 4 Fed. Regis. 2730.

[59]The bank was created by Executive Order No. 6581, February 2, 1934, and was ordered continued to 1947 by an act of Congress of January 31, 1935 (49 Stat. 4).

[60]54 Stat. 961.

[61]*Annual Report of the Secretary of the Treasury, 1941*, p. 357.

passed from the control of the private capitalist or industrial corporation to that of the government.

GOVERNMENT CREDIT FOR HOME-OWNERS · Urban real-estate values suffered greatly in the depression of 1929. Mortgages had increased eightfold in amount in the eight years preceding, as against only a 14 per cent increase in the total value of real estate. Thousands of home-owners, deprived partly or wholly of their incomes, were unable to keep up the payments on their mortgages. Several objectives were behind the Federal remedial legislation: to prevent the foreclosure of mortgages and the eviction of thousands of home-owners; to rescue from collapse the banks involved in lending on real estate; to give employment to the building trades; and to further slum clearance.[62]

FEDERAL HOME LOAN BANKS · An act of July 22, 1932, established twelve regional Home Loan Banks for the purpose of giving financial aid to owners of small homes in distress.[63] These are bankers' banks, membership in which is open to savings and loan associations, insurance companies, banks, and other financial institutions engaged in making home loans. Each bank must have a capital of at least $5,000,000. Member institutions must subscribe for stock in an amount equal to at least 1 per cent of their outstanding loans, and the treasury was authorized to invest up to $125,000,000. The function of the banks is to make loans, both short-term and long-term, to its members, which in turn accommodate home-owners. The Federal Home Loan Bank Board, of five members appointed by the President of the United States, lays out the districts, charters the Home Loan Banks, and has general supervision of the whole system. Each bank is managed by a board of twelve directors, four appointed by the Federal Home Loan Bank Board and eight by the member institutions. In 1943 there were 3774 member institutions, with total assets of $6,045,000,000, to which the Home Loan Banks had advanced a total of $1,025,280,214.[64]

THE HOME OWNERS' LOAN CORPORATION · This was not a bankers' bank but made loans directly to home-owners. It was organized, under authority of an act of June 13, 1933, to supplement the work of the existing Federal Home Loan Banks.[65] Its principal object was the refunding of existing mortgages for longer terms at lower rates. Homes of not more than four families, occupied by the owner and of not more than $20,000 value, were eligible for loans up to 80 per cent of their appraised value.[66] All loans originally were limited to fifteen years, but later the limit was raised to twenty-five; the rate of interest was set at 5 per cent, but later reduced to $4\frac{1}{2}$. The corporation was governed by a board of directors,

[62] S. C. Wallace, op. cit. chap. xxvii.
[63] 47 Stat. 725.
[64] *United States Government Manual, Winter, 1943–1944*, p. 138.
[65] 47 Stat. 725; 48 Stat. 128.
[66] *United States Government Manual, 1945*, (1st ed.), pp. 123–126.

consisting of the members of the Federal Home Loan Bank Board. It was financed by a $200,000,000 stock subscription by the United States Treasury and by bonds which it might issue up to $4,750,000,000. Nearly three hundred local loan offices had been established by 1936, when its lending activities were terminated. Some idea of the magnitude of the corporation's operations may be gained from the fact that it made loans to 1,017,821 home-owners, totaling $3,093,451,321; foreclosed 195,600 properties; and in June, 1943, was still collecting on 737,000 accounts. About 243,000 borrowers and purchasers had paid their accounts in full. The aftermath of the corporation's activities was the collection of loans and interest, the foreclosure of mortgages, and the management and sale of properties thus acquired.[67] The Federal government had become the nation's foremost realtor.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS · Savings and loan associations, chiefly for the purpose of financing home-building, had long been a feature of the State banking systems. In order "to encourage local thrift and local home financing," provision for Federal incorporation was included in the Home Owners' Loan Act of 1933. Such institutions were chartered by the Federal Home Loan Bank Board, were subject to its supervision, and were members of that system of banks. The United States Treasury was authorized to subscribe for stock up to $100,000,000. The keen rivalry with similar State institutions was attested by the fact that late in 1943 the Federal savings and loan associations numbered 1468 and had combined assets of $2,426,000,000.[68]

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION · The Federal Savings and Loan Insurance Corporation was created by the same act and had for its board of trustees the members of the Federal Home Loan Bank Board. Its purpose was to insure the accounts of savings and loan associations, whether chartered by the Federal government or by a State. For this a premium of one fourth of 1 per cent of their total accounts was charged. The limit for each investor was $5000. The corporation was given a capital stock of $100,000,000, to be subscribed by the Home Owners' Loan Corporation, but might raise more funds by the sale of its notes and bonds. Insured institutions had to submit to regulations relating to sales and lending practices. These institutions numbered 2430 on June 30, 1943, and had total assets of $3,880,000,000.[69]

OTHER FEDERAL CREDIT AGENCIES · The picture of Federal credit agencies rapidly changes as new ones are created and the old are discontinued or merged with others. Clustered about the Reconstruction Finance Corporation are half a dozen or more offspring or dependents, chiefly "war babies." Three antedate the war period: the RFC Mortgage Company, to stabilize the market for mortgages on urban business properties; the Federal National Mortgage Association, to aid in the financing of

[67]Ibid. p. 139. [68]Ibid. p. 138. [69]Ibid.

rental housing projects, such as apartments and other multifamily dwellings; and the Disaster Loan Corporation, to provide loans for the victims of floods, droughts, and other catastrophes. The credit offered by the others is designed to help to supply needs occasioned by the war, as indicated by the following names: the Metals Reserve Company, the Rubber Reserve Company, the Defense Supplies Corporation, the Defense Homes Corporation, and the Defense Plant Corporation.

THE FEDERAL LOAN AGENCY · This was established by executive order of April 25, 1939, under authority of an act of Congress in the same year.[70] Under it were grouped fifteen credit agencies, comprising the nonagricultural ones described in the foregoing paragraphs. Its head, the administrator, with a salary of twelve thousand dollars, ranked in power and in prestige with the cabinet members, but had not been admitted to their ranks. It already has been noted that the independent Commodity Credit Corporation and Farm Mortgage Corporation were not included in the Farm Loan Agency but were placed under the Department of Agriculture. Two further Presidential orders of February 24, 1942, in all but name extinguished the Federal Loan Agency. Five of its subsidiaries, all connected with the financing of homes and housing, including the Federal Savings and Loan Insurance Corporation, were transferred to a new National Housing Agency; eleven others, concerned with general and war financing, to the Department of Commerce. The immediate effects of the change, however, were less than they seemed, for Jesse H. Jones was both Federal Loan Administrator and Secretary of Commerce.

FEDERAL INVESTMENTS IN CREDIT ORGANIZATIONS · The combined assets of the forty-six Federal corporations and credit agencies on June 30, 1943, were $27,214,000,000.[71] The proprietarial interest of the United States was $14,804,281,000, but the liabilities otherwise assumed were about twelve billion dollars. Its investment exceeded $200,000,000 in as many as eight different concerns, including the United States Housing Corporation, the Farm Security Administration, the Tennessee Valley Authority, the Reconstruction Finance Corporation, and the United States Maritime Commission.

SUMMARY AND CONCLUSIONS · In the early years of our national history the Federal government chartered in succession two banks in which it was a minority stockholder. After the charter of the second of these expired in 1836, no banks of any kind remained under the auspices of the national government. With the establishment of the national banking system in 1863 began the era of the nationally chartered but privately owned banks,

[70]Created by the President in Reorganization Plan No. I, effective July, 1939; 4 Fed. Regis. 2727.

[71]*Annual Report of the Secretary of the Treasury, 1943*, pp. 704, 705. The Federal investment in such corporations grew from $1,920,560 in 1932 to $8,249,474,000 in 1942. The sharp increase in the next fiscal year was due to the war emergency.

which long shared the field with those chartered by the States. The Federal Reserve Act of 1913 added twelve privately owned banks, endowed with some functions of a public character and with joint governmental and private management. The various land banks, established under an act of 1916, while receiving advances from the Federal Treasury, were privately owned. However, with the establishment of the Federal Farm Loan Board in 1929 the Federal government entered the business of loans and credits extensively. This was followed in 1932 by a temporary agency, the Reconstruction Finance Corporation, which ten years later was operating on a still larger scale. The F. D. Roosevelt administration extended the banking role of the United States government into many other fields and on a constantly expanding scale.

The lending operations are not conducted directly but through chartered government corporations. The government is first a borrower itself, since all the capital which it employs is lent by individual citizens. This in turn is supplied to its banks and credit agencies, which make loans to individual farmers, home-owners, businessmen, co-operatives, or privately owned banks. The government, therefore is in the position of an intermediary, borrowing from those with funds to lend and lending to those with a need for capital. In the process it acts as a risk-taker, a guarantor, and a creator of credit, assuming functions which in times of depression or panic it can perform better than any private agency; for with unlimited taxing powers it has the first claim on the entire assets of the country. In the fields of real-estate and agricultural loans it has incurred great losses, which, had they fallen upon private firms, would have destroyed them. Weaknesses in the position of the government as a banker were shown in the political pressures which forced the interest on farm mortgages below the point of adequate return, the taking over by the Home Owners' Loan Corporation of bad mortgages, and long delays in foreclosures. The losses fall upon the United States Treasury and eventually upon the taxpayers of the entire community, large and small. On the other hand, because of long-term loans at low interest rates many thousands of persons with small incomes have been able to become home-owners and landowners, or else to repay old debts and continue as solvent and productive elements of the population.

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CHAPTER XXXV

# *Foreign Affairs*

A glance at a global map shows the land areas in variegated colors to indicate the location of states and their possessions. The law of medieval feudalism, "No land without its lord," holds good today; for apparently every square mile of the earth's land surface is occupied or claimed by some sovereign body. Dominating the layout in 1939 were the colors of six states or federations: the British Commonwealth of Nations, the French empire, the Soviet Union, China, the United States, and Brazil. Two old, small, and weak states, the Netherlands and Portugal, showed up well because of their vast colonial possessions, as did Italy and Japan because of recent conquests. Splotches of color, varying greatly in size and design, represented the fifty-odd other states.

CHARACTER OF THE MODERN STATE · The appropriation by the stronger states of all the earth's unsettled land areas marked the end of the era of international individualism and laissez faire. No longer may a Marco Polo, John Jacob Astor, or Cecil Rhodes go wherever his courage and strength may take him to explore, trade, fish, or mine precious minerals. The chances are that the whaler, sealer, or big-game hunter, wherever he goes, except on the high seas, will find a "No Trespassing" or "No Hunting without a License" sign. The pre-emption of the world's natural resources by the stronger states is one of the most significant facts of the present international situation.

The modern state cannot refuse to accept responsibility for the material well-being of its people. It furnishes food, shelter, and clothing when necessary, and even employment if private enterprise fails. It undertakes to obtain raw materials from abroad for its factories. If other means fail, it promotes the investments and business ventures of its citizens in foreign lands and attempts to protect them from despoliation. It even may seek new *Lebensraum* for its expanding population, a dangerous move in this day of fixed frontiers and vanished no-man's land.

The modern state, moreover, is an aggregation of power, both physical and moral. The modern business corporation exemplifies what is to be gained by the pooling of persons and property under one management. The state is only the corporation writ large. Its people are marshaled under one set of laws; they yield obedience to one authority; their resources in terms of men and materials are under one command. If, as is usually true, the state is based on nationality, common language, literature, customs, and religion, then the bonds of cohesion are very strong

indeed. Internal co-operation is obtainable without the use of force, and a solid front is presented to rival states.

INTERNATIONAL RELATIONS · The key to an understanding of international relations is the fact that the states have no common superior, owe obedience to no government, and acknowledge as binding only that law which they individually accept. Each is the master of its own household; but as a corollary the force of its laws ends at the boundary line, except for its ships on the high seas. It may permit the entry of persons or goods from abroad under such conditions as it may prescribe, or forbid their entrance altogether; and it likewise may control all movement outward. Naturally, an extreme use of such prerogatives is exceptional, since nations, like individuals, attempt to profit as much as they can by association and dealings with others.

International co-operation is regularized and facilitated by two instruments: the body of rules called international law, and special agreements called treaties or conventions. The former is a set of rules regulating the rights and duties of nations, which has developed from many sources: from the customs of nations, the writings of jurists, special international agreements, and the decisions of courts. While international law is without a common administration, large portions of it, particularly those relating to peacetime relations, are faithfully followed. Treaties, on the other hand, are simple contracts or agreements between states by which each binds itself to do or not to do certain things, to fulfill certain obligations. Any state, of course, may break a treaty without the risk of finding a court summons at its doorstep; but treaties, nevertheless, are an indispensable part of the machinery of international intercourse.

## *AMERICAN FOREIGN POLICY*

*Policy*, as the term is used in politics, refers to the end, or objective, chosen, as well as the program to be followed in attaining it. It has been seen that policy-making in a democracy is properly the function of the legislature; for presumably it is the obligation of that body to write into law those issues on which the party majority in the legislature won the election. In the United States the Chief Executive is much concerned with the making of foreign policy both as a legislator and as the titular head of the state. To him, with the collaboration of Congress, falls the task of choosing the point toward which the ship of state shall be directed and devising the means by which it may safely make the trip.

FUNDAMENTALS OF FOREIGN POLICY · The first aim of foreign policy is to live; the secondary aim, to live well. The first consideration is the security and integrity of the people, territory, and properties at home and abroad. Foreign invasion or even strong menace brings death or disorder to the political organization, abrogates the rights of persons and property,

and places them at the mercy of the invader. Beyond the primary objective of security lie an indefinite number of others: the extension of markets, the securing of raw materials, friendly collaboration, cultural co-operation, the propagation of political views, or the forcible acquisition of new territories for purposes of economic exploitation, colonization, or military strategy. A prudent and nonaggressive nation plans as a minimum to keep on such terms with its neighbors that its independence is not placed in peril, meanwhile attempting to secure for itself a fair opportunity in the markets of the world. A nation's foreign policy, therefore, is conditioned by its vulnerability to attack, the strength of its immediate neighbors, the extent of its natural resources, its industrial organization, and, of course, the character of its people.

THE BASES OF AMERICAN FOREIGN POLICY · Several basic factors are accountable for the characteristic trends in American foreign policy. In spite of the changes in the techniques of modern warfare, the United States is still the most favorably located of all nations from the standpoint of defense. Three thousand miles of water separate it from the warlike nations of Europe, and nine thousand from the coast of Asia. While water may furnish a medium for enemy attack, its defensive value remains great. England was saved from the fate of France only by the twenty-two miles of the Strait of Dover. The land frontiers of the United States join with those of two nations, Canada and Mexico, both peaceful and friendly, the former tied closely to it by cultural bonds, and both destined by climate and population to remain weak militarily. In the entire South American continent there is no nation endowed with sufficient natural resources to constitute a military threat. Japan, which rivals the United States in the security of its location, faces across the sea Russia, one of the greatest military powers, and, more important in the long run, the potentialities of a united China.

INFLUENCE OF NATURAL RESOURCES[1] · The United States is the best endowed of all nations, possibly excepting the Soviet Union, with the natural resources necessary for the works of both war and peace. It is a food-exporting country, particularly in the essential lines of cereals and meats. Large quantities of tropical fruits are imported, but the production of California and Florida would be sufficient to forestall any real hardship in wartime. Sugar is produced on the mainland only in small quantities; but, with the sea lanes open, adequate quantities are available at Hawaii and near-by Cuba. The basic raw materials of modern industry, namely, coal, petroleum, iron ore, copper, and cotton fiber, it possesses in abundance. Several minerals necessary to steel manufacture and other production are lacking. Manganese is obtained chiefly in Brazil, India, and Russia; chromium in India, Turkey, Spain, South Africa, and the East Indies; nickel, across the boundary line in Canada.

[1]F. Simonds and B. Emeny, *The Great Powers in World Affairs: International Relations and Economic Nationalism* (1935), chap. xxviii.

The Japanese conquests during the Second World War cut off in whole or in part three essential commodities: tin, rubber, and quinine. Our tin came chiefly from Malaya, the Dutch East Indies, Ceylon, and Bolivia; rubber, from Malaya and the Dutch East Indies; and quinine from Java (in the last named). Heroic measures for the production of synthetic rubber, the stimulation of rubber production in Brazil, and a step-up of tin production in Bolivia saved the day. Quinine, needed for the troops in the malarial areas, was not obtainable, but atabrine, an unsatisfactory substitute, was used.

ECONOMIC AND POLITICAL FACTORS · The character of the American industrial machine is a further element in the determination of its foreign policy. The educational system and industry itself have trained large numbers of men and women in the techniques of production. The conversion of factories in 1917 and 1941 to large-volume production of the materials of war was a step for which American industrialists had eminent qualifications. Finally, the dominant social and political philosophies of the American people are factors with which the makers of foreign policy must reckon. Whether because of abstract good will or the good fortune of abundant natural resources at home, the American people is unfriendly toward the use of force to secure foreign markets or toward the conquest and ruling of the so-called backward races. There is a general recognition that a strong-arm policy abroad is basically inconsistent with democratic institutions at home.

## *THE FORMULATION OF AMERICAN FOREIGN POLICY*

FOREIGN POLICY IN A DEMOCRACY · The handling of foreign affairs finds democracy at its weakest point. While the final expression of foreign policy in all states is the task of a single person, whether king, dictator, prime minister, president, or foreign secretary, in a democracy this person must keep within the limitations set by public opinion and the legislative body. Long-time commitments cannot be made, or, if made, are subject to repudiation by a new popular majority. The successful conduct of foreign relations calls for full information, a shrewd and realistic understanding of the issues, and oftentimes secrecy and swift decisions. It is difficult for a democratic government to meet those requirements.

At the base of the difficulty is the popular absorption in the problems close at home. The average voter may have a fair conception of how his city and county government are being administered, for the proofs are at his doorstep; but the facts requisite for rational judgments on foreign issues are inadequate. As to the character of the various foreign peoples, their national ambitions, economic needs, and military and naval preparations, he has only the haziest of ideas, if any at all. The mental picture of such matters is generally a compound of myth, romance, prejudice, and

unrealistic stereotypes. Seldom is the picture gray; usually it is of blacks and whites: traditional friends and traditional foes. Public opinion, of course, is no better than the materials of which it is fabricated.

The need for legislative consent to any international agreement (and such consent can hardly be forgone in a democracy) is a handicap. The debate inevitably leads to delay; meanwhile rival states are on the alert; and the proposed agreement may fall through because of advance publicity. An illustration of the efficacy of one-man control of foreign policy was shown in the Russo-German nonaggression pact of August, 1939.[2] The Russian people long had been taught to regard Germany as their most dangerous enemy. A French-British military mission was at Moscow, attempting to negotiate a military alliance, when the news broke that a pact had been signed with Germany, which was doubtless as great a surprise to the Russian public as to the French and British. Germany promptly turned its armies against Poland and France, while Russia gained nearly two years in which to strengthen its forces. This was in sharp contrast to the conduct of foreign relations in the British and French democracies where, in the face of the plain threat from Germany, the divisions in public opinion induced a vacillating foreign policy.

LOCATION OF THE FOREIGN-POLICY POWER · The constitutional agencies for the formulation of foreign policy in the United States are the same as those for domestic policy, but with a different emphasis. The President, as the head of the state, has a pre-eminence in foreign affairs which he cannot claim with respect to internal affairs. The Senate is given a preferred position by virtue of its power to consent to treaties by a two-thirds vote, while the co-operation of Congress as the lawmaking power is necessary to the maintenance of any long-term foreign policy.

POLICY-MAKING POWERS OF THE PRESIDENT · The Constitution of the United States follows the practice of all other nations in giving its Chief Executive the leadership in the formulation of foreign policy.[3] This, however, was not the original plan. The Committee of Detail of the Philadelphia convention, which drafted the greater part of the Constitution, had divided the foreign-relations power between the Senate and the President.[4] To the former was given the power to make treaties and appoint ambassadors, leaving the President only the reception of foreign ambassadors, and its necessary implication, the recognition of foreign governments. When this proposal came before the convention, the strong objections expressed led to its postponement and later reference to the committee of the states. On September 4 this committee brought in a report which in effect passed the leadership to the President. The wording proposed and

[2]S. F. Bemis, *A Diplomatic History of the United States* (Rev. Ed., 1942), p. 836.

[3]The standard authority on this question is Quincy Wright, *The Control of American Foreign Relations* (1922).

[4]M. Farrand, *Records of the Federal Convention*, Vol. II, pp. 392–394.

finally adopted read, "The President, by and with the advice and consent of the Senate, shall have power to make Treaties; and he shall nominate and, by and with the consent of the Senate, shall appoint ambassadors, and other public ministers."[5] The clause empowering him to receive ambassadors was retained. This decision showed a shrewd realization on the part of the framers that the Chief Executive, rather than a numerous body like the Senate, was best fitted to be the "general Guardian of the National interests," as Gouverneur Morris remarked.[6]

JUDICIAL INTERPRETATION · The courts have shown little disposition to circumscribe the President's powers in foreign relations. Executive agreements, which do not need the consent of the Senate, have been upheld.[7] Moreover, the Supreme Court in 1936 ruled that the President, in conducting foreign affairs, is not confined to the enumerated and implied powers of the Constitution. Since the power in foreign affairs had never been held by the States, it could not have been surrendered or limited by them in the Constitution. Instead, the President's power comes from his position as the spokesman of the United States as a member of the society of nations. "In this vast external realm," the Court concluded, "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[8]

PRESIDENTIAL PRONOUNCEMENTS · The President may proclaim his views in messages to Congress and to foreign countries, in letters and interviews, and in speeches to conventions and popular audiences. The doctrine of American self-sufficiency in international affairs came from Washington's Farewell Address; that against entangling alliances, from Jefferson's first inaugural speech; and the momentous Monroe Doctrine was delivered in an annual message to Congress. President Wilson's Fourteen Points for a settlement of the issues of the First World War was delivered to Congress, although it was directed to all the warring parties. Indeed, by the last year of the war Wilson had made himself in effect a world spokesman by successive pronouncements in letters, speeches, and diplomatic notes. F. D. Roosevelt, in a speech at Chicago, October 5, 1937, called attention to the epidemic of lawlessness and aggression in the international realm, and suggested an international "quarantine" of the aggressor nations.[9] Coming in the midst of bitter partisan battles on domestic questions, the warning was discounted and little heeded.

USE OF THE MILITARY AND NAVAL FORCES · The President has it in his power to throw the weight of the military and naval forces into the diplomatic scales. In 1846 President Polk sent an army into the territory be-

[5]September 10, 1877. M. Farrand, op. cit. Vol. II, p. 498.
[6]Ibid. p. 541.
[7]E. S. Corwin, *The President: Office and Powers* (1940), pp. 235–240.
[8]*United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304 (1936).
[9]*Documents on American Foreign Relations* (L. Goodrich, Ed., 1942), Vol. IV, p. 428.

yond the Nueces River, then under dispute with Mexico; and when it was attacked, he announced, "American blood has been shed on American soil." Congress could do nothing else than respond with a formal declaration of war. In 1898, at the time diplomatic pressure was being applied to Spain for the change of the conduct of its war in Cuba, President McKinley ordered the battleship *Maine* to Havana, Cuba, and its destruction in the harbor by an explosion crystallized public opinion in favor of war with Spain. President Theodore Roosevelt, in 1910, as a warning to Japan, which lately had defeated Russia, sent the American battle fleet around the world, with instructions to stop at Australia and our new possession the Philippine Islands. F. D. Roosevelt's executive agreement with Great Britain in the late summer of 1940, trading fifty destroyers for air and naval bases in the British American islands, was of the same character.[10]

ACCESS TO INFORMATION · The President has a further qualification for the making of foreign policy. He has access to information regarding affairs abroad which is available to no other person. The foreign service of the Department of State collects data respecting political and economic conditions in every nation of the world. The confidential reports and recommendations of ambassadors and consuls and the diplomatic correspondence between the United States and foreign nations are all at hand. The delicacy of international intercourse requires that most of this be kept secret. The annual volumes of *Foreign Relations* published by the State Department normally apprise the general public of events which happened twenty years earlier. The publication late in 1943 of the correspondence between the American and Japanese foreign offices, and the digests of the interviews of the American and Japanese ambassadors with the respective foreign ministers, gave the American public for the first time a realization of the serious state of affairs in the months preceding the attack on Pearl Harbor.[11] If the President, day by day, should take the public into his confidence on the state of foreign relations, he would often run the risks of being considered at home an alarmist for political purposes or of precipitating a war abroad. His obligation, as the guardian of the nation's security abroad, is an enormous one, and he often must take action without the benefit of an enlightened public opinion at home.

PRESIDENTIAL AGENTS · Outside the framework of the regular diplomatic service are special agents sent on special missions abroad by the President, chosen without the consent of the Senate, and paid out of a secret contingent fund for which no accounting is required by law.[12] One of the most famous was the political friend and confidant of President Woodrow Wilson, Colonel House, who was given a commission during the First World War as a sort of roving ambassador of the United States.

[10]S. F. Bemis, op. cit. pp. 233, 234, 444, 856.
[11]*United States News*, Supplement, "Prelude to Infamy" (1943).
[12]H. M. Wriston, *Executive Agents in American Foreign Relations* (1929), passim.

Washington was the first President to exercise this implied power by sending Gouverneur Morris, famed as the final draftsman of the Constitution, to England on a special mission in 1789. The peace with Mexico in 1847 was negotiated by a special agent, Nicholas Trist; and Commodore Perry, who opened Japan to our commerce by force, had the same status. A committee of the Senate reported that by 1887 four hundred and thirty-eight such special agents had been employed, only thirty-two of whom had had the consent of the Senate. Against this practice the Senate has continued to protest, generally taking the attitude that it is a lawless, unconstitutional usurpation. The special agent meets the need of the President for speedy action by one specially qualified for emergency tasks; avoids delay and debate in the Senate; and ensures secrecy for the negotiations. The practice will doubtless continue as in the past.

RECOGNITION[13] · The President's power to receive foreign representatives is the principal means by which he may recognize or refuse to recognize the existence of a government in a foreign country. The responsibility is great; for the recognition of a new government based on revolution might well be regarded by the rival government or parent state as a hostile act. President Washington in 1793 gave recognition to the new French republican government, and President Monroe in 1822 recognized the independence of the new South American republics. It has been seen that President Theodore Roosevelt recognized the independence of the republic of Panama within thirty-six hours of its proclamation. Woodrow Wilson refused to recognize the regime of President Huerta in Mexico, although apparently it was well established, because it was based on violence and bloodshed. This decision isolated Huerta financially and economically and led to his speedy overthrow. Secretary Stimson, under Hoover, refused to recognize the acquisition of territories by force, specifically Japan's conquests in Manchuria and China; and this policy has been generally followed since. Successive American Presidents refused to recognize the Russian Soviet Republic from its founding in 1919 until 1933, when F. D. Roosevelt reversed the earlier stand.[14] For strong militaristic nations in close proximity a choice must be made soon between recognition and probable hostile action on the part of the nation whose acts are not recognized. The isolated position of the United States makes the nonrecognition policy relatively safe.

EXECUTIVE AGREEMENTS · Although treaties require the consent of two thirds of the Senate, the President acting alone may make a restricted class of agreements with foreign states.[15] An executive agreement binds only the President who makes it, but may amount to such a commitment as to

[13]J. B. Moore, *A Digest of International Law* (8 vols.) (Washington, 1906), Vol. I, pp. 244–247; E. S. Corwin, *The President's Control of Foreign Relations* (1917), pp. 71–83.

[14]S. F. Bemis, op. cit. pp. 735, 736.

[15]Q. Wright, op. cit. pp. 237–246; E. S. Corwin, *The President: Office and Powers*, pp. 235–238.

constitute a moral obligation upon future governments. The right to make executive agreements is an implied one, but rests upon ample grounds. It may result from the President's obligation as head of the administration to see that the laws are faithfully executed; for instance, agreements for the settlement of claims by American citizens against foreign governments, or the execution of treaties. Through his power as commander in chief the President may make agreements with an enemy state for the exchange of prisoners and for armistices. He may proceed, under power delegated to him by Congress, to make agreements as specified on such matters as patents and copyrights, postal service, or reciprocal tariffs. His power to "receive ambassadors and other public ministers" and to negotiate treaties opens the way for political agreements which may go far beyond the limits of temporary administrative arrangements. The Lansing-Ishii exchange of notes in 1917 contained the expression "The United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous," which, while counterbalanced by further expressions in favor of the open door and the integrity of China, had the net effect of weakening the American position in the Far East.

How far may the executive agreement be used to by-pass the Senate's power in foreign relations? The right answer undoubtedly is, Not very far; just as no foreign policy can long be maintained without the cooperation not only of the Senate but of Congress as a whole. The armistice of November 11, 1918, for instance, contained much that later was embodied in the Treaty of Versailles, only to be rejected by the Senate. Perhaps no more extreme use may be made of the executive agreement than that of Theodore Roosevelt with Santo Domingo in 1905, which provided in effect for an American financial receivership. When the Senate refused consent to such a treaty, the President proceeded to administer it as an executive agreement; and after two years the Senate fell into line. How far the President may go in the future with these "little treaties" will depend much on his qualities of leadership, the character of the issue, and the surrounding circumstances.

TREATIES: ADVICE AND CONSENT OF THE SENATE · Under the Articles of Confederation treaties were made by Congress, with the concurrence of nine of the thirteen States there represented. It was an easy step to shift a portion of this power to the Senate. After the example of the colonial charters this body was expected to act as an executive advisory council to the President. There the rights of the States would be safeguarded by their equal representation. That the Senate eventually would take on the character of a purely legislative body co-ordinate with the House of Representatives seems not to have been foreseen. The setting up of another check-and-balance feature was an added motive. That this would result in fewer treaties was recognized, but was not regarded as a fault. "The more dif-

ficulty in making treaties, the more value will be set on them," Gouverneur Morris remarked.[16]

NEGOTIATION · The first steps in the making of a treaty are feelers, followed by direct negotiation.[17] In such a process full information on the part of the negotiators, as well as conditions of secrecy, is necessary. These the President and the Department of State, with its staff of trained officials and its diplomatic service abroad, can furnish; but the President alone may make the final decision as to what the United States may offer in the treaty. No President since Washington has entered the Senate chamber to ask its aid in the negotiation of treaties. Presidents or their Secretaries of State from time to time have asked the opinions of individual Senators. Wilson, for instance, in February, 1919, conferred with the members of the Senate and House foreign-affairs committees on the text of the Treaty of Versailles as completed to that date, and carried some of their suggestions back to Paris. Joint or concurrent resolutions originating in either house have sometimes been adopted urging the President to begin certain negotiations, but these are strictly without binding effect.

INFLUENCE OF THE SENATE · While it has largely lost its power to advise, the Senate has fully maintained its constitutional power to consent. Down to 1922 it had refused consent to twenty out of six hundred and fifty treaties negotiated and signed, and had made amendments or reservations to more than one hundred.[18] When this has been done, the President may send the document back to the other party and ask its consent to the change; or he may regard the Senate's action as a rejection of the treaty and let the matter rest there. For instance, when the Senate in 1911 plastered a series of arbitration treaties with reservations and amendments, President Taft indignantly withdrew them from further consideration. "So I put them on the shelf," he said, "and let the dust accumulate on them in the hope that the Senators might change their minds, or that the people might change the Senate; instead of which they changed me."[19]

Some of the treaties which the Senate refused outright to ratify were four for the annexation of territory: Texas in 1844, Hawaii in 1855, the Virgin Islands in 1868, and Santo Domingo in 1869; in all these cases, except that of Santo Domingo, the desired action was accomplished later by a simple joint resolution of Congress. Two important arbitration treaties with Great Britain, in 1869 and 1897, likewise fell by the wayside. The most notable use of the Senate's negative was the defeat of the Treaty of Versailles on the eve of a Presidential campaign in 1920, which made necessary the making of a peace with Germany apart from our associates in the war.

[16]M. Farrand, op. cit. Vol. II, p. 393.

[17]Q. Wright, op. cit. pp. 248–251; D. F. Fleming, *The Treaty Veto of the American Senate* (1930), chap. ii.

[18]Q. Wright, op. cit. p. 252; W. S. Holt, *Treaties Defeated by the Senate* (1933), passim.

[19]W. H. Taft, *The United States and Peace* (1914), chap. iii.

Many students of American foreign relations regard the requirement for the Senate's consent by a two-thirds vote to the making of a treaty as inimical to the best interests of the United States. The chief reasons for the original adoption of the rule have ceased to exist. The Senate has lost its character as an advisory body; its numbers, grown from twenty-two to ninety-six, are too great for purposes of consultation and secrecy; and the doctrine of States' rights has lost its force. Unforeseen was the development of the Senate as a body in which voting is chiefly on party lines, making the two-thirds rule a hazard for any treaty that may be submitted. A careful student of the part played by the Senate concluded that "the ratification of nearly every important treaty had been endangered by a constitutional system which, instead of permitting a decision solely on the merits of the question, produces impotence and friction."[20] The power of a Senate minority to reject a treaty seems inconsistent with other constitutional practices as they have developed by custom. The substitution of "consent" through joint action of the two houses by a simple majority vote would properly represent public opinion and give proof of the willingness of Congress to support the treaty by proper legislation.

POLICY-MAKING POWERS OF CONGRESS · Foreign policy in the long run must conform to the will of Congress.[21] As a representative body Congress reflects the will of the people, and only from it can come the funds necessary to the execution of such agreements with foreign countries as the President and the Senate may make. Moreover, legislation on domestic questions inevitably has repercussions on relations with other nations. Measures for the promotion of home manufacture may promote such competition with foreign rivals as to induce hostile political combinations. Legislation for the revaluation of the currency may unsettle the currency and cause runs on banks in other countries; government purchase of silver above the market price may cause hardships in those countries where silver is the basis of the currency. The insistence of Congress on the repayment of debts owed the United States by its allies of the First World War deeply affected the general diplomatic dealings with France, England, Russia, and other countries. Specific instances in which the action of Congress directly molded foreign policy were the annexation of Texas and Hawaii and the denunciation of certain treaties with Great Britain by joint resolution; the passage of legislation which had the effect of rendering treaties ineffective, such as the Chinese exclusion laws of 1879, 1882, and 1888, which were in contravention of treaties with China made in 1868 and 1880; refusals to appropriate money to carry out international agreements; legislation giving independence to the Philippine Islands; and the delegation of authority to the President to make reciprocal tariff agreements with foreign countries.

[20]W. S. Holt, op. cit. p. 305.
[21]Q. Wright, op. cit. pp. 275, 276, 278–282, 289–293.

## *SPECIFIC AMERICAN FOREIGN POLICIES*

The foreign policy of the United States since its entrance into the sisterhood of nations has been one thing at one period and something else at others. It cannot be said that the present policies are the culmination of an unbroken and consistent development. Rather some of the distinguishable policies have been dominant for a time, only to be overshadowed or discarded and possibly revived again. None, however, can be dismissed as without consequence today; for each represents a particular national interest whose re-emergence may again bring that particular policy to the forefront.

POLITICAL SELF-SUFFICIENCY OR ISOLATION · Logically a nation's international relations may run from one extreme to the other: from habitual concert with others by means of formal alliances to a self-imposed rule of no political commitments whatsoever. *Isolation* is the term usually applied to the latter policy. Political isolation, it must be noted, does not necessarily mean commercial or social detachment from the rest of the world. Although until the nineteenth century both China and Japan pursued policies nearly approximating complete isolation, since the development of rapid transportation no nation has followed such a program.

Nevertheless, America's foreign policy has often been referred to as traditionally isolationist. It acquired this character in the nation's early years, when the potential military power was small because of a meager population, and the Atlantic Ocean, traversed only by sailing vessels, created an actual isolation. The pronouncements of the early Presidents conformed to the facts of the situation. Washington, in his Farewell Address, counseled:[22]

> The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little *political* connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop. . . . Our detached and distant situation invites and enables us to pursue such a course. . . . Why forego the advantages of so peculiar a situation. Why quit our own to stand upon foreign ground? It is our true policy to steer clear of permanent alliances with any portion of the foreign world. . . . Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Commercial intercourse, to be sure, was to be sought with all nations, "neither seeking nor granting exclusive favors or preferences," encouraging "by gentle means the streams of commerce, but forcing nothing." Washington's advice, in short, was to keep political ties with Europe at a minimum; to avoid permanent alliances, using temporary ones where

[22] J. D. Richardson, *Messages and Papers of the Presidents*, Vol. I, pp. 222, 223.

necessary; and by fair means to encourage commerce with all nations. This was not a doctrine of either political or commercial isolation, but rather a counsel of tempered self-reliance.

Jefferson, in his inaugural address of 1801, affirmed Washington's stand in the words "peace, commerce, and honest friendship with all nations, entangling alliances with none."[23] The expressions of these two men often have been cited as proof of their hostility to all political engagements with other nations, temporary or long-term.

NEUTRALITY AND NEUTRAL RIGHTS · The United States started its career with an "entangling alliance," which had been much to its advantage. On the basis of the treaty of alliance with France in 1778 a French army and fleet had been sent to America, with whose aid the British army of General Cornwallis was besieged at Yorktown and forced to surrender. Under the terms of a supplementary treaty of the following year, prizes taken by the French in war might be brought into American ports for condemnation. When war broke out in 1793 between the new French Republic and Great Britain and the other chief powers of Europe, the French minister to the United States, Citizen Genêt, set up prize courts and began to issue commissions to privateers. This, quite naturally, would soon have brought retaliation on the part of Great Britain and involved us in the general European war. President Washington, on the basis of the country's military weakness and lack of vital interest in European affairs, took measures to avoid such embroilment. Genêt's activities were suppressed, and his recall was demanded. Of more lasting importance was Washington's neutrality proclamation of April 22, 1793.

DEFINITION OF NEUTRALITY · Neutrality, as has been said, "implies two countries at war, and a third in friendship with both."[24] Washington's proclamation assumed the right of a nation to stand aside as a spectator while a war between other nations was in progress. Though Grotius, the first comprehensive writer on international law, had included a short chapter on the rights of neutrals in his treatise *De Jure Belli ac Pacis*, the practices of nations heretofore had given little consideration to neutrals. The various combatants yielded just as much respect to the territorial and other rights of the onlookers as was deemed advantageous. Washington announced that the United States would "with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers."[25] Citizens were admonished to refrain from all acts contrary to such a course and were warned that no protection would be given those punished by either belligerent for warlike acts, particularly the carrying of contraband goods. In the following year Congress passed a neutrality act embodying in greater detail the acts prohibited.

[23]Ibid. p. 323.
[24]J. B. Moore, op. cit. Vol. VII, p. 860; *Case of the Resolution*, 2 Dallas 19, 21 (1781).
[25]G. G. Wilson, *On International Law* (2d ed., 1927), p. 433.

CHAMPIONSHIP OF NEUTRAL RIGHTS · It became the practice at the outbreak of a war for a nation deciding to remain outside the conflict to issue a proclamation of neutrality, both as a notice to the warring nations and as a warning to its own citizens. Still more important was the movement, in which the United States assumed a leadership, to establish a body of law defining the rights and duties both of neutrals and of belligerents in time of war. Among the duties imposed on the neutral by international law are these: to refrain from giving military assistance to either party, including the furnishing of troops, ships, and military supplies; to prevent the use of its territory as a base of hostile operations against either party or the enlistment of troops or fitting out of ships of war; to make no monetary contributions by gifts or loans to any belligerent.[26] The individual citizen of the neutral state, however, is not so closely circumscribed. He may make loans or sell materials of war to belligerents, subject to the risks of capture or loss. War materials destined for a belligerent nation, and the vessel in which they are carried, are subject to capture and confiscation; but neutral goods not contraband of war, though destined for enemy territory, are not subject to capture. The blockade of a country, however, must be respected, and all ships and goods attempting to pass through it are subject to capture and confiscation.

NEUTRALITY IN THE FIRST WORLD WAR · President Wilson, at the outbreak of war in 1914, issued the customary neutrality proclamation. American citizens were admonished to be "neutral, in fact as well as name; impartial in thought as well as deed."[27] During the first two and a half years the government was in constant controversy both with Great Britain, the dominant naval power, and Germany respecting neutral rights. However, Germany's unrestricted submarine warfare, resulting in the loss of American lives and the stagnation of our commerce, was the occasion for the abandonment of neutrality and a declaration of war on the Central Powers.

POSTWAR NEUTRALITY · American participation in the First World War ensured the military success of the Allies. The failure, however, to write a treaty of peace on the idealistic plane advocated by President Wilson was one of the factors resulting in great disillusionment for the people of the United States. The popular trend toward noncollaboration with other nations became increasingly marked; and when Hitler's accession to power in Germany, early in 1933, foreshadowed another world conflict, public opinion was set to resist American involvement. The policies of the President and Congress were vacillating and at times contradictory, but

[26]G. G. Wilson, op. cit. pp. 247–250, 442–458. The law of neutrality was elaborated in various treaties and conventions, including the Declaration of Paris of 1856, the Hague conventions of 1899 and 1907, and the Declaration of London of 1909. Ibid. Appendices I, III, IV.

[27]For President Wilson's neutrality proclamation of 1914 cf. ibid. pp. 441, 442. Wilson's struggle to maintain neutrality in the First World War is summarized in S. F. Bemis, op. cit. chap. xxxii.

truly reflected the confused state of the public mind. In the effort to maintain the nation's neutrality, legislation went to the point of abandoning many of the rights of neutrals painfully acquired in the course of more than a century.[28] Space does not permit an elaboration but only a brief mention of some of the measures, which were designed to seal off the United States from the contamination of the coming world conflict.

NEUTRALITY LEGISLATION · One of the widely held beliefs was that the United States had entered the First World War chiefly to save the loans made by American bankers to Great Britain. To forestall such a motive in the future, Congress, in April, 1934, passed the so-called Johnson Act, which forbade any American citizen to lend money to a country in default of its debts to the United States government, on pain of five years' imprisonment or ten thousand dollars' fine.[29] Four neutrality laws, those of 1935, 1936, 1937, and 1939, contained drastic provisions of an isolationist character. A six months' embargo was placed on the shipment of all arms and implements of war to belligerents; and American citizens were forbidden to travel on the ships of belligerents except at their own risk. A munitions control board was set up to license the export of arms to nonwarring nations. The fourth act, passed November 4, 1939, after the outbreak of the Second World War, empowered the President to delimit the combat zones from which American vessels were excluded.[30] He accordingly designated an area of a radius of about three hundred and fifty miles surrounding Great Britain, including neutral Denmark, Belgium, and Holland. Later the zone was extended to include Scandinavia and the Mediterranean and Red Seas. The arming of merchant vessels of the United States was prohibited, and foreign submarines or armed merchant vessels might be barred from American territorial waters.

THE BREAKDOWN OF NEUTRALITY · The conquest of Norway, the Low Countries, and France in the spring of 1940, and the signing of an alliance by Japan with Germany and Italy in September, plainly directed toward the United States, aroused the American people to the threat from the totalitarian powers. The incongruity of the legislation which deprived England and France of the right, accorded by international law, to purchase war materials was apparent. Late in May, 1940, the Department of State amended the regulations under the Neutrality Act, permitting delivery of American planes to the maritime provinces of Canada. In December the British purchasing commission in the United States was advised that it might place orders for war materials on a large scale with assurance that new legislation would authorize the extension of credits. On March 11,

[28]Denys Smith, *America and the Axis War* (1942), chaps. iv, viii, and ix, and J. H. Latané and D. W. Wainhouse, *American Foreign Policy* (1940), chap. xxxix, give the history of American neutrality legislation between the two wars.

[29]48 Stat. 574.

[30]54 Stat. 4.

1941, in response to the President's request, Congress passed the Lend-Lease Act, which in effect placed the credit of the United States Treasury behind the war efforts of Great Britain or any other state warring on the Axis powers. The following day Congress made the first appropriation of seven billion dollars under the act. By this step the United States passed from the position of extreme neutrality to that of near belligerency.

## *THE INDEPENDENCE OF THE WESTERN HEMISPHERE*

THE MONROE DOCTRINE · The political independence of the Western Hemisphere was the chief objective of the so-called Monroe Doctrine. In 1823 the principal powers of continental Europe, banded in the Holy Alliance, were threatening to aid Spain and Portugal in reconquering their American colonies, which lately had revolted and established their independence. These together comprised a vast area, all of South America except the Guianas, and all of North America west and south of the Louisiana Purchase. Both the United States and England feared that such intervention might result in the allocation of large territories to Austria, France, and Russia. The British foreign minister, George Canning, proposed that the United States and Great Britain make a joint declaration opposing the transfer of territory to any country other than Spain, which obviously was too weak to make the conquest itself. The proposition at first was well received; but upon the insistence of the Secretary of State, John Quincy Adams, the United States acted alone.

In his annual message to Congress, on December 2, 1823, President Monroe made the famous declaration which bears his name.[31] He said, in substance, that the United States had refrained from participation in European wars, as not comporting with its policy. But with the affairs of this hemisphere the United States was of necessity more immediately concerned. This policy was dictated by the sharp differences between the American and European political systems, as well as by considerations of defense. It would be impossible to extend the political systems of the allied powers to the American continent without endangering the peace and happiness of the United States. Out of these considerations flowed the following warning:

> We owe it therefore to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration of just principles, acknowledged, we

[31]Seventh Annual Message, December 2, 1823; J. D. Richardson, op. cit. p. 218.

could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States.

This declaration, which meant, in short, "America for the Americans," has remained throughout the basic policy of the United States. Tacitly accepted by Great Britain, whose fleets for many years dominated the Atlantic Ocean, it has been successful in warding off the conquest of Latin-American territory by any European country. It is true that during our own Civil War the French set up a monarchy in Mexico headed by an Austrian prince, the Archduke Ferdinand Maximilian; but his empire collapsed soon after the French army, in response to American pressure, had been withdrawn. Not an inch of Western Hemisphere territory which was free in 1823 has fallen under the political domination of a non-American power.

LATER INTERPRETATIONS · Though the essentials of the Monroe Doctrine as originally expounded have remained unchanged, from time to time they have been refined and reinterpreted. In the course of the British-Venezuelan boundary dispute, in 1895, the American Secretary of State, Richard Olney, made the extreme assertion in a note to Great Britain: "Today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition."[32] For nearly two decades after the Spanish-American War, of 1898, the United States seemed disposed to regard itself not only as the protector of the Latin-American republics from external aggression but also as a policeman to settle their internal affairs in case of disorder. At various times it sent armed forces into Cuba, Haiti, Santo Domingo, Nicaragua, and San Salvador, to restore order or to aid in the collection of debts owed foreign countries or their citizens.

The Woodrow Wilson administration began the retreat from the extreme claim of guardianship. When, in 1915, his recommendation to the two warring factions in Mexico to make peace was without avail, President Wilson sought to share the responsibility for settling the civil war with certain others of the Latin-American republics. Representatives of six of these, including Argentina, Brazil, and Chile, sent a note to the Mexican leaders, urging their collaboration in a new provisional government; and their later recommendation that the government of General Venustiano Carranza be recognized was followed by the United States.[33]

Although the Monroe Doctrine is only a unilateral policy of the United States and has never received formal acceptance by other nations as international law, no European state since the German threat to Santo Domingo in 1914 has attempted to apply force to an American republic, or vigorously

[32]S. Richard Olney to Thomas E. Bayard, July 20, 1895, *Papers Relating to the Foreign Relations of the United States* (Washington, 1896), Pt. I, p. 558.

[33]S. F. Bemis, op. cit. pp. 549, 550.

pressed a claim without first consulting the United States. Article XXI of the Covenant of the League of Nations, which stated that nothing therein should be deemed to affect the validity of such "regional understandings" as the Monroe Doctrine, may be regarded, however, as a back-handed recognition of its binding force.

## *PAN-AMERICANISM*

In spite of the belligerent sound of the term, *Pan-Americanism* is only a name to cover a policy, fostered by the United States, whose object is a maximum of co-operation between the free states of the Western Hemisphere. The South American hero and liberator Simón Bolívar, when president of Peru, had called a conference of the American republics to meet in 1826 at Panama; but owing to obstruction in Congress the United States delegates appointed by President John Quincy Adams never participated. While the Pan-American movement on the whole has furnished an interesting example of international co-operation, the difficulties to be overcome have not been slight. The cultural and religious ties of Latin-America are primarily with the continent of Europe; while its resources of raw materials draw it closely to the manufacturing states of western Europe. In spite of democratic constitutions, dictatorial or oligarchic government prevails in about two thirds of the republics. Fear of North American aggression is a constant impediment to co-operative action with the United States.

THE INTERNATIONAL CONFERENCE OF AMERICAN STATES · Until the formulation of the Act of Chapultepec in 1945, periodical and special conferences, rather than a formal statute such as the Covenant of the League of Nations, were the device governing Pan-American co-operation.[34] The Secretary of State, James G. Blaine, in 1881 had suggested the calling of a conference to consider means for the peaceful settlement of international disputes; but not until the winter of 1889–1890 did the first one meet. Others followed at five-year intervals, except for the interruption of the First World War. The important eighth conference met at Lima, Peru, in 1933; since then there have been a regular meeting at Montevideo in 1938 and special meetings at Panama in 1939, Havana in 1940, and Mexico City in 1945. At the last named it was voted to hold subsequent meetings quadrennially.

THE PAN-AMERICAN UNION · A permanent organization, the Pan-American Union, serves to give continuity to the co-operative efforts of the American states. The International Bureau of American Republics was established at Washington in 1890, and reorganized as the Pan-American Union at the fourth conference, held in 1910 at Buenos Aires.[35] The governing board was composed of the ambassadors of the twenty-one republics

[34]The Department of State, *Bulletin*, March 4, 1945, pp. 339–340.

[35]G. H. Stuart, *American Diplomatic and Consular Practice* (1936), chap. i.

at Washington and the Secretary of State of the United States, who served as chairman. Under the terms of the agreement reached by the Mexico City Conference in 1945 the board is to be made up of delegates, with the rank of ambassador, appointed by each state for this purpose alone, and the chairman is to be chosen annually by these delegates from among their own number. The board elects a director-general and an assistant director, who are in general charge of a secretariat of a hundred or more, including editors, trade experts, translators, and clerks. There are a dozen or more technical divisions, such as those of intellectual co-operation, travel, music, and agricultural co-operation. Illustrated monthly bulletins in English, Spanish, and Portuguese are prepared and distributed among the member nations. The staff of the Union is housed in the beautiful Pan-American Building in Washington, the gift of Andrew Carnegie.

WORK OF THE CONFERENCES · The accomplishments of these conferences make an impressive total.[36] The conferences have drafted and sponsored treaties of arbitration, conciliation, and inquiry, which in some cases have been accepted by most member states. Among these is the Inter-American Arbitration Treaty of 1929, which binds the parties to arbitrate all disputes of a juridical character, and the Antiwar Treaty of 1933, which condemns wars of aggression, pledges all parties to settle their disputes by pacific means, and debars all territorial changes made by force. Among the matters which the conferences have considered are the codification of international law, the protection of the property rights of aliens, intervention for the purpose of collecting debts, reciprocal trade agreements, treaties for the removal of trade barriers, and the construction of an intercontinental highway. They have considered also measures for protection from tropical diseases, the exchange of professors and students among the colleges, and the protection of labor. The conferences and the Pan-American Union throughout have vigorously backed projects for cultural co-operation, and have done much to bring about a better understanding between two such diverse civilizations as the Spanish and the North American.

THE "GOOD NEIGHBOR" POLICY · The existing policy of Western Hemisphere co-operation received a rechristening as the "good neighbor" policy at the hands of President F. D. Roosevelt in his inaugural speech of 1933. The United States, he said, would "dedicate this Nation to the policy of the Good Neighbor—the Neighbor who resolutely respects himself and, because he does so, respects the rights of others."[37] Benevolence and altruism, it seems, were to be substituted for hard bargaining and sharp dealing. Early manifestations of the new policy were the cancellation by treaty, May 29, 1934, of the Platt Amendment of the Cuban constitution, and the removal the same year of the marines from Haiti. These, however, were

[36] B. H. Williams, *American Diplomacy: Policies and Practice* (1936), chap. vii.

[37] *The Public Papers and Addresses of Franklin D. Roosevelt* (S. I. Rosenman, Ed., 1938–1941), Vol. I, p. 14, March 4, 1933.

small matters when compared with the extension of credit to the Latin-American states through the Federal Export-Import Bank, whose capital was expanded by law in the summer of 1940 from two hundred thousand dollars to seven hundred thousand dollars. Loans were made for a great variety of purposes, including the financing of agriculture, mining, and steel manufacturing (in Brazil); marketing; and the making of internal improvements. The risk-taking now fell to the American taxpayer instead of the private investor. The vast expansion of credit was justified as a war measure: to stimulate production, counteract Axis influence, and win favor. The effect on foreign relations when some future Congress may insist on payment can hardly be foreseen.

LATER CONFERENCES · Elaborate programs came before the conferences staged after the proclamation of the "good neighbor" policy. The regular conference at Montevideo in December, 1933, drew up a Convention on the Rights and Duties of States, which included the provision "No state has the right to intervene in the internal or external affairs of another." A special conference held at Buenos Aires in December, 1936, adopted a Peace Convention, which pledged the members to "consult together for the purpose of finding and adopting methods of peaceful co-operation" if the peace of the American continent should be threatened. The regular Lima conference of 1938 adopted a number of important resolutions. It was agreed that if any republic were threatened from the outside, all should take common action against the aggressor. The special conference which met at Panama on September 23, 1939, attempted to set up a vast "zone of security" in the high seas and territorial waters about the Americas, from which the ships of the belligerents were to be excluded. This proved a futile gesture.[38] The occasion for the second of the special conferences, held at Havana in July, 1940, was concern over the fate of the colonies of France and Holland in this hemisphere after the conquest of the home countries by the Nazis. The United States already had notified the Axis powers that it would recognize no transfer of territory in this hemisphere from one European power to another. The Havana conference adopted a similar resolution, and accepted Pan-American responsibility for the administration of such motherless colonies as might be set adrift. The Act of Chapultepec, of the Mexico City conference of March, 1945, was in the nature of a charter reaffirming the principles of co-operation made in previous conferences and agreeing upon methods of common action against any aggressor. The conclusion of a treaty to authorize the "use of armed force to repel aggression" was recommended.

NORTH AMERICAN AND CARIBBEAN SUPREMACY · While the United States has receded from the claims of overlordship under the Monroe Doctrine asserted by Olney and Theodore Roosevelt, it has taken care not

[38] *The Public Papers and Addresses of Franklin D. Roosevelt* (S. I. Rosenman, Ed., 1938–1941), Vol. I, pp. 220–223, 278–280.

to weaken its position in the Caribbean area. The reasons are primarily those of defense. The Panama Canal, the key to American defense, must be protected at all costs. The frequent interventions by force in the small republics of that region, beginning shortly after the acquisition of the Canal Zone, were motivated by the desire to keep order and give no excuse to European nations for intervention. Submarine or airplane bases anywhere in the territory down to the Guianas would constitute a threat not only to the Panama Canal but to the United States proper. The declaration of the United States, supported by the Havana meeting of the American republics in 1940, that no transfers of Dutch or French territory to another non-American power should be recognized has been noted already. The treaty of 1903 with the republic of Panama not only gave the United States a ten-mile zone across the Isthmus but authorized the United States to use, occupy, or control any other lands or waters beyond it which might be necessary for the operation or defense of the Canal. In October, 1941, President Arnulfo Arias, of Panama, who had revised the constitution to give himself greater powers and had shown a hostile attitude toward the United States, was displaced by a peaceful revolution.

In 1917 the United States extended its territory in the Caribbean by the purchase of the Danish West Indies, and all serious talk of independence for Puerto Rico has ceased. While Canada, as a member of the strong British Commonwealth of Nations, has been outside the purview of the Monroe Doctrine, the establishment of any political or military power there inimical to the United States would not be countenanced. President F. D. Roosevelt created a mild sensation in a speech on August 18, 1938, at Queen's University, Kingston, Ontario, when he said, "I give to you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other Empire [than the British]."[39]

## *THE INTEGRITY OF CHINA AND THE "OPEN DOOR"*

Facing Asia across the waters of the Pacific, the United States necessarily has an interest in the affairs of that continent. The New England sailing vessels early in our history demonstrated what profits might accrue from trade with wealthy and populous China; and the acquisition of the Philippine Islands in 1898 made the United States a political power in the Orient. Aside from altruistic motives, the interests of the United States are best served by a balance of power in the Far East. The progressive ousting of American and British trade, culminating in 1941 in the Japanese attack, was due to the inability of China, the United States, Great Britain, and Russia to counterbalance the greatly augmented power of Japan.

THE "OPEN DOOR" · In 1898 England, France, Russia, and Japan were extending their spheres of influence in China, and Germany had just en-

[39] *Documents on American Foreign Relations* (L. Goodrich, Ed., 1942), Vol. IV, p. 428.

tered the scramble. It appeared that soon China would be entirely divided among them, with the probable consequence of the exclusion of all other nations from its trade, or their admission only on such terms as the conquerors might grant. The Secretary of State, John Hay, in 1899, accordingly sent strong notes to the various occupying powers, demanding an equality of trade opportunities, including tariffs, railway rates, and other commercial charges, within the leased and occupied zones. This "open door" policy was finally agreed to by all the powers, if reluctantly by some.[40] The year following the intervention of the powers in the Boxer Rebellion, Hay sent other notes urging the preservation of the territorial integrity of China and its political independence, and the easing of the extorted reparations load. The Nine-Power Treaty of Washington (1922) pledged all those signing it to respect the sovereignty, independence, and territorial integrity of China and to co-operate in maintaining equal trade opportunities for all.

THE CLOSED DOOR · It had become evident even before the First World War that Japan was the chief obstacle to the fulfillment of these policies. Japan had joined the Allied powers in 1914, speedily ejected the Germans from their concessions in China, and captured the German Pacific islands north and east of the Philippines. With all the great powers preoccupied with the war in Europe, Japan, in January, 1915, presented to helpless China its famous Twenty-One demands, which would have made that country a dependency and protectorate.[41] Intervention on the part of the United States forced Japan to make a partial retraction, but left it in a position of dominance. The Lansing-Ischii agreement, of November 2, 1917, recognized the "special interests" of Japan in China, but reaffirmed the principles of the "open door" and Chinese independence and territorial integrity. The Nine-Power Treaty, of 1922, recognized the existing possessions of the powers and pledged that no new fortifications or naval bases should be established in those possessions. Japan, in a separate treaty with China, agreed to the speedy evacuation of Shantung province. The principles of the "open door" and Chinese independence were reaffirmed.

In 1931, with its invasion of Manchuria, Japan began the steady march which resulted in its conquest of almost the entire seacoast of China, the eviction of the United States and the European powers, and the slamming shut of the "open door." Early in December, 1937, the American gunboat *Panay* was sunk in the Yangtze River by Japanese war planes. The utter defeat of Japan in 1945 and the prospective resurgence of China indicate the triumph of the "open-door" policy for China and the entire Far East.

[40]J. W. Foster, *A Century of American Diplomacy* (1900), pp. 288–292; J. B. Moore, *The Principles of American Diplomacy* (1918), pp. 172–184.

[41]S. F. Bemis, op. cit. pp. 680–684.

## *THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES*

From the memorable words of Washington's Farewell Address "Observe good faith and justice toward all nations. Cultivate peace and harmony with all" to F. D. Roosevelt's pronouncement of the "good neighbor" sentiment, American Presidents and Secretaries of State have consistently given voice to a policy of peace. The United States, it is true, has been more favorably situated than any other strong nation, by reason of natural resources and geographical location, to follow the path of peace. In very few instances have controversies arisen with foreign nations in which it would have been to its advantage to engage in war. Since Washington's inauguration the United States has engaged in five declared wars with foreign nations, amounting to only ten years out of one hundred and fifty-six. Two of these wars, those with Mexico and Spain, resulted in the acquisition of territory.

ARBITRATION · In the scheme of arbitration the issues in a dispute are referred to an unbiased third party for decision.[42] One of the earliest authorizations for its use was in Jay's treaty of 1794 between the United States and Great Britain. With this as a precedent the United States in subsequent years submitted to arbitration various disputes with foreign countries. Of these the most famous was the American claim for damages against Great Britain for the building of a Confederate raider in her ports. An arbitral commission sitting at Geneva, Switzerland, in 1871 upheld the United States and awarded the United States the sum of $15,500,000.

It is not to be understood, however, that the United States has been willing consistently to submit its claims to arbitration. Several times it has refused to arbitrate difficulties with the Latin-American states, in part because of the fear that such arbitration might weaken its position under the Monroe Doctrine. The United States Senate, through its veto power, usually has stood in the way of sweeping treaties for this purpose. Arbitration was raised to a new dignity when the international conference at the Hague in 1899 created a Permanent Court of Arbitration, of which the United States is one of the adherents. The United States now has either treaties of arbitration or those of "inquiry and conciliation" with all but a few of the states of the world.

THE JUDICIAL SETTLEMENT OF DISPUTES · The Hague Court remains the world's chief arbitral tribunal. Students had long thought that a court of justice, following the rules and procedure of international law much as a domestic court follows national laws, was the next logical step toward a peaceful world order. The Covenant of the League of Nations made provision for such a court, and in 1920 one of the League committees, on which sat an American representative, drew up a statute creating a court of

[42] J. B. Moore, *The Principles of American Diplomacy* (1918), chap. viii; B. H. Williams, op. cit. pp. 291–302.

fifteen members.[43] This President Harding sent to the Senate, but neither then nor since has the Senate considered ratification without qualifying reservations which destroy its effectiveness. The last attempt at ratification, in 1935, was defeated by a vote of 52 to 36, only seven votes short of the necessary two thirds. The charter for the proposed United Nations, drawn at San Francisco in 1945, provides for a World Court as an integral part of the system.

THE OUTLAWING OF WAR · "Men of good will" of many nations during the past half century have reacted increasingly against war as an instrument of international policy. The irrationality of the destruction, on a gigantic scale, of life, property, and the fruits and treasures of civilization as a means of settling disputes is all too apparent in an age of learning and increased social consciousness. Even the few philosophers who glorify war, and the dictators who use it ruthlessly against their neighbors, agree in banning the use of force by their own carefully regimented citizens. Rudyard Kipling, the English poet of imperialism, evinced a troubled conscience in the following lines of his "Recessional":

> For heathen heart that puts her trust,
> In reeking tube and iron shard,
> . . . . . .
> Thy Mercy on Thy people, Lord!

The complete repudiation of war as an instrument of state policy would be the next logical step after the general establishment of arbitration and adjudication. The suggestion for an international agreement to that effect came from Aristide Briand, the French Foreign Minister, in a speech on the tenth anniversary of America's entry into the First World War, April 7, 1927.[44] The treaty, as finally drafted, on the insistence of the American Secretary of State, Frank Kellogg, was made available to all nations. It was signed by fifteen "charter" states on August 27, 1928, was ratified by the United States without reservations, and finally received the adherence of all but five of the nations of the world. The two chief paragraphs of this Kellogg-Briand Pact, or Pact of Paris, are these:[45]

ARTICLE I. The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE II. The high contracting parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

[43] M. O. Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), chaps. vii–x.
[44] J. T. Shotwell, *War as an Instrument of National Policy* (1929), pp 181–186.
[45] 45 Stat. 2343.

Interpretations and reservations attached to these two declarations, however, go far to restrict their sweeping nature. Nothing in them is construed to impair the right of self-defense of any signatory, or of every nation to be its own judge of what constitutes self-defense. If one party resorts to war, the others are automatically released from their obligations to the treaty-breaking state. Obligations already existing under the Covenant of the League of Nations, the treaties of Locarno, and treaties of neutrality are not affected by the pact; nor does it affect the rights of the United States under the Monroe Doctrine or of Great Britain in those regions where it has vital interests.

The easy cynicism with which some of the great powers signed the pact throws light on the traditions of international practice. Within a little more than three years Japan had attacked China in Manchuria; in two more Germany had begun rearmament; and in three more Italy had attacked Ethiopia. On January 7, 1932, Secretary of State Stimson, in identical notes to Japan and China, announced that it was the policy of his country not "to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928." This so-called "Stimson Doctrine" has since been followed in the refusal to recognize Japan's conquests in China, the Italian conquest of Ethiopia, and of course the German conquests in Europe. Loopholes in the language, and the lack of means of enforcement, leave the pact little more than an expression of a sentiment which, however, someday may find acceptance in practice.

## *IMPERIALISM*

By *imperialism* is meant the extension of the political power of a state over peoples and areas outside the original homeland. Typical imperialism consists in the actual annexation of distant and unrelated peoples and their territories; but the same end may be accomplished by the use of puppets under nominal freedom, or by the loan of money or other economic controls. The panoply and trappings of empire, from the age of Persia to the present time, have never lost their lure for the ambitious. To rule another race is a satisfaction to the national vanity. Considerations of race, religion, culture, and national prestige enter in; but perhaps the economic motive, the urge for food, raw materials, and markets, is the most important.

EXPANSION IN THE PACIFIC · The expansion of the United States on the North American continent went steadily on to the time of the Gadsden Purchase, in 1853. Here the word *imperialism*, except for the Alaskan purchase in 1867, is hardly applicable, since the expansion was into contiguous and almost unpopulated territory. The enterprise of American traders in China and of whalers in the Pacific accounted for the small

beginnings of expansion in that direction. In 1856 Congress passed an act providing that islands with guano deposits outside the jurisdiction of any other nation might, in the discretion of the President, be declared as "appertaining to the United States."[46] In this manner various islands were acquired, and some later were abandoned. Several of these tiny specks in the mid-Pacific, such as Wake, Midway, Baker, Howland, and Jarvis, were retained and acquired unanticipated value as landing places for transoceanic airplanes. By agreement in 1899 with other claimants the United States acquired full title to Tutuila, the one island of the Samoan group containing a good harbor.[47]

ACQUISITION OF THE SPANISH COLONIES · The American colonial empire, however, dates principally from the war with Spain in 1898. At its conclusion the United States found itself in possession of the islands of Cuba and Puerto Rico in the West Indies, the Ladrone Islands in the western Pacific, and the Philippine archipelago off the southeast coast of China. At the same time the Hawaiian Islands, lying some two thousand miles southwest of the California coast, upon their petition were annexed to the United States. At the time of the acquisition Congress pledged the United States to give the Philippine Islands their independence after a period of preparation for self-government.

EXPANSION IN THE CARIBBEAN · It has been seen that Cuba was given its independence, although as a virtual protectorate of the United States; and that the Virgin Islands, on the eastern fringe of the West Indies, were acquired by purchase in 1917. However, the most important forward step in that region was the acquisition in 1903 of the Panama Canal Zone. The United States and Great Britain long had been political and commercial rivals in Central America and both had visualized the construction there of an interoceanic canal. In the Clayton-Bulwer Treaty, of 1850, it had been agreed that neither would seek exclusive control of any canal routes; that any canal built would be open on equal terms to all the nations of the world, and its neutrality guaranteed by the two. Finally, in 1901, after long negotiation the Hay-Pauncefote Treaty was ratified, which abrogated the Clayton-Bulwer Treaty and gave the United States the sole right to construct, own, and manage a canal. While the canal was to be open on equal terms to all nations, the United States by implication was given the right to fortify it and to close it in time of war.

ACQUISITION OF THE CANAL ZONE · The United States, having decided in favor of the Panama route over one through Nicaragua, made arrangements to buy for the sum of forty million dollars the rights and property of a French company which had begun excavation.[48] When a treaty with Colombia for a right of way across the Isthmus was held up in its senate, a

[46] 11 Stat. 119.

[47] G. H. Ryden, *The Foreign Policy of the United States in Relation to Samoa* (1933), chap. xv.

[48] J. H. Latané and D. W. Wainhouse, op. cit. chap. xxii.

revolution was engineered in Panama by the agents of the French company, and the province of Panama was declared an independent republic. President Theodore Roosevelt speedily extended recognition and negotiated a treaty. For the sum of ten million dollars and an annual payment of two hundred and fifty thousand dollars the United States was granted the use, occupation, and control of a zone ten miles wide across the Isthmus for canal purposes.

THE END OF IMPERIALISM · The policies of the Republican administrations from McKinley through Taft had been denounced by their Democratic opponents as imperialistic and tainted with "dollar diplomacy." Woodrow Wilson set about reversing the trend. The Jones Act of 1915 increased self-government in the Philippine Islands and promised the Filipinos eventual independence. Colombia's grievance against the United States for its part in the loss of the province of Panama was met by a treaty ratified in 1922 which granted Colombia an indemnity of twenty-five million dollars and the concession to its citizens of the same privileges in the use of the Canal as those of the United States. The F. D. Roosevelt administration sponsored the Philippine Commonwealth Act of 1934, which provided for complete independence by 1946.[49] Although the United States had expended many lives and much treasure in the First World War, it scrupulously kept its original pledge not to profit by the annexation of a single foot of territory.

## *POLITICAL CO-OPERATION WITH OTHER NATIONS*

It has been noted that the advice of the first President was to steer clear of "permanent alliances," and to trust to "temporary alliances" when necessary. If by an alliance is meant a written agreement with another state, effective for a considerable period, providing for joint political and military action, then the United States has had none since the abandonment of the French alliance of 1778. The nearest approach was the full military and naval collaboration with England and France in the First World War. But even in this instance the record was kept clean; for the states fighting Germany were referred to in the Treaty of Versailles as the "Allied and Associated Powers," the United States falling in the latter category.

In a world shrunken by the advent of rapid communication, intensified co-operation of many kinds, cultural, scientific, and commercial, becomes inevitable. This may be regularized in formal treaties or be improvised from month to month. Even political co-operation may be had without a treaty. "Parallel action" to carry out a policy informally agreed upon may be quite as effective. American co-operation with other states, while mostly in matters of peace, has included two world wars.

[49] 48 Stat. 456.

INTERNATIONAL UNIONS · The term *international unions* is used to designate organizations participated in by a few or many states; they may be known as unions, institutes, bureaus, commissions, associations, or boards. The Department of State in 1945 listed nearly seventy in which the United States had membership.[50] One of the best-known is the Universal Postal Union, dating from 1874, under whose arrangements maximum postal rates are established and mail may be sent to any corner of the globe. The character of the work of some of these unions is indicated by their titles: International Bureau of Weights and Measures, International Institute of Agriculture, International Labor Office, and International Penal and Penitentiary Commission.

ARMS LIMITATION AND CONTROL · International co-operation to limit the manufacture and sale of arms and munitions also has been sought.[51] The United States was a signatory of the Brussels treaty of 1890, which forbade the shipment of arms into equatorial Africa and the vast bordering regions, except as controlled by the respective colonial governments. It signed but refused to ratify the Treaty of Saint-Germain, of 1919, which extended the prohibited zone to western Asia. A more inclusive treaty, drawn up at Geneva in 1925 but not ratified by the United States until 1934, divided Asia and Africa into zones, with a particular type of regulation for each.

More important for the peace of the world were the efforts to limit the armaments of the great powers. The Harding administration, which had repudiated the League of Nations, somewhat inconsistently sent out a call for an international disarmament conference to meet at Washington in November, 1921: The outcome was an agreement to confine the tonnage of capital ships to a certain amount for each nation, and to observe a naval holiday for ten years.[52] A capital ship ratio of 10–10–6–3–3 for Great Britain, the United States, Japan, Italy, and France, respectively, was agreed upon. Airplane carriers also were restricted; but all other classes of ships, including light cruisers and submarines, were left open. The treaty meant the scrapping by Great Britain and Japan of old battleships and a few just begun; and the scrapping by the United States of a few old battleships, seven battleships and six heavy cruisers under construction, and two battleships launched and nearly finished. Later conferences at London in 1930 and 1935 modified the original agreement; but Japan's notification in 1934 of withdrawal from the naval-limitations feature of the Washington treaty of 1922 and the failure of the 1935 conference were the signals for the renewal of the race in naval armaments.

[50] *United States Government Manual, 1945* (1st ed.), pp. 204–205.

[51] General Jan Smuts, of the Union of South Africa, in 1918 had submitted to the nations a plan for the nationalization of arms manufacture. At the Geneva meeting the United States opposed all such proposals, explaining that the private manufacture of arms was necessary for our defense; but in 1934 it reversed its position and proposed to the disarmament conference that each government assume "entire responsibility" for the manufacture of arms within its borders.

[52] 43 Stat. 1655–1685.

SLAVERY AND OPIUM · The United States lent its co-operation to a sort of international police for the suppression or regulation of the traffic in slaves and opium. The five great powers of Europe, by treaty in 1841, declared the slave trade piracy; and the United States joined with Great Britain and France in maintaining a sea patrol against slavers.[53] An anti-slavery conference of the states having dominions in Africa was held at Brussels, in 1889, and this resulted the following year in the ratification of a treaty for the suppression of the traffic. As a nonmember of the League of Nations the United States did not collaborate with that body in further action against the African slave trade, but in 1926 at Geneva joined with many other nations in a treaty directed against slavery wherever it might exist.[54] A conference at the Hague in 1912 called at the suggestion of President Taft, drew up an international convention for the regulation of the traffic in opium. This became effective at the close of the First World War and was placed under the administration of the Permanent Advisory Board of the League of Nations. In 1923 the United States appointed a representative to sit with this board in an unofficial capacity, and continued participation in the Permanent Central Opium Board established under a new opium convention drawn up in 1925. In 1931 the Senate gave its advice and consent to a new opium convention of that year.

LABOR · The League of Nations Covenant contained an article which pledged its members to "endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend." In fulfillment of this declaration a General International Labor Conference was provided to meet annually; and an International Labor Office was established at the League seat at Geneva. In spite of its failure to join the League, the United States was given permission to send delegates to the General International Labor Conference, but did not avail itself of this privilege until 1934. The annual conferences drafted proposals for labor legislation for recommendation to the various member states; while the Labor Office, through its secretariat, made studies of labor conditions, drafted proposals to be considered by the conferences, and collected labor statistics.

## *BELLIGERENT CO-OPERATION*

The United States became involved in all the three wars of a world-wide character which have occurred since its independence. In the War of 1812, which was only a side issue of the Napoleonic Wars, it fought Great Britain over the question of neutral rights; in the First and Second World Wars it collaborated with Great Britain, France, and their allies against

[53] R. L. Buell, *International Relations* (1925), pp. 261–262.
[54] 46 Stat. 2183–2198.

Germany and its allies. The occasion for its entrance into the First World War was the declaration of unrestricted submarine warfare by Germany; while in the Second World War, Germany and Japan made the initial declarations of war after the attack on the American fleet at Pearl Harbor. In both wars the United States made loans of money and armament to its allies and integrated its military and naval forces with theirs.

WAR AIMS · President Wilson, in a message to Congress, January 8, 1918, stated the American war aims in his famous Fourteen Points.[55] Among these were the following: the freedom of the seas, the restoration of the conquered states, the removal of international trade barriers, the impartial adjustment of colonial claims, the reduction of armaments to the lowest level consistent with safety, and the formation of an association of nations for the preservation of peace. Later he added the destruction of "every arbitrary power anywhere that can separately, secretly, and of its single choice, disturb the peace of the world." The aims enunciated by President F. D. Roosevelt for the Second World War were generally the same. Before American entrance into the war President Roosevelt and Prime Minister Churchill had agreed to an "Atlantic Charter" of eight points, which included a disclaimer of territorial aggrandizement, respect for the right of all peoples to choose the form of government under which they shall live, access of all nations to the raw materials of the world, collaboration in securing better conditions for labor, and the eventual abandonment of the use of force.[56]

WORLD ORGANIZATION · That the well-being of individual states was becoming increasingly dependent upon co-operation on a world-wide scale was apparent to many observers. Nicholas Murray Butler had well stated this fact in the words "We have come to a situation in which nothing that happens in the world of any consequence is foreign to any people of the world."[57] The project for a permanent association of nations was due largely to the initiative and efforts of President Wilson. The prospects for its success seemed favorable, since the three chief victors of the First World War, Great Britain, France, and the United States, were also the world's most powerful democracies. The United States Senate, however, refused its consent to the Treaty of Versailles, to which the Covenant of the League of Nations had been attached, and the opportunity was allowed to slip.

President F. D. Roosevelt, early in the Second World War, renewed the efforts for a world organization; and representatives from China, Great Britain, the Soviet Union, and the United States met at Dumbarton Oaks, Washington, in September and October, 1944, to discuss its essentials.

[55] *Congressional Record*, 65th Cong., 2d Sess., pp. 680–681.

[56] Department of State, *Bulletin*, Vol. V, No. 112, Publication No. 1632, August 16, 1941, pp. 125–126.

[57] An address, *The International Mind* (1931), published in part in M. Spahr, *Readings in Recent Political Philosophy*, p. 728.

Their plan for an organization to be known as the United Nations followed generally that of the defunct League of Nations, but with some important departures.[58] The Security Council, in which the above-mentioned four powers and ultimately France would have permanent seats, and six minor states would have nonpermanent seats, would bear the chief responsibility for the maintenance of peace. Member states would be pledged to place adequate air, naval, and military forces at its disposal, in the use of which it would be advised by a permanent Military Staff Committee. No military or other coercive action could be taken against one of the five permanent member states of the Security Council except by a unanimous vote of the Council. A General Assembly, to include representatives of all member states, and an International Court of Justice were included. The right to maintain regional arrangements, such as that of the Act of Chapultepec, was specifically recognized. A charter, embodying the essential features of the Dumbarton Oaks proposals, was drawn up by the representatives of fifty states and dominions sitting at San Francisco in May and June, 1945, and was unanimously signed. It received Senate approval by a vote of 89 to 2 on July 28, 1945, after only six days of debate.

WORLD ECONOMIC COLLABORATION · Previously the representatives of forty-four states had met at Bretton Woods, New Hampshire, to consider plans to foster international economic co-operation. "Economic diseases," President Roosevelt told the conference, "are highly communicable. It follows, therefore, that the economic health of every country is a proper matter of concern to all neighbors, near and distant." The conference report provided for the creation of an International Monetary Fund and an International Bank for Reconstruction and Development.[59] The chief purposes were to provide funds for investment in productive enterprises vital to world prosperity, and a gold reserve to support the value of the currencies of the participating states. The fund was set at $8,800,000,000 and the capital stock of the bank at $10,000,000,000, both to be subscribed by the member states in proportion to their resources. The share of the United States for the two, respectively, was $2,750,000,000 and $3,175,000,000. The Senate, on July 20, 1945, by a vote of 61 to 16, passed the House bill embodying the substance of the Bretton Woods report.

## *THE ADMINISTRATION OF FOREIGN AFFAIRS*

The President not only has the chief responsibility in the formation of foreign policy but is in direct charge of its administration. To aid him in this function there is an organization comprising in peacetime more than five thousand persons. Only a thousand of these are in the Department of

[58]Department of State, *Dumbarton Oaks Documents on International Organization* (revised), Publication 2257, Conference Series 60.

[59]Department of State, *United Nations Monetary and Financial Conference* (1944), Publication 2187, Conference Series 55.

State at Washington, the remainder being in the diplomatic and consular services abroad.

THE SECRETARY OF STATE · This officer is the highest ranking member of the cabinet and the administrative head of the Department of State. In July, 1789, Congress created a "Department of Foreign Affairs," but in the following September an amending statute changed the name to "Department of State" and conferred upon it some new duties.[60] Its head is actually a state secretary. Official correspondence between the President and the executives of other nations and governors of the States of the Union pass through his hands. Proclamations of the President are drawn in the secretary's office and countersigned and sealed by him. When President Woodrow Wilson in 1918–1919 was abroad helping to negotiate the Treaty of Versailles, Presidential proclamations for the first time were issued from a foreign city and countersigned and sealed there by the Secretary of State, who had accompanied the President. The Secretary of State by seniority ranks next to the President, and the nature of his duties makes him more immediately subject to the President's direction than any other departmental head. Indeed, during the First World War, President Wilson was said to have been his own Secretary of State, taking over the direction of correspondence with the warring nations and leaving to Lansing the conduct of the routine affairs of his department. The roll of the men who have occupied the office is a distinguished one, hardly equaled by that of any other office in the government. A list that contains the names of Thomas Jefferson, John Quincy Adams, William H. Seward, Daniel Webster, James G. Blaine, John Hay, Elihu Root, and Charles Evans Hughes sounds like a roll call of the nation's great.

FUNCTIONS OF THE DEPARTMENT OF STATE · The foreign-affairs functions of the Secretary of State and of his department are very numerous, but they may all be classified under two headings: assistance to the President in the formulation of foreign policy by furnishing counsel and information and the conduct of foreign relations under the President's general direction.[61] These include the mechanical task of framing diplomatic correspondence to be sent to foreign countries and of receiving and disposing of correspondence from them; the supervision of the large field service of the department scattered throughout the world; the gathering and collation of information bearing on questions of international policy from far and wide; the giving of advice and aid in the recall or the reception of foreign diplomatic representatives; the protection of American citizens and of their interests abroad; and the negotiation, formulation, and interpretation of treaties and execu-

[60] 1 Stat. 28, 68.

[61] B. D. Hulen, *Inside the Department of State* (1939), pp. 38–75; G. Hunt, *The Department of State of the United States* (1914), chaps. i-iii; G. H. Stuart, *American Diplomatic and Consular Practice* (1936), chap. iv. For a critical view of the organization of the Department of State, cf. R. Bendiner, *The Riddle of the State Department* (1942).

tive agreements. These and related duties constitute a formidable whole, and call for a complex organization in the Department of State and its field services.

ORGANIZATION · The disturbed state of world politics after the rise of Hitler called for successive additions to the Department of State to enable it to meet increased burdens. Two departmental orders and an act of Congress in 1944 brought about a much needed reorganization of its internal machinery.[62]

The departmental organization at Washington comprises three levels of principal officers or offices. At the top are the Secretary of State and the personnel of his immediate office, which includes special assistants, assistants, and consultants and advisers, among whom, for instance, are those for international organization, White House liaison, drafting, and matters of general policy. The second group, which is responsible directly to the secretary, is composed of six Assistant Secretaries of State and the legal adviser. The third level comprises the directors of the twelve principal functional and technical offices into which the department is divided.

The Undersecretary of State, the six Assistant Secretaries of State, and a designated special assistant constitute the executive committee, whose task is to advise and assist the secretary in determining current and long-range foreign policy. The undersecretary assists the secretary in formulating and executing foreign policies; sometimes acts as spokesman for the government or represents it at foreign conferences; and in the absence of his superior serves as Acting Secretary of State. Each of the Assistant Secretaries of State is in charge of a series of offices or divisions dealing with specialized matters. The senior secretary has supervision of the three geographic offices of European, Far Eastern, and Near Eastern and African Affairs; another has charge of the Office of American Republic Affairs. To another fall the Offices of Foreign Service, Departmental Administration, and Controls; to another, three offices dealing with economic matters; and to still another, the handling of relations with Congress and the supervision of the organization of international conferences. A sixth is in charge of public information respecting the department's activities. The office of the legal adviser drafts and interprets treaties and other international agreements and advises the department in general on questions of international law.

THE GEOGRAPHIC OFFICES · The routine work of the department involves problems respecting particular countries or regions of the world. To assist in the formulation of policy, there were established six geographical divisions staffed with experts in those respective fields. In 1943 these were reduced to four. Besides furnishing information, their specific duties are numerous, including the development of basic country and area policies, the guidance of day-to-day relationships with the other countries,

[62]Department of State, *Bulletin*, Vol. XI, No. 286A, Supplement, December 17, 1944.

and the direction of the work of the foreign-service officers abroad. Each office is divided into regional divisions; for instance, the Office of Far Eastern Affairs has the Divisions of Chinese Affairs, Japanese Affairs, Southwest Pacific Affairs, and Philippine Affairs.

THE SUBORDINATE DIVISIONS · The Department of State was the first to make a clean sweep of the welter of names used for offices of the same rank and to establish uniformity throughout. The twelve administrative divisions among which the work of the department is distributed are known as "offices" and their internal agencies as "divisions." A director is at the head of each office and a chief at the head of each division. Strangely enough, the bureaucracy of the Department of State does not contain a single "bureau."

How the respective functions of the fifty-seven divisions combine to furnish the basis for American foreign policy and control the administration of foreign relations would make an interesting story, but the work of a few will suffice to illustrate the operation of the whole.

The Office of Foreign Service has general charge of diplomatic and consular personnels abroad. Its many duties are performed by several divisions. One allots funds for the running expenses of the embassies and consulates throughout the world; another keeps an inventory of all property belonging to the foreign service in foreign countries; another keeps vital statistics of Americans living abroad; and still another handles all cases involving the welfare or whereabouts of Americans traveling abroad.

In the Office of Departmental Administration the Division of Central Services has the responsibility for all communications services of the department by mail, telegraph, telephone, messenger, or otherwise, including encoding and decoding. In normal times the mail handled has amounted to as high as a million pieces and the telegrams to fifty thousand a year. The actual development of the codes is the responsibility of the Division of Cryptography. The Division of International Conferences has the important function of making and executing the plans for American participation in foreign conferences, including such matters as the organization of the delegations and the preparation of their instructions. The Division of Protocol deals with matters of ceremony, precedence, and correct form, which until little more than a generation ago were thought of too trivial a nature to concern the government of a democracy. It has a ceremonial officer whom members of the diplomatic corps or any other officer may consult about correct form or procedure. The delicate matter of precedence at state receptions, arrangements for international conferences, presentations of foreign representatives to the President, the drafting of ceremonial letters from the President to the heads of foreign governments, and the arrangements for the reception of distinguished foreign statesmen or rulers are among the matters which fall to this division.

A few other scattered divisions deserve mention. In the Office of Controls are the Passport and Visa Divisions, which take care of the matters suggested by their names. The Treaty Division, abolished in the 1944 reorganization, its duties being shifted to the Office of the Secretary, was the important auxiliary in the negotiation of treaties. It prepared memoranda for the negotiators and assisted them in their work of drafting. All the forms in the whole process, including the credentials, full powers, instructions of negotiators, interpretative notes, instruments of ratification, and the communications to the President and from him to the Senate, were its work. The Division of Research and Publication prepares various manuscripts and departmental data for publication, including the annual volumes of the *Foreign Relations of the United States*, which contain the most interesting parts of the correspondence between the Secretary of State and the ministers of foreign countries. Its library of about two hundred thousand volumes contains among other things a collection of the statutes of all civilized countries. The Division of Cultural Co-operation has responsibility for formulating policy designed to encourage cultural contact, interchange, and mutual understanding between the peoples of the United States and those of other nations. It is in charge of the exchange of teachers, students, and leaders in the fields of science, the arts, and social welfare between the United States and foreign countries; and has been entrusted with the task of developing programs with private organizations and other governments for the reconstruction of educational and cultural facilities in the war-devastated areas.

## *THE FIELD SERVICES*

Every state is presumed by international law to have the right of legation, the right to send and receive diplomatic representatives. In classical times these legates, or messengers, were generally sent to perform a special mission, whether of war or peace, at the conclusion of which the mission terminated. The practice of establishing permanent legations abroad seems to have originated with the Italian city states of early modern times. For several centuries the practice varied; but by the time the United States joined the sisterhood of nations, the system of permanent legations had become established, and the foreign services had become differentiated into two branches. The diplomatic service deals chiefly with political relations, and the consular service with matters of trade, commerce, and business affecting the state's nationals abroad. At the present time the United States maintains diplomatic representatives in about sixty countries, and two hundred and fifty consular offices in cities throughout the world.[63]

DUTIES OF DIPLOMATIC SERVICE · The duties falling to an ambassador or minister are many and varied, ranging from the gravest to the most trivial.

[63] *United States Government Manual—1945*, p. 189.

They fall chiefly under three headings, however.[64] First, the foreign minister has a limited "power of attorney" to negotiate for his principal, the home government. In so doing he may make proposals and counter-proposals. In an emergency he may be called upon to make quick decisions which the home government may feel in honor bound to ratify. Much depends upon his good sense, tact, and acumen. The home government must trust his judgment in many matters, for he has the advantage of position.

Second, the ambassador and his staff have a reporting function. The home office needs information on the economic and political conditions of foreign countries, an understanding of the characters of the leading politicians and statesmen with whom they may have to deal, and the facts concerning the international commitments of the respective countries which may have a bearing on American interests. Trends in public opinion, political opposition to the government in power, and the attitude of the press are all within the scope of this reporting. That Hitler was kept well informed of the course of American politics was shown in his Reichstag speech of April 28, 1939, in which he attacked President Roosevelt in the terms which had been used against him by his partisan opponents.

A third duty which absorbs much of the time of an embassy staff is that of protecting and caring for its nationals. Many such cases involve claims made against the national or local governments for money or restitution of goods. There are many others, such as the imprisonment of nationals for alleged crimes, and securing tickets of admission to government buildings or an audience with government officials. A large portion of the ambassador's time is taken up with social affairs, of both an official and a private nature. One prime obligation is the cultivation of friendship with a wide circle of influential people. Often influence gained in this way is of greater value than that derived through official intercourse.

Ranks of Diplomatic Officers · The Congress of Vienna, a meeting of the representatives of the great powers of Europe convened in November, 1814, toward the close of the Napoleonic Wars, to restore a measure of system and order, agreed upon a classification of diplomatic officers. These, in the order of precedence, were ambassador, envoy extraordinary, minister plenipotentiary, minister resident, and chargé d'affaires. The United States followed this scheme, adding in 1893 a sixth rank, special envoy. Representatives of the first three ranks are accredited permanently to the monarch or chief executive of a state; the others, to the foreign office. The ambassador outranks all others, taking precedence over all other ranks at diplomatic meetings and social functions.

The American Republic, with a democratic disdain for monarchy and its trappings, was long content to see its diplomats occupy rear seats in the various chancelleries of the world; but in 1893 Congress passed an act

[64] G. H. Stuart, op. cit. chaps. xi–xiii.

authorizing the President to appoint diplomatic officers of the higher ranks whenever foreign nations should express the wish to employ diplomats of the same ranks here. Accordingly in that year Great Britain, Germany, France, and Italy gave the rank of ambassador to their representatives, and President Cleveland in turn did the same for our representatives in those countries. At present the United States maintains embassies in thirty-seven states, including all the American republics, large and small.[65] The question of whether Congress or the President has the authority to say what rank shall be accorded the representative to a given country is unsettled, although the language of the Constitution would seem to support the claim of the latter. As a matter of practice the President sent no ambassadors until after the act of 1893 had given such authorization. In 1919 President Woodrow Wilson independently appointed an ambassador to Peru, and in 1927 President Coolidge, without legislation, sent ministers to the Irish Free State and Canada.

RECRUITMENT FOR THE DIPLOMATIC SERVICE · The Constitution specifically vests in the President the power, by and with the consent of the Senate, to appoint "ambassadors, public ministers, and consuls." He is therefore not otherwise restricted in his choice of appointees. Since the duties of diplomatic officers are political, or policy-making, in character, it is logical that the President should wish men of his own choosing. The result is that at the end of a President's term all heads of embassies and legations offer their resignations, which may or may not be accepted. For many years even the legation staffs were filled on the spoils basis. Diplomatic posts often were filled with wealthy supporters of the party, since the inadequate salaries and expense accounts made it impossible for persons of small means to accept such posts. Men of wealth often desired foreign posts for reasons of social prestige; while small-time politicians were rewarded with posts in the smaller countries, where it was thought their ineptitude would do a minimum of injury.

After the United States became a world power, however, and so more exposed to the dangers of war, public sentiment demanded a higher character for the diplomatic service. By a combination of statutes and executive orders the merit system was brought into the diplomatic and consular services. In 1924 these were summarized and rounded out in the so-called Rogers Act.[66] The two services were merged into one, known as "the Foreign Service"; the term "Foreign Service officer" was made to cover all permanent officers below the rank of minister; and the merit system was applied to all such appointments. Nine classes of diplomatic secretaries and consuls were established, with salaries running from nine thousand

[65] *United States Government Manual—1945*, p. 188.

[66] G. H. Stuart, op. cit. pp. 185–191. The Rogers Act was generally overhauled in the Moses-Linthicum Act of February 23, 1931, including a reclassification of the clerks in the foreign service (48 Stat. 1207).

dollars in the highest to three thousand dollars in the lowest class. A career service was now made possible. A young man may start in the lowest rank and with time and experience win promotion to the top; or he may start in the consular service and later be assigned to the diplomatic service, or vice versa. "Tea drinkers" or "cookie pushers," who take examinations with the aim of landing a place in Paris, London, or Berlin, run the risk of assignment to Tegucigalpa or Jibuti. The Secretary of State was empowered to recommend to the President for appointment as minister any person who had shown unusual ability as a foreign-service officer. Foreign-service officers may be appointed first to places in the State Department, to familiarize them with its work, and be sent later to foreign posts. A retirement and disability fund makes proper provision for these contingencies.

THE CONSULAR SERVICE · As stated above, the consular service since 1924 has existed only as a division of the foreign service. The office of consul, or its analogue, is an ancient one. Persons wandering into foreign countries met not only the handicaps of strange languages, laws, courts, and customs but often harsh discriminations. Some alleviation was necessary if trade and commerce were to develop. Late in the Middle Ages the flourishing towns of northern Italy, Germany, and the Low Countries both established consular officers abroad and devised codes of maritime and mercantile law applicable to ships, traders, and aliens. The American consular system dates from the beginning of the Republic.

The services rendered by the consuls to their nationals abroad cover almost the whole range of social relations.[67] They include legal advice; scientific and trade information; business counsel; mediation between husband and wife; work as policeman, detective, or interpreter; and guardianship of the young and the mentally defective. Temporary financial relief may be provided for those stranded for lack of funds; and aid may be given in the settlement of estates and the probate of wills. Consuls are required to maintain a registry of the persons living in their districts who claim American citizenship and to keep a record of births. They have also a limited power of issuing passports and visas.

All these are duties which grew up over and above the basic ones with reference to trade and commerce. Consuls are required to observe and make periodical reports on the economics of the country in which they are stationed: manufacturing, mining, agriculture, and shipping. Our customs laws require a consular certification of every shipment of goods from a foreign country where the amount of the customs tax will be one hundred dollars or more. Other regulations about imports, such as those prohibiting the importation of goods made by prison labor or forced labor, call for consular certification.

The consuls have wide administrative and protective duties respecting

[67] *United States Code* (1940 ed.), Title 22, sects. 51–109.

American traders and shippers abroad. They must be able to furnish accurate and full information about the local rules and regulations as to tariffs, warehousing, qualities of goods, and their packing and care. Every master of an American vessel, upon arrival in a foreign port, must deposit with the American consul his register and sea letter, which are returned upon the presentation of clearance papers from the port authorities. Before sailing for an American port a vessel must submit to the consul, for his inspection and approval, its manifest showing the passenger list, the contents of the cargo, and the names of the consignees.

The consul has a certain amount of jurisdiction in disputes arising between the master and the sailors of ships putting into port. He is empowered to discharge the seamen of such vessels from service upon proper complaint, when the general rules of maritime law permit it; and he must see that the discharged seamen are paid in full. Destitute seamen must be given relief and may be sent home at government expense.

## *SUMMARY OF THE FOREIGN-RELATIONS POWER*

Republics are faced with much the same problems as monarchies and dictatorships in conducting their relations with their sister states. The task presents many difficulties not encountered in the administration of domestic affairs. The parties may differ greatly in size, strength, and social outlook, and have no common language or universally recognized common law to smooth the way. Moreover, mistakes in policy and administration may bring such disastrous consequences as devastating war, loss of independence, or complete national annihilation.

The conduct of foreign relations has two aspects: the making of policy and its administration. In the United States policy-making is lodged by the Constitution in the President, the Senate, and the Congress as a whole. The initiative, however, is almost entirely with the President. By speeches, messages, interviews, or executive agreements he may go far in making commitments which the Senate or Congress may feel bound to fulfill. Acting with the Senate, he may make treaties with foreign states, which become a part of the supreme law of the land. A minority of the Senate, however, may defeat a negotiated and signed treaty and so reverse one of the President's most carefully nurtured policies. Neither the President nor the Senate in the long run can go far beyond what Congress as a legislative body will support; and the action of Congress is strictly limited by the dictates of public opinion.

The President, as chief executive, has the general oversight of foreign-policy administration. Directly in charge is his senior adviser, the Secretary of State, who has at his command the resources of a large department, well equipped with technical experts. Scattered among all the states of the world are the numerous diplomatic and consular officers, who

execute the orders from Washington and in turn supply information as a basis for new policies. This is the machinery upon whose good judgment and efficiency our prosperity at home and safety abroad in no small measure depend.

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## CHAPTER XXXVI

# *National Defense*

THE USE OF FORCE · Political philosophers of the seventeenth and eighteenth centuries were fond of speculating on the "state of nature," by which they meant the condition of mankind before the appearance of government. Some pictured it as a state of bliss; others, like Thomas Hobbes, thought of it as filled with "continuall feare and danger of violent death; and the life of man, [as] solitary, poore, nasty, brutish, and short."[1] There was general agreement, however, that man at least was free to act as was best in his own eyes. Without government, he consequently was without law; and without law the rights of property and personal liberty did not exist. The material things and personal liberties which he possessed were only what his strength and wit could command. He was free to employ his available strength to protect himself and his family or to extend his power over the persons and goods of his neighbors.

But when government arrived on the scene, all this was changed. The use of force became a government monopoly. The protection of persons fell to the government's police; disputes regarding the possession of property, to its courts. While the common law of states generally reserved to the individual the right to use force in self-defense, this was an exception to the rule. *The king's peace* and *pax Romana* had reference in England and the Roman Empire, respectively, to the government's denial of the individual's right to take the law into his own hands, and government's own exclusive right to administer justice and keep the peace. Unfortunately no world organization has yet been devised to administer justice and enforce peace among the nations themselves.

WAR AS AN INSTRUMENT OF THE STATE · War is force organized and employed on a large scale. In a civil war a numerous part of the people of a country organizes itself to resist or overthrow the existing government. The law of nations accords certain legal privileges to rebels, whereas brigands, robbers, and rioters may be punished according to the criminal laws of the land. In a war between nations the resources of men and materials of each are organized into a force to hurl at a similar force of the other. The object of a war of aggression is to impose the will of the one state on the other: to secure valuable concessions from the one attacked or to conquer and absorb it entirely. Occasionally a war is undertaken as a punitive or as a face-saving, or prestige, measure. Often the mere threat of war may be sufficient to bring about submission or the surrender of

[1]Thomas Hobbes, *Hobbes's Leviathan* (1909 ed.), p. 62.

territories, as in the case of Germany and Czechoslovakia in 1938. Naturally, the object of the defending state is to repel the aggressor, retain control of its territory, and so preserve its goods from seizure and its people from capture.

BASES OF MILITARY POWER · The effectiveness with which a state may make war is dependent upon a variety of factors. Among these are geographical situation and topography, the extent of the natural resources, the strength of the government, and the character of the people. Homogeneity as respects nationality is important, as well as the existence of a consensus in the basic political and social philosophies. The ease of the German conquests of Czechoslovakia, Yugoslavia, and Poland was due in part to sharp social and cultural divisions among their respective peoples.

ARMS AND THE MAN · The techniques of industrial production and of warfare have evolved on strictly parallel lines. The investment in workshop and loom for the worker of ancient Greece was relatively small; in the modern factory the situation is reversed: the equipment dwarfs the worker. When Vergil sang of "arms and the man," much was said of the soldier but little of the arms. Today the young man who changes his place in the factory for one in the army finds a striking similarity in the magnitude of the equipment relative to the persons who use it.

No purely agricultural nation today can successfully defend itself against one highly industrialized. The spear, the lance, the bow and arrow, and the buckskin shield have given way to repeating rifles, machine guns, high explosives, the airplane, and the motorized steel fortress called the tank. The same factories and workers which produce heavy goods for the markets of the world are needed in time of war to produce the deadly instruments with which those markets may be protected. Behind the army and the navy millions of workers, business managers, and industrial equipment must be organized and kept moving to sustain the combat forces. It needs no detailed examination to see that the United States possesses all the prerequisites to make it an effective combatant.

## *THE AMERICAN DEFENSE PROBLEM*

The close dependence of military policy on foreign policy is apparent. This was pointed out in 1832 by Clausewitz, the leading philosopher of war, who wrote, "War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means."[2] American foreign policies, as recited in the preceding chapter, are actually counterparts of three different conceptions of national defense involving successively wider horizons.

That representing the irreducible minimum is the maintenance of armament to defend continental United States. The techniques of modern

[2]Carl von Clausewitz, *On War* (1940 ed., J. J. Graham, Tr.), Vol. I, p. 23.

warfare are such, however, that the minimum cannot be accomplished without the defense of a much greater outlying area. This would necessarily include all of North and Central America, and South America at least to a line drawn through central Brazil; in the Pacific area, the Aleutians, Hawaii, and the Galápagos Islands, and possibly other islands west and southwest as far as the Marshalls and Samoa; and in the Atlantic, Bermuda, the Bahamas, the West Indies, and Greenland. Continental defense would not necessarily require that the United States occupy and fortify all this territory, but that fortified military or naval bases of other states be excluded.

The second defense scheme corresponds to the foreign policy of maintaining the independence of the Philippines and of China, and opportunities for open trade in the Far East. This would necessitate, over and above the first plan, the fortification of the Philippine Islands and of the string of small islands lying between those islands and Hawaii. It would require also a somewhat larger navy and standing army. The success of this defense policy would depend much on the maintenance of a balance of power in that region between China, Russia, Japan, and Great Britain.

The third conception of American defense is that corresponding to the assumption by the United States of full responsibility with other leading powers for world peace and order. It might plausibly be argued that the military and naval establishments so required would be smaller than for the second or even the first of the foregoing schemes. If the half dozen more powerful states, associated in a league or bound together by treaty, were able to agree on general world policy and take prompt action in case of a threat to the peace of the world, this probably would be true. But the uncertainty of any such solidarity in the event of such a threat would seem to make it good insurance for the United States to maintain naval and military forces capable of quick action in any part of the world. The involvement of the United States in two world wars within twenty-five years gives substantial support to those observers who believe that the third diplomatic and defense policy is the one which the logic of events will force the United States to follow, whether it wishes or not.[3]

## *THE PLAN OF CONTINENTAL DEFENSE*

The military policies of the United States up to its involvement in the Second World War were based on the first objective, the defense of continental United States. The defense forces were designed to prevent the bombardment or blockade of the coastal cities of the United States by

[3]For various views of the American defense problem cf. C. A. Beard, *The Open Door at Home* (1935), chap. xi; O. G. Villard, *Our Military Chaos* (1939), chaps. i, ii, xi; H. W. Baldwin, *United We Stand* (1941), chaps. ii, iv, vi; G. F. Eliot, *The Ramparts We Watch*; H. H. Sprout, *America's Problem of National Defense* (1939).

enemy fleets or air forces; to repel actual invasion and seizure of territory; and make hazardous all attacks on Americans or their commerce on the high seas and in foreign countries. The chief elements in this system of defense were the navy and army and their respective air arms, the Panama Canal, and the naval and military bases on the coasts of the United States and in outlying islands.

THE NAVY · Geographic considerations made the navy the first line of defense. The plan was to maintain it at a strength superior to that of any fleet or combination of fleets which could be sent against us. Such a superiority could the more easily be obtained since any hostile fleet would be at least three thousand miles from a refueling or repair base and meanwhile subject to attack from the air and under water.

THE ARMY · The maintenance of a strong navy enabled the United States to enjoy the luxury of an army cut to a skeleton basis, with all that that meant in the saving of expense and the devotion of man power to the pursuits of peace. Kept during the 1920's and the 1930's to the figure of scarcely one hundred and fifty thousand officers and enlisted men, it was designed to serve chiefly two purposes: to furnish a nucleus of highly trained men as the basis for a great expansion in numbers in wartime, and to supply garrisons for the Panama Canal and the Hawaiian Islands sufficient, with naval and air aid, to hold them until reinforcements should arrive. Mobile units of coast artillery and airplanes were maintained which could be shifted to any threatened point.

THE PANAMA CANAL · The best defense against seaborne invasion, contrary to the layman's belief, is not to be had by stationing war vessels like sentries in front of each port, but rather in concentrating them at one point. Isolated vessels may be attacked and destroyed in detail; but if concentrated in one fleet, they may be able to repel or destroy the enemy fleet. For example, during the First World War, Great Britain maintained the command of the seas by keeping its battleship fleet as a unit at Scapa Flow, ready to challenge any concentration of enemy power which might venture forth. Similarly, for about three decades following the Spanish-American War, the heavier United States vessels were organized as a combat unit and based on Norfolk, Virginia; and when the tension grew with Japan, they were transferred to the Pacific and based on Puget Sound and later Pearl Harbor, Hawaii.

These considerations account for the supreme value placed by naval strategists on the Panama Canal in the scheme of American defense. By the ability to shift rapidly from one ocean to the other and force the enemy to make the long and hazardous trip around Cape Horn, the potential strength of the American fleet was nearly doubled. The steaming distance via the Panama Canal between the naval base at Norfolk and the one on Puget Sound is 5800 nautical miles, while around the Horn it is 13,600 miles, added to which are the problems of supply and interception. Moreover,

without the Canal public opinion in wartime might well force a disastrous division of the fleet between the Atlantic and the Pacific. The best-known American authority on naval warfare, Admiral A. T. Mahan, writing before the completion of the Canal, pointed out these advantages:[4] "Primarily, and above all, it will be the most important link in the line of communications between our Atlantic and Pacific coasts. There is throughout the whole length and extension of our seacoast, from Maine to Puget Sound, no single position or reach of water comparable to Panama in this respect."

NAVAL AND AIR BASES · The naval and air bases, at home and outlying, constitute the fourth element in the scheme of continental defense.[5] Bases are places of naval or military concentration and may serve both offensive and defensive purposes. They are of all grades, from main bases, with adequate anchorage space, machine shops, docking facilities, airfields, and supply depots, to those which are mere listening posts. Continental defense in the Pacific hinges on Kodiak, in the Aleutian Islands; Pearl Harbor, Hawaii; the Galápagos Islands, off the coast of Ecuador; and several west-coast bases. Generally speaking, no considerable enemy force dares by-pass a main enemy base. Without that at Pearl Harbor the Japanese attack of December 7, 1941, doubtless would have been delivered against the California coast. In the Atlantic, American bases now extend from Iceland, through Greenland, Nova Scotia, the Bahamas, and the West Indies, to British Guiana.

## *THE SECOND DEFENSE PLAN: THE PHILIPPINES AND THE OPEN DOOR*

What was described above had to do with the defense of continental United States and the lands and waters necessarily involved. Other than the great size of the fleet, which might conceivably have been moved to any part of the globe, there were neither plans nor preparations for the defense of any greater zone. The treaty of Washington of 1921, by surrendering the right to fortify the Philippines and other Pacific islands, had reduced the United States to impotence in the region west of Hawaii. The Philippine Independence Bill of 1934 was further evidence of the intention of the United States to trust its fortunes in the Far East to the mercy of others.

However, when the aggressive intentions of Japan became unmistakable, the United States in 1941 began a weak program of rearmament. General Douglas MacArthur was lent to the Commonwealth of the Philippines as commander of its troops; small quantities of airplanes, artillery, and munitions were sent there, with more on the way; and a small force of American troops, including one tank unit, had arrived shortly before the Japanese

[4]A. T. Mahan, *Armaments and Arbitration* (1912), pp. 184, 185.
[5]H. W. Baldwin, op. cit. pp. 93–115.

attack. Contingents of Marines and construction workers had been sent to Midway, Wake, and Guam, steppingstones from Hawaii west to the Philippines.

After entering the war the United States established various bases in Australia, New Zealand, and smaller islands of the southwest Pacific. A party of five members of the United States Senate, who visited the region in 1943, recommended that some of those bases be retained at the conclusion of peace.[6] The United States already had expended in two years of time much blood and treasure in expelling the Japanese from islands which it could have had at the close of the First World War. In spite of its emergence from the Second World War as a victor, the United States faced the same question as it did at the time of the Washington Disarmament Conference. That was whether to trust its commercial and political future in the Far East to the mercies of other powers or to entrench itself in various islands from Japan through the Philippines and westward.

## *THE MILITARY FORCES AND THEIR ADMINISTRATION*

The military power of states traditionally has attached to their executive heads. Indeed, the absolute monarch or the dictator owes his position as civil head to his control of the armed forces. The Constitution of the United States in unequivocal terms made the President "Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."[7] No President ever has assumed active command, although Abraham Lincoln issued a few general field orders in his own name and interfered directly in military affairs more than any other President, owing to his proximity to the field of operations. In time of peace no out-of-the-routine dispositions of the army or navy are made except on order of the President. United States troops, of course, are not sent into any State for the purpose of suppressing disorder except on his instructions. The President's military powers, like all his other powers, are performed, however, in the first instance by persons to whom he has delegated them, always subject to his general supervision. Those as head of the army are given over to the Department of War; those as head of the navy, to the Department of the Navy.

THE DEPARTMENT OF WAR · The Department of War was created by act of Congress in 1789.[8] As the name suggests, its duties at first covered the whole field of national defense; and after the creation of the Department of the Navy, in 1798, the name was not displaced by a more descrip-

[6] *United States News*, Supplement (1943), "Five Senators Report on War," pp. 10, 30, 48.
[7] *United States Constitution*, Art. II, clause 1.
[8] 1 Stat. 49 (August 7, 1789); E. P. Herring, *The Impact of War* (1941), chap. iv,

tive title, such as "Department of Military Affairs." This department has charge of all matters pertaining to the military forces of the United States: war plans; the enlistment, equipment, and training of troops; the education of officers; and the building and provisioning of forts and arsenals. It performs also certain nonmilitary functions, which will be explained at the proper points.

In charge of the department is the Secretary of War, a member of the President's cabinet, and, in line with the American tradition that the military should be kept subordinate to the civilian part of the government, a civilian and politician. Next to him in rank, and serving as head in his absence, is the Undersecretary of War, who is particularly charged with the making of plans for the procurement of war supplies and industrial mobilization in wartime. There are two Assistant Secretaries of War, one of whom has general administrative duties in the department, whereas the other has special duties in connection with the Army Air Forces. The present organization of the department is based chiefly on acts of Congress of 1904, 1916, and 1920, and an executive order of February 28, 1942.[9]

WAR DEPARTMENT GENERAL STAFF · Until 1903 the President's powers as army chief were lodged in a Commanding General, who was usually a person who had won fame on the field of battle, such as Generals Winfield Scott, W. T. Sherman, and Nelson A. Miles. This, in peacetime, was the cause of awkward problems concerning the relation of the Commanding General to the Department of War and the various services which it must render. Usually the commander maintained headquarters outside the War Department Building. Under the statute of 1903 the office of Commanding General was abolished, the Secretary of War was made nominal head of the army, and the strictly military duties were turned over to a General Staff headed by a Chief of Staff.[10] The National Defense Act of 1916 and the act of 1920 continued and elaborated the plan.

The Chief of Staff, with the rank of General, succeeded to most of the duties of the Commanding General, and is the principal military assistant and adviser to the President as commander in chief. It is his statutory duty to make "the necessary plans for recruiting, organizing, supplying, equipping, mobilizing, training, and demobilizing the army of the United States, and for the use of the military forces for national defense." He has "supervision of all troops of the line" and all matters pertaining to the "command, discipline, or administration of the existing military establishment."[11]

The General Staff is charged with the formulation of broad basic plans for the army, and assists in the general direction of its field operations. It

[9] 33 Stat. 262; 39 Stat. 626; 41 Stat. 956. Executive Order 9082, February 28, 1942.

[10] February 14, 1903 (32 Stat. 830); June 3, 1916 (39 Stat. 167); June 4, 1920 (41 Stat. 762).

[11] *United States Code* (1940 ed.), Title 10, sects. 33, 33a; *United States Government Manual, Winter, 1943–1944*, pp. 237–241.

is a small body, composed of the Chief of Staff, Deputy Chief of Staff, five Assistant Chiefs of Staff selected by the President from the general officers of the line, and, during wartime, several other officers sitting ex officio. "General Staff Corps" is the collective name given to the War Department General Staff, the General Staff with Troops, and officers detailed for four years from the staffs of territorial departments, corps, and other units. It acts only in an advisory and planning capacity.

WAR DEPARTMENT GENERAL STAFF ORGANIZATION · The work of the General Staff is organized in five divisions known as G–1, G–2, G–3, G–4, and Operations. G–1 is concerned with problems of personnel, including procurement, promotion, transfer, and discharge.[12] The duties of G–2, Military Intelligence, relate to the collection, evaluation, and dissemination of information of use to the army in its operations. G–3, the Organization and Training Division, is in charge of the mobilization, training, and organization of the military forces, and formulates general plans. The Supply Division, G–4, prepares plans for the supplies required by the different divisions of the service and theaters of operation and assists in determining priorities of materials. The Operations Division in peacetime prepares and supervises mobilization and war plans; in wartime it serves as the command post for the strategic direction of the armed forces in the various fields of operations.

ARMS AND SERVICES · A distinction is drawn in each component of the United States army between the "arms," or combat units, and the "services," which support the "arms" in the performance of their work. The arms have nine different kinds of units: Infantry, Cavalry, Field Artillery Corps, Coast Artillery Corps, Corps of Engineers, Signal Corps, Air Corps, Armored Force, and Tank Destroyer Command. The army of the United States as designated by acts of Congress consists of the Regular Army, the National Guard (when in the service of the United States), and the Organized Reserves. The military forces at home are organized in three units, each headed by a Commanding General stationed at Washington: two "arms" units, the Army Ground Forces and the Army Air Forces, and one "service" unit, the Services of Supply.

## *THE UNITED STATES ARMY*

THE REGULAR ARMY · The Regular Army is the nation's only permanent, professional military force. The policy has been to keep its numbers at a minimum. Under the act of 1920 the total of officers and enlisted men could not exceed 280,000. On June 30, 1939, at which time the fully equipped German army numbered in the millions, the American Regular Army totaled only 180,711 officers and enlisted men. A year later, with

[12] *United States Government Manual, Winter, 1945* (1st ed.), pp. 254–255; Military Service Publishing Co., *The Officers' Guide* (9th ed., 1943), pp. 10–15.

the war in Europe nine months old, the number was 243,095, nearly 40,000 below the authorized strength. By September, 1941, the number had reached 535,500.[13]

The purposes of the Regular Army, besides furnishing a combat force in small wars, are to garrison the frontiers of the United States and its overseas possessions, to carry on experiments and investigations in the techniques of warfare, and to make available a training staff for the enlargement of the army in wartime. The deceptively small peacetime army contains a percentage of highly trained strategists and technicians sufficient to multiply the number of available trained troops in a year or so.

THE NATIONAL GUARD · The Constitution of 1787 did not attempt to deprive the States of their military forces. These were implicitly recognized in giving Congress the power to provide for their organization, arming, and discipline.[14] Each State from the beginning maintained an armed force of which the governor was commander in chief. Militia companies were organized in neighborhoods, and sometimes given characteristic names such as the Cleveland Grays, the New York Zouaves, and the Ancient and Honorable Artillery Company of Boston. Each chose its own weapons and kind of uniform. The first act of Congress respecting the militia, in 1792, provided that each person should bring his own arms, uniform, and equipment.

While some of the militia companies had more social than military importance, those in the frontier States played an important part in defense against the Indians. It is correct to say that these "citizen armies" were a characteristic part of American life before the Civil War. The highly developed armament and specialized training required today, however, leave no place for such nondescript forces.

The organization and character of the state militia of today were fixed by the acts of Congress of 1903, 1908, and 1916.[15] These provided that the National Guard, as it now was called, should be armed and equipped by the Secretary of War at Federal expense; that its system of discipline and instruction should conform to that of the United States army; that Regular Army officers should be detailed as instructors to the militia; and that State encampments should be held each summer for training purposes, with joint maneuvers between the Federal and State forces. Despite the constitutional provision to the contrary, the appointment of the National Guard officers was given to the President of the United States. Each State is required to establish the office of Adjutant General as the administrative head of its National Guard units. To the State, however, are left the size of the force, within the maximum set by Congress, and the location and headquarters of the various units.

[13]Military Service Publishing Co., *The Officers' Guide* (9th ed., 1943), pp. 22–23.

[14]*United States Constitution*, Art. I, sect. 8, clause 16.

[15]32 Stat. 776; O. L. Spaulding, *The United States Army in War and Peace* (1937), chap. xxvii.

By the terms of the Constitution the State militia may be called into the service of the United States only for certain purposes: to "execute the laws of the Union, suppress insurrections, and repel invasions."[16] During the War of 1812 several governors refused to send the militia outside the State; and the militia of New York once refused to cross the Niagara River into Canada, on the ground that none of the constitutional contingencies had arisen. The act of 1916 skillfully sidesteps any such State autonomy in the future. These forces now have a dual capacity: they are both a "National Guard of the United States," or a part of the United States army, and a "National Guard of the States." Should they refuse to respond to the President's call as State troops, they still would be obliged to respond as members of the Federal military establishment.

The law authorizes National Guards for each State up to the number of 800 for each member of Congress, which would make an over-all total of 424,800. The actual number, however, is dependent on State legislation, community co-operation, and the appropriations made by Congress. On December 7, 1941, the National Guard, exclusive of Hawaii and Puerto Rico, consisted of 278,000 officers and enlisted men.[17]

## *THE ORGANIZED RESERVES*

An Officers' Reserve Corps is authorized, to be appointed by the President from officers who have served in the Regular Army, in the First World War army, or the National Guard, or who have graduated from the Reserve Officers Training Corps.[18] All officers of the National Guard are automatically members. Its 116,719 members, of June, 1940, played a significant part in the training of the greatly expanded forces needed for the Second World War.

Reserve Officers Training Corps are maintained in such universities and colleges as are willing to establish a two years' course in military training and comply with the standards established by the War Department under an instructor detailed from the army for that purpose. Land-grant colleges, under the Morrill Act of 1862, are under obligation to maintain such corps. Medical, dental, and veterinary students may be admitted for a specialized course of training. There is also an Enlisted Reserve Corps, which is made up of volunteers trained by regular army men. Camps for short-term military training are also used in building up the reserve force. One type takes graduates of the student Reserve Officers Training Corps for a period of six weeks in the summer; another is open to civilians and enlisted men who desire training which may qualify them for membership in the Officers' Reserve Corps.

[16] *United States Constitution*, Art. I, sect. 8, clause 15.
[17] Military Service Publishing Co., *The Officers' Guide* (9th ed., 1943), pp. 23–28.
[18] Ibid. pp. 28–32; 39 Stat. 189; 48 Stat. 154.

## *FUNCTIONAL ORGANIZATION OF THE ARMY*

Regular Army, National Guard, and Organized Reserves representing, respectively, the professional force, the partially trained militia, and their reserves and inactive officers, together constitute the permanent components of the United States army as established by law. At the beginning of 1944 the total strength was announced as approximately 7,700,000 officers and enlisted men, and by the time of the fall of Germany it had reached 8,300,000. For purposes of operation, however, these three are merged and divided into three functional components: the Army Ground Forces, the Army Air Forces, and the Services of Supply.[19]

THE ARMY GROUND FORCES · The army combat forces are made up of successively larger units.[20] Beginning with the squad, the units are in order: section or platoon, company, battalion, regiment, brigade, division, corps, and field army. Each is in command of an officer responsible in hierarchical order to an officer above, ranging from sergeant or corporal, through the general of the field army, the theater commander, and the General Staff at Washington, to the President of the United States. The infantry division of 15,000 men and the cavalry division of 10,000, in command of a major general, are the smallest self-sufficient units capable of carrying on all normal military operations. The division in this respect supplants the corps, famous as the fighting unit of the Civil War. The corps now is composed of two or three divisions, constituting, with accessory units, a force of from 65,000 to 90,000 men, and is commanded by a lieutenant general. The field army is as large as the exigencies of the military situation of the front demand. A theater of war comprises a large area in which the co-ordination of all armed forces is requisite, such as, in the Second World War, the Mediterranean, western-European, and southwest-Pacific areas. The general in command of the theater will have several armies at his disposal.

THE ARMY AIR FORCES · The greatly increased effectiveness of the airplane in the technique of modern warfare was responsible for the augmentation of the Army Air Forces.[21] The United States acquired its first airplane from the Wright brothers in July, 1909, at which time it was considered valuable chiefly for reconnaissance purposes. The experience of the First World War, and the steady development of the airplane in structure, speed, and design, demonstrated its many-sided usefulness as an army auxiliary. Besides reconnaissance and defense against opposing air forces, the airplane is used as an immediate aid to the troops in ground attack; as artillery, to bombard the enemy lines and to destroy communi-

[19]J. I. Greene, *What You Should Know about Army Ground Forces*, chaps. i–iii.

[20]Ibid. chap. iv; Military Service Publishing Co., *The Officers' Guide* (9th ed., 1943), pp. 17–22, 32–35.

[21]H. E. Hartney, *What the Citizen Should Know about Our Air Forces* (1942); H. H. Arnold and I. C. Eaker, *Winged Warfare* (1941), chaps. iv, v.

cations in the enemy's rear; as a means of communication between army units; and as a transport for troops. Specialized types of aircraft are designed to perform each of these functions.

At the head of the Army Air Forces is the Commanding General at Washington, aided by a general staff whose task it is to provide new types of planes, new armament, and training for the pilots. For purposes of administration the United States is divided into four areas, each with an air force and several operating bases. A typical air force consists of four subdivisions: air defense, bombardment, ground support, and base service. The combat units are known as "flights," "squadrons," "groups," and "wings" (6 to 8 planes, 8 to 25 planes, 26 to 80 planes, and 55 to 250 planes respectively).

THE SERVICES OF SUPPLY · The branch known as the Services of Supply performs a wide variety of duties, all directed toward the support of the combat forces.[22] At its head at Washington are the Commanding General, who is directly responsible to the Undersecretary of War in matters of procurement and supply, and an elaborate staff in charge of the complex and varied functions. Mention of only a few of the offices and divisions will show something of the scope of the Services of Supply. The Adjutant General's Department is largely a secretarial and recording office, handling communications and orders, keeping military records, and answering inquiries. The Inspector General's Department makes periodic inspections of army posts, camps, and other military properties. The Judge Advocate General is the legal adviser of the Secretary of War, supervises the system of military courts, reviews records of trials by courts-martial, and performs other matters of a legal nature concerned with the Department of War. The Quartermaster Corps procures supplies and furnishes transportation. The Ordnance Department procures weapons and ammunition of all kinds. The functions of the Signal Corps, Corps of Engineers, Corps of Chaplains, Medical Department, and Chemical Warfare Department are suggested by their names. The Corps of Engineers is in charge of all construction work, including field and base fortifications and highways.

## *TERRITORIAL ORGANIZATION*

SERVICE COMMANDS · For purposes of administration the Department of War divided the United States into nine parts, of approximately equal population, called Corps Areas.[23] These, comprising three or more States, were designated as the First Corps Area, Second Corps Area, and so on. Sometime after the commencement of the Second World War the name was changed to "Service Command." The corresponding areas for the overseas possessions are known as Departments, of which there are three: those of Hawaii, the Panama Canal, and Puerto Rico. Alaska was at-

[22]Military Service Publishing Co., *The Officers' Guide* (9th ed., 1943), pp. 12–22.
[23]Ibid. pp. 45–48.

tached to the Ninth Service Command. The respective headquarters of each Service Command are in general charge of military affairs in the area, including enlistments, the training of troops, maneuvers, the care of military property, and co-operation with the National Guards of the States.

FIELD-ARMY ORGANIZATION · Cutting across the Service Command areas, all the military forces, consisting of regulars, militia, and reserves, were organized into four field armies designated as the First, Second, Third, and Fourth Armies. The various National Guard units were grouped into army divisions and attached to the appropriate field army. For instance, those of Kansas, Missouri, and Nebraska, of the Seventh Corps or Service Command Area, were part of the Third Army, with headquarters at San Antonio, Texas. It is seen that this plan of organization made it easy, at the outbreak of war, to weld all the various units into one great military organization. The National Guard units, in the autumn of 1940, were recruited to full strength, called into Federal service, and by the time of the attack on Pearl Harbor had been given a year's training. At the outbreak of the war the four armies and the areas which they represented were designated as Defense Commands, known as the Northeast, the Central, the Southern, and the Western. Outside the United States a fifth, the Caribbean Defense Command, was constituted, to include the Panama Canal and Caribbean Departments.

MILITARY EDUCATION · The complexities of modern warfare are responsible for the great elaboration of military education which has taken place in the United States since the First World War. The United States Military Academy at West Point is the chief source of commissioned officers for the Regular Army.[24] Its peacetime corps of cadets of 1960 men is appointed in various ways. Besides three designated by each member of Congress, 172 are chosen from the United States at large from honor graduates of selected schools and the sons of veterans killed in action, and 180 from among the enlisted men of the Regular Army and the National Guard. To be eligible for appointment, the applicant must be a citizen of the United States between 17 and 22 years of age and meet high physical, mental, and educational tests. A few places are reserved for citizens of Puerto Rico, the Panama Canal Zone, Alaska, Hawaii, and the Philippines.

A series of schools and training centers furnishing postgraduate and specialized training both for the arms and the services round out the scheme of military education. The mention of a few will give an idea of their scope. At Randolph and Kelly Fields, San Antonio, Texas, is the Army Air Corps Training Center; at Fort Benning, Georgia, the Infantry School; at Fort Riley, Kansas, the Cavalry School; at Fort Sill, Oklahoma, the Field Artillery School; and at Fort Monroe, Virginia, the Coast Artillery School. There are also schools for those specializing in ordnance, engineering, medicine, chemical warfare, and finance quartermaster

[24]Ibid. chap. ii; E. D. J. Waugh, *West Point* (1944), chap. xiv.

service, as well as for chaplains. The Army War College at Washington, D. C., and the Command and General Staff School at Fort Leavenworth, Kansas, give instruction of a highly professional grade to selected officers from all arms of the service. Finally, officers are sent for technical instruction to about forty selected institutions, schools, hospitals, and industrial establishments.

## *THE UNITED STATES FLEET AND ITS ADMINISTRATION*

THE DEPARTMENT OF THE NAVY · The President's duties as commander in chief of the navy are administered through a Secretary of the Navy and his department. The statute of 1798, still in force, provides that the secretary shall execute the orders of the President "relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval Establishment."[25] True to tradition, the office of secretary always is filled by a civilian: during the two world wars, by newspaper editors, one from the banks of North Carolina's Neuse River, the other from the shores of Lake Michigan. The secretary has for his chief advisers the Undersecretary of the Navy, two Assistant Secretaries of the Navy, the Commander in Chief of the United States Fleet and Chief of Naval Operations, the Commandant of the Marine Corps, the Commandant of the Coast Guard, and the Judge Advocate General. Fifteen bureaus and offices carry on the work of the department, the character of whose work is indicated by such titles as the following: Yards and Docks, Naval Personnel, Ordnance, Ships, Aeronautics, and Medicine and Surgery.[26]

THE GENERAL BOARD OF THE NAVY · While the navy, unlike the army, has no formal general staff, a General Board, made up of from five to eight high-ranking officers, serves somewhat the same purpose.[27] Its duties, however, are entirely advisory. It studies naval policy; makes recommendations to the secretary as to the number and types of vessels requisite for a proper balance in the fleet; draws plans for naval districts, operating bases, and shore establishments; and considers such other questions as may be referred to it. An interesting contribution of these "elder statesmen" of the navy is the formal statement of naval policy drawn up from time to time.

COMMANDER IN CHIEF OF THE UNITED STATES FLEET AND CHIEF OF NAVAL OPERATIONS · In March, 1942, the two important offices of Commander in Chief of the United States Fleet and Chief of Naval Operations were combined and their duties given to one officer with the rank of

[25] 1 Stat. 553; *United States Government Manual, 1945* (1st ed.), pp. 290–291.
[26] A. A. Ageton, *The Naval Officer's Guide* (1943), pp. 29–62.
[27] *Annual Report of the Secretary of the Navy, 1942*, p. 9.

Admiral.[28] The incumbent is the chief naval adviser of the President on the conduct of naval warfare, and the executive of the Secretary of the Navy in the administration of the Naval Establishment. As Commander in Chief of the United States Fleet he is in supreme command of the operating forces, which comprise the several fleets and their auxiliary forces. He prepares and directs naval training in peacetime, and during war prepares and executes plans for combat operations. He is assisted by an elaborate staff, which has the five divisions of Plans, Combat Intelligence, Operations, Readiness, and Antisubmarine.

In his capacity as Chief of Naval Operations he directs those services which prepare, maintain, and support the naval combat forces. Eighteen separate divisions of his office are engaged in specialized work to this end. The Naval Communications Division, for instance, is in charge of the entire radio, telegraph, telephone, cable, and direction-finder systems. The Fleet Maintenance Division, as may well be judged, covers a very wide range, including the overhaul, converting, and repair of ships and the making of recommendations for changes in design. The Hydrographic Office makes hydrographic surveys in foreign waters and on the high seas, and prepares and prints navigation maps and charts. The Base Maintenance Division supervises the administration of the naval districts and develops and administers the naval bases.

### *THE NAVAL ESTABLISHMENT*

The combat forces, together known as the Naval Establishment, are made up of three elements: the United States Fleet, the United States Marine Corps, and the United States Coast Guard.[29] Auxiliary to these are the Naval Districts, the Special Naval Defense Areas, the Naval Shore Stations, the Advance Bases, and other stations of the navy at home and abroad.

STRENGTH OF THE FLEET · The General Board of the Navy, some months before the Japanese attack on Pearl Harbor, thus summarized its fundamental policy: "To maintain the Navy in strength and readiness to uphold national policies and interest, and to guard the United States and its continental and overseas possessions." It has been seen that the naval-limitations agreements of the Washington conference of 1921, by stopping the construction of battleships and certain other types of vessels, had left the United States Fleet with many ships of the line twenty years old or older in design. However, after the withdrawal of the Axis Powers from the treaty, the United States embarked on a new naval building program. By January, 1941, the fleet comprised 322 combat vessels, of which fifteen were

[28] *United States Government Manual, 1945* (1st ed.), pp. 298–301; *Annual Report of the Secretary of the Navy, 1942*, p. 44.

[29] A. A. Ageton, op. cit. pp. 54–62.

battleships, with about 250,000 officers and enlisted men.[30] In addition, seventeen battleships of from 35,000 to 58,000 tons were under construction. As a result of the Japanese attack on Pearl Harbor eight battleships were put out of action. Late in the year 1943 the Secretary of the Navy announced that the fleet had grown to 838 combat vessels, exclusive of auxiliary vessels, manned by a personnel of 2,300,000 men.[31]

THE BATTLESHIP · The battleship is the modern counterpart of the three-decker man-of-war of sailing days. Both have been called "ships of the line," because they were substantial enough to form the front line in a general naval combat. The battleship's great tonnage permits the use of heavy guns, thick armor plate for the hull and decks, and torpedo-resisting watertight compartments which enable it both to give and to take severe punishment without destruction. The size of its guns enables it to destroy cruisers or other light vessels while still beyond their range. The prowess of the battleship caused naval technicians to use the number of battleships as the gauge of the strength of a nation's fleet. Thus in January, 1941, the numbers of capital ships of Great Britain, the United States, and Japan (16, 15, and 10, respectively) were thought to represent approximately the relative strengths of the three navies.[32]

THE AIRPLANE CARRIER · The Japanese attack on Pearl Harbor, by putting eight of the American first-line battleships out of action, according to accepted theories of naval warfare should have given Japan the supremacy of the Pacific Ocean. Its fleet, if concentrated, could have sailed to any part of that ocean; for its ten or twelve heavy battleships would have been superior to any force available to be sent against it. Under the conditions of the First World War, American communications with Australia and New Zealand would have been cut, and those two British dominions would have been open to attack and perhaps capture and occupation. As it was, the American losses left the Japanese free to conquer British Malaya, Burma, and the Dutch East Indies at their leisure.

That the United States was not ousted from the southwest Pacific was due to an element of naval warfare not found in the First World War, the airplane. It already had been shown that the bombing plane possessed some powers equivalent to those of the capital ship. The bomber, in effect, is artillery with a greater range and heavier charge than the sixteen-inch guns of the "queen of the seas." This had been demonstrated when two

[30]H. W. Baldwin, op. cit. pp. 158–163. According to an estimate of the magazine *Time* of January 8, 1945 (Vol. XLV, No. 2, p. 57), the United States navy as of January 1, 1945, consisted of nearly 1300 combat vessels, namely, 23 first-line battleships, 59 cruisers, more than 100 aircraft carriers and 37,000 planes, 425 destroyers, 400 destroyer escorts, 237 submarines, and more than 54,000 landing and assault craft of all types.

[31]*New York Times*, December 28, 1943.

[32]H. W. Baldwin, op. cit. p. 174; H. W. Baldwin, *What the Citizen Should Know about the Navy* (1941), pp. 98–106. For data on the United States Naval Establishment in 1940 cf. K. Banning, *The Fleet Today* (1940), pp. 283–316.

of the newest British battleships, without air protection, were sunk by Japanese planes off the coast of Malaya; and earlier by the inability of the British navy to stop the transport by sea of German troops under air protection to Norway. Fear of losses from American naval planes was undoubtedly the reason why the Japanese fleet was not sent far beyond its bases to seek a general engagement with the weakened American fleet. Airplane carriers are much more expeditiously built than battleships and, if properly supported, may perform much the same function. Small American task forces, typically composed of one or two heavy and several light vessels and an airplane carrier, succeeded in keeping the sea lanes open to Australia until, by the repairing of old vessels and the building of new ones, the United States had regained its general naval supremacy.[33]

ORGANIZATION OF THE FLEET · Before December 7, 1941, the United States Fleet was divided into three separate fleets, the Atlantic Fleet, the Asiatic Fleet, and the Pacific Fleet.[34] The Commander in Chief of the United States Fleet was in general command of all three, but in immediate command of the Pacific Fleet, stationed at Pearl Harbor, which comprised the greater part of the capital ships. Upon our entry into the war the fleet organization underwent important changes. As already pointed out, a supreme naval command was established by the union of the offices of Commander in Chief and Chief of Naval Operations. Directly responsible to this officer were the Atlantic Fleet, which was engaged chiefly in convoy work; the Pacific Fleet; the Sea Frontier Forces, a nondescript collection of vessels engaged in antisubmarine warfare; and special task forces, combat units organized for particular objectives. In addition, special forces were organized as the exigencies of the war demanded, such as the Southwest Pacific Force and various amphibious forces.

## *THE MARINE CORPS*

The Marine Corps, known as "the Soldiers of the Sea," dates from an act of the Continental Congress of November 10, 1775.[35] The Marines constitute a highly trained, ever-ready, hard-hitting, ship-to-shore force. In the day of sailing vessels they served as police aboard ship to keep unruly sailors in line. When the vessels closed in combat, they were stationed in the masts as sharpshooters, and acted as boarding parties or as defenders against such attacks from enemy vessels. Then as now, they constituted a mobile force to be sent to foreign parts to protect American lives and property. In the early decades of the present century they were used as

[33]H. W. Baldwin, *What the Citizen Should Know about the Navy* (1941), pp. 106–110; K. Banning, op. cit. chap. xix; Admiral Sir Herbert Richmond, "The Modern Conception of Sea Power," *Brassey's Naval Annual* (1943), pp. 98–111.

[34]*Annual Report of the Secretary of the Navy, 1942*, pp. 43–48; A. A. Ageton, op. cit. pp. 68–72.

[35]J. H. Craige, *What the Citizen Should Know about the Marines* (1941), chaps. i, iv.

occupying forces in several of the disturbed Caribbean countries. Because of their high degree of training, preparedness, and mobility they were used in both world wars as spearhead land infantry. Small Marine detachments were at Wake and Midway islands when these were attacked by large Japanese forces in December, 1941. The crucial Guadalcanal landing and seizure were made by Marines; and Marine detachments were in many of the amphibious forces which successively seized the fortified Japanese islands of the Pacific.

ORGANIZATION · The Marine Corps of today is a far cry from the light-armed infantry of its beginnings.[36] The corps has its own artillery, tank, and aviation units. Its internal organization closely parallels that of the army. Before the opening of the Second World War the Fleet Marine Force, a composite body of infantry, artillery, aviation, tanks, and signal, engineering, and chemical troops, had been trained for landing on hostile coasts. This later was expanded into the First (Atlantic) and Second (Pacific) Divisions. Another type of unit is the Defense Battalion, especially trained to dig in and hold ground already taken by the offensive units.

At the head of the Marine Corps is the Commandant, who in peacetime holds the rank of Major General. He is assisted by the usual type of staff, including a Paymaster, a Quartermaster, and a Director of Personnel.

Following the plan of the army, there is a Marine Corps Reserve, which consists of three classes: the Organized Marine Corps Reserve, of whose members an annual field training of fifteen days is required; the Fleet Marine Corps Reserve, composed of inactive officers and enlisted men, who previously have served with the regular naval or military forces; and the Volunteer Marine Corps Reserve, of inactive men who have had previous military experience.

The Marine Corps as of March 25, 1941, totaled 50,243 officers and enlisted men, of whom 40,279 were regulars.[37]

## *THE COAST GUARD*

In organizing the Coast Guard, Congress declared it "a part of the military forces of the United States."[38] In time of peace, when it operates as a sort of maritime police, it is a bureau of the Department of the Treasury; in time of war it becomes part of the Naval Establishment. As a police force it acts as a coast patrol, keeping guard against the smuggling of persons and goods into the United States; rescues vessels and persons in distress; and removes derelicts and other obstructions to navigation. A month before America's entry into the Second World War, President

[36] J. H. Craige, op. cit. chaps. viii–x.

[37] *The United States Navy*, Senate Document 58, 77th Cong., 1st Sess., p. 65.

[38] *Annual Report of the Secretary of the Navy, 1942*, pp. 50–54; *United States Government Manual, Winter, 1943–1944*, p. 303.

Roosevelt ordered its transfer to the navy and the expansion of its personnel.[39] It was immediately given the task of guarding wharves, piers, vessels, and canals against sabotage. Later came a large-scale training program for crews and officers of the merchant marine, radiomen, aviators, and gunners' mates. Attached to it was the Coast Guard Auxiliary, a voluntary and largely unpaid organization of yacht and motorboat owners, assigned to coast-patrol duty. With a personnel in 1942 of 11,500 men and 9500 boats, this performed a valuable service, particularly in the days of the submarine menace.[40]

At the head of the Coast Guard is a Commandant. The United States and its possessions are divided into sixteen Coast Guard Districts, with headquarters on the coasts and the navigable rivers. At the close of the year 1942 the Coast Guard had a personnel of over 55,000 officers and enlisted men.[41]

## *THE NAVAL SHORE ESTABLISHMENT*

While the United States Fleet operates chiefly on the high seas and in the coastal waters, it must draw its strength of men and materials from the homeland. In the days of sailing vessels enlisted men were drawn mostly from the coastal regions, where much of the population was inured to the rigors of the sea. Today, with large motor-driven vessels, experience in a Nevada or Arizona desert garage may furnish just the experience needed for some phases of ship operation. Likewise materials for the ships formerly were taken from the forests accessible to the sea. In colonial New England surveyors went through the "king's woods," cutting the broad arrow of the royal navy on the tall white-pine trees suitable for masts. Now the iron ore of Michigan and the copper ore of Arizona, fabricated in the plants of private industry, with a wide variety of complicated machinery, go to make up the completed man-of-war.

THE NAVAL DISTRICTS · For purposes of administration the United States and its possessions are divided into sixteen naval districts, each in charge of a commandant responsible directly to the chief of Naval Operations. Within each of these is a variety of establishments.[42] The largest are the navy yards, for the building and repair of vessels, the chief of which are at Brooklyn; Portsmouth, New Hampshire; Philadelphia; Mare Island, San Francisco; Bremerton, Washington; and Pearl Harbor, Hawaii. Other types of shore establishments are the naval operating bases, training stations, factories of the Bureau of Ordnance, twenty-six naval air stations, and the submarine school at New London, Connecticut.

[39] A. A. Ageton, op. cit. pp. 56–58.
[40] *Annual Report of the Secretary of the Navy, 1942*, pp. 49–54.
[41] Ibid. p. 54.
[42] A. A. Ageton, op. cit. pp. 58–62.

NAVAL BASES · One of the most important elements in the long-standing British naval supremacy was the numerous naval bases conveniently placed at points in all the seven seas. The term *base* designates naval stations of several grades, from those competent to afford protected anchorage, furnish supplies of food, fuel, and ammunition, and put vessels in drydock for reconditioning and repair, to those which afford only temporary refuge or serve merely as look-out stations.[43] Main bases are usually located in the home territory and contain all facilities for operating a fleet. In this category are those at Bremerton, on Puget Sound, at San Francisco, and at San Diego, on the Pacific coast; at Hampton Roads, Virginia, at New York, at Charleston, South Carolina, and at Boston, on the Atlantic coast; at Balboa, in the Canal Zone, and at Pearl Harbor, Hawaii.

Location has much to do with the value of a naval base. Advance bases permit the fleet to operate at distances from the homeland by assuring needed supplies and repairs and affording protection against superior forces. Submarine and naval aviation bases on outlying islands under modern conditions of warfare are essential both in defense and in offensive operations. The minor bases, like those on the coral islets of the Pacific, such as Wake, Midway, Guam, and Canton, serve chiefly as listening posts, and as delaying obstacles to an attacking force. Defended by artillery and aerial forces, they are capable of slowing an attack even by strong forces and of inflicting large losses.

OUTLYING ATLANTIC BASES · The United States was not well supplied with outlying bases in the Atlantic; but this had not been considered a dangerous weakness, because the only strong fleet there, the British, was in friendly hands and kept occupied by the precarious balance of power in Europe. The occupation by the Germans, in 1940, of most of western Europe except the island of Great Britain, and the chance that the British fleet might fall into hostile hands, revealed the weakness of American defense from the Atlantic side. The situation was remedied by an executive agreement with Great Britain in September, 1940, by which, in return for fifty old destroyers, the United States was given long-term leases for a chain of bases extending from Newfoundland to British Guiana, in South America.[44] These sites are adapted chiefly for advance naval and air stations of limited purposes. Located in Bermuda, the Bahamas, and various West India islands, together with existing bases in Puerto Rico and the Virgin Islands, they furnish an outer rim of defense which no enemy fleet could well by-pass. Shortly afterward the United States established bases in Danish Greenland and Iceland, which guard the great-circle route to Great Britain and northern Europe.

NAVAL EDUCATION · The United States Naval Academy, opened in 1845 at Annapolis, Maryland, is the chief institution for the training of

[43]The United States naval bases are listed in H. W. Baldwin, *United We Stand*, pp. 328–332.
[44]F. Davis and E. K. Lindley, *How War Came* (1942), chap. iii.

young men as officers of the navy.[45] The students, given the rank of midshipmen, are appointed in a variety of ways. Each member of Congress is allowed five; and the President of the United States is allowed twenty-five, to be appointed from the sons of officers and enlisted men of the navy and Marine Corps, and forty to be appointed from the sons of soldiers, sailors, and Marines killed in action. Candidates must be between seventeen and twenty-one years of age and pass rigid mental and physical examinations. On January 1, 1941, there was an enrollment of 2598 midshipmen. The Naval War College at Newport, Rhode Island, gives advanced and specialized training for officers. In addition, graduate work is given at Annapolis, and technical training in a dozen or more engineering and business schools.

## *CONSTITUTIONAL PROBLEMS OF WARTIME*

War gives constitutional and free government its severest test. A written constitution is a more or less rigid thing. The chief organs of government there are designated, their respective powers prescribed, and the rights and privileges of the citizens outlined. In a federal union like that of the United States, the respective powers of national and State governments are segregated. Yet the exigencies of war may require violent readjustments in the constitutional plan in order that the military operations may be crowned with success. The constitutions of some republics authorize the chief executive in times of war or emergency to "declare a state of siege" or "suspend constitutional guarantees." The framers included nothing in the American frame of government which would countenance anything so drastic. The Supreme Court in the case of *Ex parte Milligan* said:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[46]

THE WAR POWER · Although the Constitution cannot be set aside, war does change the relative importance of the various powers.[47] Some of small force in peacetime are augmented, while others are curtailed. In general the Federal powers are increased and those of the States diminished. The "war power," for instance, becomes dominant, and others must yield ground. No single phrase of the Constitution sets up the "war

[45] A. A. Ageton, op. cit. chaps. ii, iii.

[46] *Ex parte Milligan*, 4 Wall. 2 (1866).

[47] C. G. Fenwick, *Political Systems in Transition*, chaps. v–viii; E. S. Corwin, *The President: Office and Powers* (1940), pp. 189 ff.

power"; but it is inferred from several, the chief of which are those giving Congress the power to "raise and support Armies" and "provide and maintain a Navy," and that making the President "Commander in Chief of the Army and Navy of the United States." No court has attempted to mark the limits of the power of Congress to raise and equip armies and provide and maintain a navy. No serious doubt exists of its right, in furtherance of this power, to ration food and materials, to control industrial production, to allocate man power, and in general to mobilize the nation for purposes of war production. The normal division between the Federal and State fields of action undergoes alteration. Although the individual's rights of free speech and of free press remain, they yield ground to the right of the government to raise military forces and to conduct military operations.

SPEEDY TRIAL IN A CIVIL COURT · The Bill of Rights guarantees the citizen indictment by a grand jury, and a speedy and public trial by jury in a civil court. Do these rights hold in wartime? It has been seen that the chief guarantee of a speedy trial is the writ of habeas corpus. The Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[48] Early in the Civil War, President Lincoln suspended the privilege of the writ for a certain district and later for others, the effect of which was to permit the arrest and imprisonment of persons without trial.[49] Congress, in March, 1863, passed a law authorizing the President to suspend the writ whenever he thought necessary; but the question as to whether he could act without such authorization was left unsettled. President Lincoln also authorized the establishment of military courts for the trial of civilians accused of disloyal practices or of offering aid and comfort to the enemy.

THE CASE OF EX PARTE MILLIGAN · The right to try members of the military forces in military courts is plainly authorized by the Constitution. The question of whether a disloyal civilian might be denied a trial in a civil court was raised in the case of one Lambdin P. Milligan, of Indiana.[50] Milligan had entered into a conspiracy with others to free Confederate prisoners and start an insurrection in the loyal States of the North. He was arrested under order of the commander of the military district of Indiana,

[48] *United States Constitution*, Art. I, sect. 9, clause 2.

[49] J. G. Randall, *Constitutional Problems under Lincoln* (1926), chap. vi.

[50] S. Klaus, *Ex parte Milligan* (1929), pp. 27–47. In June, 1942, eight German saboteurs, wearing military uniforms, were landed by submarines on American shores, four at Long Island and four at Florida. After burying their uniforms and quantities of explosives in the sand they proceeded inland in civilian dress. After capture they were charged with espionage under the Articles of War, tried before a military commission appointed by the President, convicted, and executed. The legality of the military commission was upheld by the United States Supreme Court in the case of *Ex parte Quirin*, 63 Sup. St. Rep. 2 (1942). The case was unlike that of Milligan in that the accused were members of an enemy armed force and not American citizens.

tried in a military court, and sentenced to be hanged. Before the sentence could be carried out, he appealed to the civil courts for release on a writ of habeas corpus. The United States Supreme Court held that no person, not a member of the armed forces, a prisoner of war, or a citizen of a rebellious State, could be tried in a military court in any State where the regular courts were open and unimpeded. Indiana not being a war zone, Milligan was entitled to a trial in a regular civil court.

The decision, by a vote of 5 to 4, came after the close of the war and was greatly criticized. Chief Justice Chase, speaking for the minority, held that either Congress, under its power to raise, support, and govern armies, or the President, as commander in chief, had the right to institute military courts. The decision, on the other hand, received wide praise as a reaffirmation of the supremacy of the civil government over the military. Whether the ruling would stand today is uncertain, as no occasion has arisen since to give it a crucial test.

MILITARY RULE · The framers of the Constitution had a genuine fear and abhorrence of government by the military or of any sort of dictatorial authority, and did their best to make it impossible. However, they as well as the authors of the various State constitutions had to face the fact that emergencies might arise which would call for a partial modification of the ordinary processes and practices of civil government. In the Federal realm a slight concession to emergency was made in the permission to the President or Congress to suspend the privilege of the writ of habeas corpus.[51] The States, on whom the first obligation for maintaining peace and order rests, generally have been given an even greater latitude in employing military rule.

MILITARY LAW[52] · Three sorts of military rule are recognized. These are known as military law, military government, and martial law. Military law is that law which applies only to members of the military and naval forces. Its employment is clearly authorized in the power conferred on Congress "to make rules for the government and regulation of the land and naval forces." The orders of the President, as commander in chief, also are a part of the body of military law. The first comprehensive statement of American military law, drawn up during the Civil War by the jurist Franz Lieber, was entitled "Instructions for the Government of the United States Army in the Field." The existing Articles of War were adopted by Congress in 1920, and cover in general the rules for the conduct of officers and enlisted men.[53] Among other offenses, the crimes of desertion, absence without leave, mutiny, assaulting of or disobedience to

[51] *United States Constitution*, Art. I, sect. 9, clause 2.

[52] A. A. Schiller, *Military Law and Defense Legislation* (1941), pp. 357–359; C. Fairman, *The Law of Martial Rule* (1930), pp. 39–45; W. E. Birkheimer, *Military Government and Martial Law* (3d ed., 1914), pp. 21–44.

[53] 41 Stat. 787; *United States Code*, Title 10, chap. xxxvi; L. S. Tillotson, *The Articles of War Annotated* (2d ed., 1943).

a superior officer, and misbehavior before the enemy are defined and made punishable. The penalty for "conduct unbecoming an officer and a gentlemen" is dismissal from the service. A series of courts-martial, under the headship of the Judge Advocate General, for the trial of offenses against the Articles of War is established. With certain exceptions, sentences of death or any sentence respecting a general officer must be confirmed by the President of the United States before being carried into execution.

MILITARY GOVERNMENT · Military government is government conducted by the army in occupied territory.[54] Contradictory as this may seem, this is essentially civil government. In a theater of war, government usually is disrupted or collapses entirely, leaving the armed forces with the duty of administering civil affairs. Even for a considerable period following the close of operations the civil government may continue to be administered by the army. The Philippine Islands and Puerto Rico were under military government for two years after their acquisition, and the Panama Canal Zone for nine years; while the small Pacific islands of Tutuila and Guam have remained permanently under military control. Until Congress legislates, the President of the United States, acting through the army or the navy, is the government, namely, lawmaker, administrator, and judge. Soon after American entry into the Second World War, schools were set up for the training of army officers in military government. As soon as was prudent after the close of military operations, civil government in North Africa and southern Italy was turned over to friendly French and Italians respectively. Tentative agreements between the United States, Great Britain, and Russia had been reached, before the invasion of the Continent, that civil government in France should be handed over as speedily as possible to the French Committee of National Liberation, while Germany should be administered jointly by the three powers.

MARTIAL LAW · The nature of martial law and its proper relation to the civil order are not easily stated. Martial law is the rule of a civilian population by the army, but whether such rule is complete or is shared with the civil authorities depends on the circumstances of each case.[55] Martial law in general is a much less drastic remedy than military government. It often has been employed by the States where strikes, floods, fires, or insurrection have caused a temporary breakdown in local government. The military forces in such cases may function as little more than a supreme police force. The military commander is supreme, but shares his authority with the mayor and other civil officials. Martial law permits the arrest of offenders without warrant, and their detention without benefit of habeas corpus; but in practice ordinary civil processes are interfered with as little as possible.

[54]W. E. Birkheimer, op. cit. chap. ii.

[55]C. Fairman, op. cit. chap. iii; W. E. Birkheimer, op. cit. chap. xvii; R. S. Rankin, *When Civil Law Fails* (1939). R. S. Rankin gives an account of the development and use of martial law in the United States in his *When Civil Law Fails* (1939).

The courts have held that the governor is the judge as to the necessity for martial law.[56] In some instances troops have been called and martial law has been proclaimed on too small a provocation; but, in general, politics and public opinion are adequate checks on the governor's power. Governor Huey P. Long, of Louisiana, called out the militia during an election dispute, as did Governor "Alfalfa Bill" Murray, of Oklahoma, to stop oil production in violation of the conservation laws.[57] During the Republic Steel strike in 1937 Governor Martin L. Davey of Ohio called out the militia and declared martial law, first to keep the mills from reopening and later to ensure the right of nonstrikers to work.[58]

FREEDOM OF SPEECH AND PRESS · As explained in another connection, the constitutional rights of free speech and press may not be set aside in time of war, but they must yield somewhat to the right of the government to raise and equip armies and conduct military operations.[59] In both world wars the importance of preserving those rights was recognized on all sides, even at the price of some inconvenience to the war effort. The measures taken were generally satisfactory both in keeping news of value from the enemy and in avoiding all infringements of free speech and press which might serve as dangerous precedents in time of peace. At the outset of the Second World War, Congress gave the President authority to censor all communications by mail, cable, radio, or other means passing between the United States and foreign countries, an authority which he delegated to an Office of Censorship acting under the guidance of two boards.[60] This was reinforced by "censorship at the source"; that is, the conferring of authority on the War and Navy Departments at home and on the military and naval commanders abroad to give or withhold news at their discretion.

VOLUNTARY DOMESTIC CENSORSHIP · Publication of news by the domestic press was regulated by a "voluntary" censorship,[61] under the management of the Director of Censorship, Byron Price, who had served as the executive director of the Associated Press. A code of things which the press was requested not to publish was drawn up and sent to all publishers of newspapers, magazines, and books. While the news policies of the government were sometimes unwise and bungling, and caused popular dissatisfaction, the system was generally satisfactory, and few violations of the spirit of the code occurred. Self-government and self-regulation not only proved effective but preserved the press from the intrusion of government censors and

[56]*In re Moyer*, 35 Colo. 159 (1905); *Moyer* v. *Peabody*, 212 U. S. 78 (1909).

[57]R. S. Rankin, op. cit. chap x.

[58]Governor Murray's use of the militia was declared illegal by the Oklahoma Supreme Court in the case of *Russell Petroleum Co.* v. *Walker*, 162 Okla. 1216 (1933.)

[59]Chap. VII.

[60]Act of December 18, 1941 (55 Stat. 840).

[61]D. O. Walter, *American Government at War* (1942), pp. 118–123; Office of Censorship, *Code of Wartime Practices for the American Press* (December 1, 1943).

the ill effects of criminal prosecutions. Stricter regulations were laid down for the radio, whose words, unlike those of the press, could not be stopped at the borders. Lurking in the background were the criminal penalties of the Espionage Act of 1917, which forbids the giving of information to the enemy relating to national defense.

THE DECLARATION OF WAR · The power to declare war is conferred by the Constitution on Congress.[62] The usual form is a joint resolution of the two houses, which needs the signature of the President to become effective. In practice such action by Congress is in response to a request by the President. The declaration of war against Germany and its allies in the First World War was dramatized by the appearance of President Wilson before a joint session of the two houses, at which he set forth in detail the reasons for the request. For the Second World War the situation was reversed: Japan and Germany declared war on the United States, and Congress countered with a declaration in response to a message from the President. The power of Congress to make war, however, is not exclusive. The President, as commander in chief, might so dispose the army and navy as to bring on a conflict, leaving Congress no choice but to ratify his action. In case of attack or imminent threat of attack from abroad he might open warfare without a declaration by Congress. His duty in case of civil insurrection is even plainer. After the attack on Fort Sumter, in April, 1861, President Lincoln called for volunteers for the army, suspended the privilege of the writ of habeas corpus in certain areas, and proclaimed a blockade of the Southern ports without even calling Congress into special session. The Supreme Court, in upholding his action, said that "the President has no power to initiate or declare war either against a foreign or a domestic State," but conceded his right "to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States."[63]

SEGREGATION OF JAPANESE-AMERICANS · The disposition to be made of 126,000 persons of Japanese descent residing in the United States at the outbreak of war with Japan raised constitutional and social problems of the greatest difficulty. Of these about two thirds, by virtue of birth in the United States, were American citizens and hence entitled to the same rights as the descendants of the *Mayflower*. The disabling of a substantial part of the fleet at Pearl Harbor had brought fears of an invasion of the Pacific States, where 110,000 of the Japanese were located, and fear of sabotage from within. The attitude of the public and the military authorities was much influenced by the policy of the Japanese government, which had encouraged dual citizenship, by the knowledge that some thousands of the Japanese-Americans had been sent to the homeland for education,

[62] *United States Constitution*, Art. I, sect. 8, clause 11.
[63] *The Prize Cases*, 2 Black 635 (1863).

and by the Japanese tradition of loyalty and obedience to the elders of the family. Unfortunately, the innocent had to suffer along with the guilty.

On March 2, 1942, the military commander of the Western Defense Area, under authorization from the President, issued the first of the orders which in turn set up military areas, established curfew regulations for all enemy aliens, and eventually ordered the evacuation of all persons of Japanese ancestry from the greater portion of Washington and Oregon, all of California, and southern Arizona. Some weeks later Congress ratified the orders and made violation of them punishable. On March 18 the President established a War Relocation Authority, which was given the task of making provision for the dispossessed Japanese. Ten camps were constructed in remote regions where land was available for agriculture. Later, on the basis of careful checking, numbers of the internees were permitted to relocate in various parts of the Middle West and East, some entering industries and others continuing their education in colleges and universities.

The removal and internment of those who were citizens of Japan presented no difficulty, since such a right over enemy aliens is possessed by all states. The problem of the two thirds who were American citizens was different. The order of removal was not applied to Americans of German or Italian descent, but only to those of Japanese descent. Had such action been taken by one of the States affected, it would have been challenged under the Fourteenth Amendment as a denial of the "equal protection of the laws." When the curfew order was brought to a test by a Japanese-American student of the University of Washington, the United States Supreme Court acknowledged that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, whose institutions are founded upon the doctrine of equality," but upheld it on the ground that the problems of defense may necessarily "place citizens of one ancestry in a different category from others."[64]

SELECTIVE SERVICE · In all its wars of the last century, except the Civil War in part, the United States had depended upon volunteers for the recruitment of its army. Early in the First World War, Congress passed the Selective Service Draft Law, which made all male citizens between the ages of twenty-one and thirty subject to military service.[65] The disturbed state of international affairs was the occasion for the passage on September 16, 1940, of the Selective Training and Service Act, the nation's first compulsory-military-service act to be adopted in time of peace.[66] Its preamble declared that "in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and

[64] *Gordon Kiyoshi Hirabayashi* v. *United States*, 63 Sup. Ct. Rep. 1375 (1943).
[65] 40 Stat. 76 (May 18, 1917).
[66] 54 Stat. 885.

service." The 1917 act was challenged in the courts as repugnant to free government and individual liberty, but was upheld by a unanimous decision of the Supreme Court. The opinion, written by Chief Justice White, an ex-Confederate soldier, was based on the assumption that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."[67]

SELECTIVE-SERVICE ADMINISTRATION · A selective-service system, headed by a director, was instituted to administer the act of 1940.[68] All men within the specified age range were registered, and classified according to fixed standards on the basis of liability to service. The actual selection of men was in the hands of local civilian boards of three or more, one or more for each county, appointed by the President of the United States on the recommendation of the governor of the State. These acted somewhat in the spirit of a jury. While guided by "directives" from headquarters, they exercised a wide discretion; and their decisions on selections were final, save for the right of individual appeal to boards constituted for that purpose. Thus the inflexibility and harshness of ironclad rules administered by professional military authorities were avoided.

The law of 1940 drafted men for the period of a year, but at the end of that time the term was extended to two and a half years in the discretion of the President. After the beginning of the war the term was made indefinite; and the period of liability for military service was made to cover the ages from eighteen to sixty-four, with immediate liability between the ages of twenty and forty-four. As the war progressed immediate liability began at the age of eighteen.

## *CARE AND COMPENSATION FOR VETERANS*

Public sentiment from the beginning of the Republic has always supported a generous program for those who have served in the armed forces. The hazards to life and health, the breaking of family ties, and losses due to interrupted business and professional life and education have seemed to place an obligation on the nation as a whole to equalize as well as may be the burdens caused by war. President Lincoln, at the close of his Second Inaugural, was only voicing public sentiment when he urged the duty "to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan."[69] Public aid to veterans has taken chiefly six forms: the gift of land, pensions, preference in the civil service, money payments, life insurance, and hospitalization and medical care.

[67] *Selective Draft Law Cases*, 245 U. S. 366 (1918).

[68] Executive Order No. 9279, December 5, 1942 (7 Fed. Reg. 10177).

[69] Second Inaugural Address, March 4, 1864, in J. D. Richardson, *Messages and Papers of the Presidents*, Vol. VI, pp. 276–277.

PENSIONS AND "ADJUSTED COMPENSATION" · The general policy has been to give pensions immediately to those disabled in the service, to the dependents of those who have lost their lives, and in their old age to all veterans. In 1942, seventy-seven years after the close of the Civil War, pensions were being paid to 975 veterans of that war and to 37,714 of their widows and children.[70] One hundred and twenty-seven years after its close one pension was being paid to a daughter of a veteran of the War of 1812, and 95 pensions were being paid to widows of Mexican War veterans. At the same time 348,103 veterans of the First World War were on the pension rolls for disabilities connected with the service.

Early in the Harding administration the American Legion began a campaign for the payment of a "bonus," or "adjusted compensation," to all who had served in the First World War. It was argued that the soldiers should be compensated on the basis of the time they had been in service, as something of an offset to the high wages and profits of those who had remained at home. A bill was passed in 1924, over the veto of President Coolidge, which gave a bonus of one dollar a day to all discharged veterans for the time they had served at home and $1.25 a day to all who had served abroad.[71] If the sum due was fifty dollars or less, payment was made in cash; if beyond that, payment was in the form of life-insurance certificates maturing in 1945. In the depression year of 1931, over a veto of President Hoover, veterans were authorized to borrow up to 50 per cent of the face value of their bonus certificates; and in 1936, over a veto by President Roosevelt, the whole amount was made payable in the form of bonds.

GOVERNMENT INSURANCE · Life and disability insurance for persons serving in the armed forces from 1917 to 1921 was provided in the World War Veterans' Act of 1924. Policies could be taken out for sums in any multiple of five hundred dollars, with a minimum of one thousand dollars and a maximum of ten thousand dollars. A law of 1940 established a second system of government insurance applicable to persons thereafter enrolled in the active service under the Selective Service Act or otherwise. The benefits payable in the event of the death of the insured were to be paid to his beneficiaries in two hundred and forty monthly installments. Early in 1942, 631,238 insurance policies were in effect for a total of $2,633,356,384.[72] The regulations as to the size of policies were the same as in the act of 1924, and the maximum for any person insuring under both plans was ten thousand dollars.

HOSPITALIZATION AND MEDICAL CARE · Under a law of 1919 hospitalization was provided for persons discharged from the armed services for injuries or illness incurred in the service; the World War Service Relief Act of 1924 extended the privilege to all such persons, irrespective of the origin

[70] *Annual Report of the Administrator of Veterans' Affairs, 1942*, pp. 16–21.
[71] 43 Stat. 121.
[72] *Annual Report of the Administrator of Veterans' Affairs, 1942*, p. 85.

of the injury or illness. Between 1919 and 1942, $209,083,610 had been expended for hospital construction, and in that period more than two and a half million admissions had been made.[73] In the latter year ninety-two hospitals were operated in forty-five States.

THE VETERANS' ADMINISTRATION · In July, 1930, the Veterans' Administration was created, as an independent agency under the President, by consolidating the United States Veterans' Bureau, the Bureau of Pensions, and the National Homes Service.[74] At its head is the Administrator of Veterans' Affairs, who is given the management of all the agencies dealing with veterans' relief insurance, pensions, and their hospital and domiciliary care. Regional offices scattered throughout the United States aid the administration in its manifold activities.

SOLDIERS' AND SAILORS' CIVIL RELIEF · It was inevitable that the business and legal interests of persons called into the armed services should suffer by their absence from the home community. Congress, in the Soldiers' and Sailors' Civil Relief Act of 1940, attempted to mitigate some of the injuries and inconveniences. Within certain limits court action involving servicemen might be stayed, including action for the foreclosure of mortgages, the repossession of property because of the nonpayment of installments, and eviction for the nonpayment of rent.[75] An interesting provision declared that no insurance policy of a person in the armed services should lapse because of nonpayment of premium, and made the United States responsible for payment in all such cases.

"THE GI BILL OF RIGHTS" · The act of June 22, 1944, extended Federal aid for the readjustment in civilian life of returning Second World War veterans.[76] Service in the armed forces meant at the minimum a discontinuance of education, the breaking of business ties, a loss in earnings and savings, and the giving up of preferred places in civilian employment. For these the law attempted to provide some measure of compensation or to speed up the process of regaining lost ground. The chief features of the program are the provision of funds for formal education or training; the guarantee of loans for the purchase of homes, farms, or businesses; the making of unemployment allowances; and the establishment of an employment service.

Every person whose education or training was impeded or delayed by reason of service in the armed forces after September 16, 1940, is entitled to the educational benefits of the act. He may take a "refresher or retraining" course of a year, which may imply a type of education not meeting the ordinary academic standard, or choose any type of educational course for which he may qualify, which he may pursue for the length of time he was

[73] *Annual Report of the Administrator of Veterans' Affairs, 1942*, p. 85.
[74] Ex. Order No. 5398, July 21, 1930; 46 Stat. 1016.
[75] 54 Stat. 1178. Extensive amendments were made in the act of October 6, 1942 (56 Stat. 769).
[76] Servicemen's Readjustment Act of 1944, Public Law 346, 78th Cong., 2d Sess.

in the active service but not for more than four years. The Federal government pays his academic expenses up to five hundred dollars a year, besides which he receives a subsistence allowance of fifty dollars a month if without dependents or seventy-five dollars if he has dependents. He may choose any academic institution or training institution for which he is eligible. To allay the fear of Federal dominance of education, the law provides that no Federal agency shall "exercise any supervision or control, whatsoever, over any State educational agency, or State apprenticeship agency, or any educational or training institution."

Loans for the purchase of homes, farms and farm equipment, or business property may be guaranteed up to 50 per cent of their amount, but not to exceed two thousand dollars for each person. A "readjustment allowance" at a set scale is provided for each week of unemployment, not to exceed fifty-two weeks, within a period of five years from the ending of the war. Self-employed persons, with net earnings of less than one hundred dollars a month, are compensated for the amount less than that figure. A Veterans' Placement Service Board was created, with a representative in each State, to facilitate the re-employment of veterans and assist in improving their working conditions.

## *CIVILIAN CONTROL IN WARTIME*

The national administrative organization for the control of the civilian population in wartime was described in another connection.[77] Modern warfare calls for the welding of the entire population into one working unit. Goods for civilian use, food for civilians, the armed forces, and our allies, and arms and munitions for the army and navy must be produced. To accomplish all this, the facilities of the factories and workshops must be employed to the best advantage, raw materials allocated on the basis of the greatest need, and man power placed and used to the greatest advantage. Moreover, measures must be taken to secure the co-operation of all elements of the population, including labor and management, on a voluntary basis if possible. Prices and wages must be stabilized not only to save elements of the population from hardships and suffering but to prevent an undue increase in the size of the national debt. Precautionary measures must be taken against harmful activities of spies, saboteurs, and malcontents; and peace and order must be maintained. The effectiveness of the national war effort requires an elaborate system of regulations and controls; but if the spirit of free government is to remain alive, no action

[77]Chap. XXV. For expositions of the various problems of civilian control in wartime cf. B. Baruch, *American Industry in War* (1941); W. D. Boutwell and others, *America Prepares for Tomorrow* (1941); H. S. Bloch and others, *Economic Mobilization* (1941); B. Finney, *Arsenal of Democracy* (1941); S. E. Harris, *Economics of American Defense* (1941); E. P. Herring, *The Impact of War* (1941); H. W. Spiegel, *The Economics of Total War* (1942); H. J. Tobin and P. W. Bidwell, *Mobilizing Civilian America* (1940).

should be taken which would serve as a valid precedent for nonpopular government in time of peace. In both world wars the Constitution exhibited qualities of flexibility which at the same time gave adequate strength to the war power and preserved the essential principles of democratic government.

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## CHAPTER XXXVII

# *The Administration of Justice: Law and the Courts*

"To establish justice" is one of the half dozen reasons given in its preamble for the adoption of the Constitution of the United States. Two thousand years earlier, Aristotle had stated in his *Politics* that "justice is the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society."[1] Religious writers usually have associated justice with the divine plan of the universe; for instance, one of the psalmists, who wrote, "Justice and judgment are the habitation of thy throne."[2]

WHAT IS JUSTICE? · The word *justice* is used in many senses. It has to do with man as a social being, with what he does to other people and what they do to him. It is not purely egotistical or self-defensive but has a tinge of right and wrong. The concept, under various names, seems to have existed among mankind at all stages of civilization. Today men at all levels of life, whether artists, scholars, or day laborers, have sharp perceptions of what is just or unjust as applied to themselves. Plato gave to one of the characters in his *Dialogues* the expression "Justice is the giving to each man of what is proper to him";[3] that is, justice consists in serving out to everyone just what he deserves. Some authorities insist that conformity to habit and custom is the essential element in justice. As one puts it, "Justice is the sense of what ought to be done by one to another, and this is, necessarily, what one might fairly expect from another,—that is, what is customarily done; for no one would think it justice to require from one anything not done in accordance with custom."[4]

CUSTOM, REASON, AND MORALITY · The difficulty of making custom the sole guide of what is just and unjust lies in the divergent standards of various groups. There are English, German, French, and Negro customs; customs of lawyers, doctors, teachers, and even thieves; and customs of the city, the country, of New England, the South, and the Middle West. National standards of justice must be built from factors common to them all. But there are large fields of human affairs in which custom has no answer to the question of what is just or its answer is dubious. Here lies the field of conflict and compromise. The legislator or the judge must call to his aid the resources of reason, the precepts of morality, and the prompt-

[1]Aristotle, *The Politics* (Jowett tr.), Bk. I, 2, § 16.
[2]*The Book of Psalms*, No. 89, verse 14.
[3]Plato, *The Republic* (Jowett tr.), Bk. I, 332 C.
[4]J. C. Carter, *Law: Its Origin, Growth, and Function* (1907), pp. 156, 157.

ings of conscience. Justice in its widest sense comes from that conduct which one ought to follow. No better definition has been made than that inscribed at the head of their monumental work by the lawyers whom the Emperor Justinian commissioned to codify the Roman law: *Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* ("The precepts of the law are: to live honestly, to injure no one, to give everyone his due").[5]

THE IDEA OF SOCIAL JUSTICE · The justice of which the men who wrote the preamble to the United States Constitution were thinking was that which comes to the individual from good laws and fair, honest, and impartial courts. As time passed, however, men began to think of justice more from the standpoint of the community. To give each one his deserts measured by his merits or the dictates of custom was both too simple and too narrow a prescription. Environment, so the argument runs, may account for irresponsible Simpkins or light-fingered Snodgrass. It is society's obligation to raise up those who deserve little to where they deserve more. "The good and happiness of the members, that is, of the majority of the members, of any state is the great standard by which everything relating to that state must finally be determined,"[6] wrote a spokesman of this view, which often is expressed as "the greatest good to the greatest number."

Experience has shown that while the good and happiness of some members of society are best attained by a maximum of freedom to acquire, possess, and use property, and to exercise their physical and mental abilities, a similar freedom extended to the weak, the incapable, or the unfortunate does not bring them success and pleasure. Therefore they have a valid claim on society for aid and protection. A program of social justice must include laws which restrain the stronger persons in such use of their faculties as directly cause injury to those who are not capable of competing successfully in the social struggle, or which otherwise give positive advantages to the weaker side.

CIVIL OR LEGAL JUSTICE · "Justice," says Mill, "is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life."[7] These rules relate to the whole field of human conduct, including the acts of all persons, clubs, associations, and corporations. The state makes no attempt to require the performance of

[5] J. B. Moyle, *Imperatoris Iustiniani Institutionum Libri Quattuor* (1883), Vol. I, pp. 90-91.

[6] J. S. Mill, *Utilitarianism*. The concept so widely held today of the state as a utilitarian institution to promote social justice and the happiness and economic well-being of the people has been traced back to a little essay by the scientist and philosopher Joseph Priestley (1733–1804), *An Essay on the First Principles of Government* (London, 1771). On page 5 he declared, "Let us then, my fellow citizens, consider the business of government with these enlarged views, and trace some of the fundamental principles of it, by an attention to what is most conducive to the happiness of mankind at present, and most favourable to the increase of this happiness in futurity."

[7] J. S. Mill, *Representative Government*, p. 101.

all acts which are just or enjoin all which are unjust. The task would be hopeless. "Many things are left alone by the state, as it were under protest, and only because it is thought that interference would do more harm than good."[8] Among these are thought, beliefs, conscience, conventions, and customs. The state confines its laws to those matters which, if left to the free discretion of individuals, would lead to social disorder; and justice consists in yielding to the laws habitual obedience. The term *administration of justice* refers to the enforcement by the state, on individuals and groups, of that conduct which the law requires: the imposition of punishment, or the requirement of compensation to those who have been injured. While legal or civil justice covers only a portion of the whole field, it is the part whose proper discharge is vital to the peaceful continuance of society. Only in this segment of justice does the student of government have a direct interest. The remainder is the particular care of the moralist, theologian, businessman, or economist.

ESSENTIALS IN THE ADMINISTRATION OF JUSTICE · The administration of justice consists in settling controversies between contending individuals or between government and individuals. This must be done on the basis of what the law allows each party. Arbitration, on the other hand, permits a third party, or arbitrator, after hearing both sides, to make an award based on what he thinks is fair or equitable under the circumstances, irrespective of the law. The administration of justice centers around tribunals set apart for that especial purpose, the courts. The process of the administration of justice, which to the layman seems involved, boils down to a few essential things. These are the ascertainment of the facts in the controversy, which the two parties are privileged to present; the ascertainment of the law involved, its interpretation, and its application to the facts; the rendering of a judgment in favor of one of the parties; and its enforcement. When these steps have been taken and the appeals, if any, are settled, the process of administering justice is complete.

THE MACHINERY OF JUSTICE · The court does not travel afield to bring contenders before it, but its doors are open to all who seek a vindication of their rights, whether they be individuals, corporations, or government itself. The court is thus dependent on other accessory agents for the proper performance of its work. The sheriff or the police bring the defendant into court if the case is a criminal one, and give notification if it is a civil case. The state's attorney begins the prosecution in criminal cases; attorneys represent the parties if it is a civil proceeding. The jury listens to the evidence presented by both sides and returns a verdict; then the sheriff or jailors execute the judgment of the court. A knowledge of the organization, duties, and methods of work of these various agencies is necessary to an understanding of the function of administering justice. They are the chief topics of this and the succeeding chapters.

[8]F. Pollock, *First Book of Jurisprudence* (1923), p. 32.

## *THE LAW*

NATURE AND DEFINITION · Law is a rule of human conduct which the state prescribes and enforces. Men cannot live in close association without generally-agreed-upon rules to govern their actions. In primitive ages such rules were found chiefly in tribal customs. The state, as the latest and most highly developed form of human association, requires a large and complex body of rules for the government of its members. Custom and convention still play their part in the whole scheme of social control; but a body of rules declared by the state and administered by it, with the use of force if necessary, is the sine qua non of an orderly society. Laws accumulate with the evolution of civilization. Mankind's passage through its various stages, consisting of savagery, barbarism, primitive agriculture, manufacturing, and life in large urban communities, requires a growth of law corresponding to the needs of each successive stage of social life. Thus in early England the law governing the relations of the highest and the lowest classes was that of master and slave. Then it was known as the law of master and servant; now, as that of employer and employee. While essential human nature remains much the same through all generations, man's possessions (land, implements, dwellings, clothing, vehicles, food, and means of communication) go through kaleidoscopic changes. Each innovation makes imperative a corresponding alteration in rules of conduct. Thus, as recently as 1929 an ancient statute remained on the books of Ohio prohibiting a speed of more than six miles an hour on a road passing a certain cemetery, which was good, prudent, and respectful before the advent of the motor-driven vehicle.

RIGHTS AND DUTIES · The rights and the duties of men are the matters which make up the body of the law. In order to protect and advance human interests, the state compels individuals to do certain things and to forbear from doing others. A person is said to have a "right" when the state not only will protect him in carrying out his wishes in a given matter but at the same time will compel such acts and forbearances on the part of other people as may be necessary for the success of his acts. "Duty" is the obligation of second parties to further or to refrain from obstructing the exercise of the first person's "right." The two terms *right* and *duty* therefore are inseparable. Wherever a right exists, duties necessarily follow. State statutes require that flywheels and dangerous moving machinery in all factories and workshops be enclosed with railings or casings. The workers by this means are given the *right* to work in safety so far as the hazards of rapidly moving and exposed machinery are concerned; while upon the factory management is imposed the *duty* of providing those things which will be in furtherance of the right. A statute forbids anyone "willfully to interrupt or disturb a lawful assembly." The law recognizes the *right* of persons in such an assembly to be free from in-

terruption, and imposes a *duty* upon all others to refrain from causing the interruption. The number of rights and obligations which the law creates for the citizen is too great for enumeration. To have a general conception of them, one would need to be familiar with the thousands of Federal, State, and municipal statutes, as well as the decisions of the courts.

THE SOURCES OF AMERICAN LAW · Laws may be written or unwritten. The former are found in formal documents which are the result of legislative enactment; the unwritten are the uncodified rules of conduct which the courts apply in the decision of cases which come before them.

1. *The United States Constitution* is the law of highest obligation in our entire body of law. Except for the preamble, it is a set of rules of conduct throughout. Some of these apply to citizens in general; others are only for the guidance of public officers. The laws of the Constitution not only guide the conduct of Federal officials and all citizens of the United States with respect to the Federal government, but they are the "supreme law of the land," wherever applicable, as regards all State and local governments. There are, for instance, such sweeping rules as those that no State legislature may make or enforce any law which shall deprive any person of life, liberty, or property without due process of law, or any law setting up a standard of race or color in the matter of the suffrage.

2. *The United States statutes*, if made in conformity with the Constitution, compose the second layer of the laws applicable to all Americans. Every session of Congress brings forth its grist of statutes. All, beginning with 1789, may be found in the series of volumes of the *United States Statutes at Large*. Until 1901 the amount of legislation was so small that the work of several sessions was easily comprised in one volume; but thereafter two volumes of statutes, treaties, and Presidential proclamations came out of every biennium. Until 1875 a citizen seeking a Federal law had to search through the statute books of eighty-four years, but at that time all the laws in force were culled from these volumes and published in the one-volume set of the *Revised Statutes of the United States*. A second edition was published in 1878, and until 1901 was kept up to date by supplements. There are now several compilations of the Federal statutes, an important one of which is the *United States Code*, an official publication. This code, like those of many of the States, contains all the statutes of general and permanent importance, arranged under such headings as "The President," "Congress," "Labor," and "the Army," with a code number to designate each division and section of the statutes.

3. *Federal Administrative Rules, Regulations, and Orders.* According to the theory of the Constitution, only Congress and the people, through their power to amend the Constitution, may legislate on national matters. But if a businessman, manufacturer, or farmer should fail to take account of the rules laid down by Federal administrative officers, commissions, and

boards, he would soon find himself confronted with pains and penalties bearing a striking resemblance to those imposed by law. Administrative bodies are empowered to make rules within the limitations laid down by acts of Congress which, like statutes, relate to the acts of lay citizens as well as officers. At the opening of the century there was only a scant amount of such law, but since then it has increased apace. In 1934 the government began a day-by-day publication of these administrative orders in a *Federal Register*. Here one may find ordinances and proclamations of the President; orders of the Bureau of Customs, the War Production Board, and the Secretary of the Treasury; and so on. At the end of a year the total makes a bulky volume.

4. *State Constitutions.* The constitution of a State is its body of supreme laws in so far as it does not conflict with the Federal constitution and laws. Some State constitutions are brief statements of a basic nature, while others contain a relatively large and detailed body of law.

5. *State Statutes.* Because the State's field of operations is much broader and more detailed than that of the Federal government, its body of statutes is much larger. Each State publishes a volume of "session laws" for each session of the legislature and generally makes provision for a codification of all statutes in force on the same plan as that used by the Federal government.

6. *State Administrative Rules, Regulations, and Orders.* The amount of rule-making by administrative bodies has increased steadily, especially in the larger, more densely populated industrial States. There are industrial commissions, boards of health, inspectors of mines and workshops, bank commissioners, and others. Their rule-making, however, is considerably less important than that of the Federal agencies.

7. *Local Government, Ordinances, Rules, and Regulations.* The acts of city legislatures are usually called ordinances. Generally the city council may legislate for the welfare, order, health, and safety of the people of the community; but the greater part of its acts are concerned chiefly with the organization and operation of the administrative services. The ordinances, at least in the larger communities, are published currently in some sort of city register, and usually are made available to the public by compilation and classification in a single volume. Local government boards, commissions, and officers in wide variety, such as county commissioners, health, school, and park boards, and public-utility commissions, have rule-making powers carefully limited by law.

8. *The Common Law.* The seven above-enumerated bodies of written laws make an impressive total of rules for the guidance of the American people and their public officers. Jurists are apt to regard them as *sources* of law rather than as law. Law, to them, is that body of rules which the government, and more particularly the courts, actively enforce. Written laws are raw material which must be worked over, smoothed out, and added to or subtracted from before they are applicable to the everyday life

and affairs of men. Every new statute creates new rights and obligations, but its innovations do not stand alone. Since all persons and things already had laws to govern them or define their status, the new statute simply adds to or modifies the old. The court's task is to merge the new statute with the mass of old rules into a coherent and usable whole.

When one speaks of "the law," he has in mind that great body of rules which is unwritten and which the courts apply. This is the "common law," to which Blackstone referred as "that ancient collection of unwritten maxims and customs" which had existed in England since time beyond memory.[9] The greater part of the common law never saw legislative halls but emanated from the courts of justice. The English courts from the very beginning had applied popular customs in the solution of controversies. Originally these customs differed sharply from neighborhood to neighborhood. But the king's judges, sent out on circuit from Westminster to hold court in all corners of England, were a unifying influence. In time the more practicable rules prevailed over the poorer ones, and those *common* to the entire kingdom gained acceptance. These together constituted a "common law" for England, and eventually played the same part in the American colonies.[10]

EQUITY · Two distinct branches of law had emerged at the time of the colonization of America, namely, law and equity, both of which are mentioned in the United States Constitution. Equity grew up in England in the course of several centuries as a sort of secondary law.[11] It arose from petitions for relief addressed to the king by persons who believed that the operation of the ordinary law had failed to give them justice. Such petitions came to the king's secretary and chief minister, the chancellor, who ordinarily handled them himself. As the number increased, set rules for the disposition of the different classes of petitions generally developed, which came to be known as the law of equity, and the office of chancellor ultimately became primarily judicial in character.

Equity thus was a sort of superjustice, more flexible and ethical than that derived from the ordinary law. In its earlier phases it was complained that equity was variable and unpredictable, because of its dependence on one man, the chancellor, the "keeper of the king's conscience." The conscience of the chancellor might be broad or narrow, just as one might have a "long foot, another a short foot, others an indifferent foot; it is the same thing in the Chancellor's conscience."[12] Equity in time matured into a fairly definite branch of law with its own peculiar procedure. As a rule it can be used only in those cases where the ordinary law does not provide

[9]W. Blackstone, *Commentaries on the Laws of England* (Chitty ed., 1831), Bk. I, p. 17.
[10]R. Pound, *The Spirit of the Common Law*, chap. 1.
[11]E. Jenks, *A History of English Law* (1912), pp. 207–236.
[12]J. Selden, *Table Talk* (1821), p. 52.

an adequate remedy. Law, for instance, permits one person to injure another, and later damages for the injury may be recovered in the courts; whereas equity, by means of its writ of injunction, may forestall the injury. Under the law a person may fail to perform an agreement, the penalty for which is damages; but equity will force him to perform what he has promised. Certain matters came to be the particular care of the equity courts. Equity may compel the restitution of property obtained through fraud or deceit; compel trustees of property left for benevolent purposes or to dependents to render an accounting of their management; and require that property lost through the foreclosure of a mortgage be restored to the original owner upon his payment of the debt. The law of equity became a part of American law and today is administered in all courts, Federal and State.

THE COMMON LAW OF THE STATES · When the new Constitution set up a national government, the authority to legislate in general for their people was left to the States. The State legislature rather than Congress inherited the general legislative power which the British Parliament had exerted, and consequently the body of the common law. "The law" in each of the forty-eight States today (with the exception of Louisiana) is comprised in its common law, which has as its basis the English common law, and the State constitution, statutes, and decisions of the courts.

AMERICAN LAW TODAY · The law of the American States is a body of rules worked out in English and American society by the method of trial and error in a period of well over a thousand years. It represents a highly condensed summary of what these people have thought to be right and expedient, as expressed through their legislatures and courts. The whole system has a high degree of flexibility. When social and economic changes render an old law unfair and unworkable, the courts may discard it and adopt another; or, if they fail to do so, the legislature may make the change. That a law has continued in use as a standard of justice through long years of contending interests is itself a presumption in favor of its soundness. The traditional judicial test of the validity of a custom or law was whether it had been "used so long that, the memory of men runneth not to the contrary."[13] Into the confines of the common law has been compressed much of the wisdom of man's experience as a social being since the beginning of Anglo-American civilization. The task of today is its progressive modification as social change renders old rights and duties unjust and new interests cry for recognition.

## *THE LAW OF THE LAND*

An oft-repeated sentiment, supposed by some to be traceable to Confucius, is to this effect: "If a man were permitted to make the ballads, he need not care who should make the laws of a nation."[14] The idea obviously

[13]W. Blackstone, op. cit. Bk. I, p. 76.

[14]Attributed to Andrew Fletcher, *ca.* 1704.

belongs more to the realm of fantasy than to that of reality. If a single person were capable of writing all the laws of a people, his would be the power to control every phase of their existence. Laws today touch life at every point, lightly in some places, profoundly in others. In the United States laws establish the form of government and the liberties of the citizen; give recognition to and define the rights, privileges, and duties of the great social institutions, such as the family, churches, schools, and corporations; fix the rights and obligations of persons engaged in trade, commerce, and the professions; prescribe the qualifications necessary for the teacher, lawyer, physician, barber, and beautician; and, to a certain degree, even regulate the planting and marketing of crops. The laws of the land are so numerous and complex that no person ever has attempted to write them all down. A fair idea of their character and breadth, however, may be obtained by noting the principal classes into which they fall.[15]

MUNICIPAL LAW AND INTERNATIONAL LAW · The term *municipal* refers to all the laws which govern the internal affairs of a country: constitutions, charters, statutes, ordinances, by-laws; that is, to every rule which is enforced by the courts or other officers of the government within its territorial bounds. *International law*, on the other hand, applies to the external affairs of the state: it is that law which governs it in its dealings with other nations. Ancient Rome was both a city, or *municipium*, and a state. Its laws at first applied only within the city limits, but gradually were extended to the conquered territories. After Rome became an empire, its law continued to be called *municipal* law, and so the term came down into modern times. *National* would now be a more descriptive term.

SUBSTANTIVE AND ADJECTIVE LAW · Substantive law creates and defines rights and duties; adjective law provides the means for their enforcement. For example, a United States statute of March 3, 1891, established the right of citizens to be compensated for property destroyed by hostile Indians, which therefore was the substantive portion of the law; and it provided that the claim should be presented for approval to the Interior Department and the Court of Claims, which was the adjective, or procedural, portion of the statute. Statutes establishing courts, defining their jurisdiction, and setting up their methods of work fall in the class of adjective law; but those which deal with the rights and obligations of individuals, relating, for instance, to personal freedom, or the holding, use, and disposal of property, come within the domain of substantive law.

PUBLIC LAW AND PRIVATE LAW · *Public law* deals with the rights of the government and the relations between government and citizens or aliens. All constitutions and charters are public law, as are all statutes organizing the government and defining the duties of its officers toward each other and toward citizens. There are, then, four chief divisions of public law: constitutional law, administrative law, international law, and criminal

[15]W. Blackstone, op. cit. Bk. 1, Introduction, sect. ii; W. L. Clark, *Elementary Law*, Pts. I–III.

law. *Private law* includes that vast body of rules which regulates the relations of citizen to citizen. This falls into four chief classes: the law of persons, the law of property, the law of contracts, and the law of torts.

## *PUBLIC LAW*

DIVISIONS OF PUBLIC LAW · *Constitutional law* is that body of rules which organizes the chief offices of the government, defines their powers, locates the supreme power in the state, and defines the fundamental rights of the citizens. The written constitutional law is embodied in the Federal and State constitutions; the unwritten, in the decisions of the Federal and State courts. *Administrative law* is that body of rules which establishes the offices and agencies of government, and defines the powers and duties of such officers with respect to each other and with respect to the citizens with whom they deal. A portion of administrative law is found in the written constitutions, and the rest in ordinary statutes and court decisions. Examples of this class of law are statutes setting up a procedure for making the annual budget, for the assessing and collecting of taxes, and for the auditing of public accounts. *International law* comprises the rules governing the relations of states, and has been described at another point in this volume.

*Criminal law* is that body of rules forbidding or requiring conduct, the violation of which entails punishment by and on the initiative of the government. Criminal law deals primarily with the conduct of individual to individual and so might seem to fall in the classification of private law. In many primitive civilizations such injuries as our criminal law forbids were considered as personal only, to be revenged by the person injured or by his kinsmen. But with the advance of culture and the increase in the power of the state the disturbance of the public peace, real or threatened, came to be regarded as of greater public than private concern. "Against the peace and dignity of our lord the king," ran the English indictments. Blackstone wrote:

> Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. . . . [In establishing the criminal law, the government had a double view:] not only to redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent; . . . but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquility of the whole.[16]

CLASSIFICATION OF THE CRIMINAL LAW · A distinction is sometimes made between offenses which are *mala prohibita*, bad because government has for-

[16]W. Blackstone, op. cit. Bk. IV, pp. 6, 7.

bidden them, and those which are *mala in se*, bad in themselves. In the former class fall the sale of groceries on Sunday or after hours on a week day, or employment of children under sixteen years of age; in the latter, murder, burglary, and kidnaping.

Crimes are classified also with reference to the enormity of the offense. Treason, which stands at the head, is defined in the United States as "levying war against them, or in adhering to their enemies, giving them aid and comfort." *Felonies*, under the old English common law, comprised every species of crime which occasioned the forfeiture of land and goods, and usually involved punishment by death. The term is now rather loosely used, referring to the more serious crimes, for which the punishment is death or long imprisonment in the State penitentiary. Among the acts made felonies in the United States are murder, the unlawful killing of a human being with malice aforethought; manslaughter, the unlawful killing of another without malice aforethought; burglary, the breaking into and entering a dwelling-house in the nighttime with the intent to commit a felony; and arson, the willful and malicious burning of the dwelling of another. Larceny is the taking and carrying away of personal goods of another with the intent to steal them; robbery differs from larceny in that the property is taken from a person or in his presence by actual or threatened violence. Kidnaping was a misdemeanor at common law, but generally has been made a felony in the various States.

*Misdemeanors* comprise a vast and varied mass of the less serious crimes, which are normally punishable by fines ranging from a few dollars to several thousand or by short terms in prison. The common-law list of misdemeanors was long, including such things as assault and battery, bigamy, receiving stolen goods, the creation or maintenance of a common nuisance, perjury, dueling, breach of the peace, participating in unlawful assemblies or affrays, forgery, and conspiracy. The list of statutory misdemeanors is even longer. Failure to comply with one of the numerous statutes passed under the police power constitutes a misdemeanor, such as employing laborers more hours per day or days per week than the statutes allow; failure to make reports to the government as required; nonobservance of health and safety regulations; exceeding the speed limit on highways; interference by an employer with the right of laborers to organize; and the use of gifts or premiums by retail stores as a means of promoting their trade.[17]

## *PRIVATE LAW: THE LAW OF PERSONS*

The law of persons is the branch of private law concerned with the rights and duties of men as persons, that is, with the relation of man to his fellows in society. Here are found the laws establishing the rights to per-

[17] W. L. Clark, op. cit. Pts. I–III.

sonal security, to the liberty of the individual, and to the free use, enjoyment, and disposal of his property. So important are some of these that in free countries they are written into the constitutions and given special protection by the courts, as, for instance, the freedom to speak, publish, or assemble for redress of grievances, to worship God according to the dictates of one's own conscience, or to bear arms for personal defense. The three bodies of law corresponding to the three great relations in private life are those of (1) employer and employee, earlier known as that of master and servant, (2) husband and wife, and (3) parent and child.

EMPLOYER AND EMPLOYEE · The ancient common law of master and servant has been more radically changed by legislation than the other two branches. Here are found the rules establishing the reciprocal rights and obligations of the employer and the employee, covering responsibility for acts of negligence and for injuries during the course of employment, the payment of wages, the hours and conditions of labor, and the right to organize. Blackstone stated that "the law of England abhors and will not endure the existence of slavery within this nation."[18] But it did recognize four classes of "servants," or employees: *menial servants*, those employed about the home (domestic); *apprentices*, or indentured servants, those bound out to service for a stated length of time for the purpose of learning a trade or a particular kind of work, generally the children of poor families; and *labourers*, workers hired by the day or week. In the eighteenth and early nineteenth centuries the wage-earning classes comprised a relatively small proportion of the population; under the capitalist-industrial-urban-corporation-controlled economy it comprises the largest economic class in the nation. The fourth class included the hired *managerial type*, such as stewards, factors, managers, and bailiffs. The common law recognized that the master might correct his apprentice for negligence or other misbehavior, if he did so with moderation; but if he should beat any other servant of full age, it was "good cause of departure."[19] A servant, workman, or laborer who assaulted his master or employer might be imprisoned for one year and given other corporal punishment not extending to life or limb.

THE LAW OF DOMESTIC RELATIONS · The law of husband and wife established who may marry, with respect to age, blood relationship, mental capacity, and race (some States of the Union forbid the intermarriage of the white and colored races); the reciprocal rights and duties of the two; the effect of marriage on the property and debts of each, including the inheritance of property; and how the marriage contract may be dissolved. Since under the common law the husband was answerable for his wife's

[18]W. Blackstone, op. cit. Bk. I, p. 424.

[19]Ibid. p. 428. The old common law was more considerate of the farm laborer or servant than its later American counterpart in that the master could not "put away his servant, or servant his master, after being so retained, either before or at the end of his term without a quarter's warning."

behavior, he was entitled to give her "moderate correction" such as he might give apprentices and servants. Blackstone noted that in the "politer reign of Charles the Second," the courts began to waver on the existence of this right, and it was now generally denied; but that "the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege."[20]

The parent-child relationship gave rise to another body of law. The first duty of the parents is the maintenance of the child, and the statutes of the States generally provide that in case of its nonperformance the parents' property may be levied upon and used for that purpose. The parents are in duty bound to provide protection for the child, physical or otherwise, and to give it an education. The parent may restrain and correct his child; his consent is necessary for the marriage of boys under the age of eighteen and for that of girls under sixteen, with some variation from State to State; and he has the power of trustee or guardian over a minor child's property. Children during their minority owe obedience to their parents.

GUARDIAN AND WARD · Another relation, that of guardian and ward, involves a body of law much like that of parent and child; for the law regards the guardian as a sort of temporary parent. This law specifies how guardians are appointed, their powers and duties, and the privileges and disabilities of an infant (a person under legal age) or other persons given the status of a ward. The extent to which an infant may perform legal acts varies with his age and the nature of the subject, such as payment for such necessities as meat, drink, and clothing. Some of his legal acts are void; others are simply voidable under certain circumstances. These and many other technical rules make up the law of guardian and ward. Certain persons over twenty-one years of age, such as those of unsound mind, may be subject to guardianship. Indians, when in their tribal relation, are wards of the United States government and may not alienate their land or make certain other business transactions without its consent.

THE LAW OF CORPORATIONS · The law which has been summarized in the foregoing paragraphs concerns natural persons. There is another branch which governs artificial persons. A corporation is a number of people entitled to act as one person. It is created by the government, for which reason it is referred to as an "artificial person." The act of incorporation confers a name, such as the Aluminum Company of America, and certain privileges. The corporation may sue and be sued, own property for certain purposes and dispose of it, and carry on the business for which it was chartered. It has the right of perpetual succession; contrary to the case of a natural person, whose rights die with him, those of a corporation continue while its membership changes. Chief Justice Marshall referred to the charter incorporating Dartmouth College as creating "an artificial, immortal being." The corporation is the instrument for the maintenance of

[20]Ibid. Bk. I, p. 445.

colleges, universities, art museums, banks, business concerns, and other enterprises whose existence would be jeopardized if made to reorganize at the death of the persons establishing them. The law of corporations is now one of the most important branches, because of the wide use of corporations in business and their extensive control of capital; and since 1900 the altering of that body of law has been one of the great issues in American politics.

## *PRIVATE LAW: THE LAW OF PROPERTY*

Blackstone refers to the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[21] The beginnings of the idea of property in land date back to the dim ages before recorded history. In the days of primitive civilization, when nature's resources were bountiful in proportion to the population, persons made use of the land, woods, fruits, and game as needed, and it may be said acquired a *right* of possession which lasted only as long as the act of possession. With advancing civilization and increasing population there was a tendency to a prolonged possession of land and things and to a corresponding prolongation of the *right* to them. One was said to have a *property* in the land or the house or the food or the weapons which he had occupied or made. At what stage this was recognized as permanent or full-fledged ownership is not clear. At first there must have been a tacit acceptance of private ownership by the members of the community and finally by the law of the state. Ownership means the right of absolute control over a thing except as it may be modified by law or by the owner's own voluntary act. Possession is the actual holding or occupation of a thing with or without the right to do so.

KINDS OF PROPERTY · Property, first, is divided into *corporeal* and *incorporeal*, sometimes called *tangible* and *intangible* respectively. The former can be seen and handled, such as land, furniture, livestock, books, factories, and machinery; the latter can neither be seen nor handled, but exists only "in contemplation." Examples are rights to corporeal property, such as mortgages, rents, promissory notes, bonds, or stock in a corporation.

Another division of property is into *real* and *personal*. Real property includes things which are relatively fixed, permanent, and immovable, chiefly land, buildings, and trees; whereas personal property covers goods of all kinds, such as money, clothing, and machinery, "which may attend the owner's person wherever he thinks proper to go." Two classes of personal property are recognized. *Chattels real* are claims to real property less than ownership, such as leases. *Chattels personal* include all other forms of personal property, and may of course be tangible or intangible.

[21] W. Blackstone, op. cit. Bk. II, pp. 1, 2.

THE LAW OF PROPERTY · The laws governing property are as important to the well-being of society as they are intricate and difficult. The problems of property are the problems of the use by mankind of the "earth and the fullness thereof." A large part of the struggle for existence is concerned with the struggle for living space, shelter, food, and the instruments made by man for his well-being and pleasure. Mankind's conceptions of property change from generation to generation, as they doubtless will to the end of time. The communist would abolish all property in the sense of private ownership; the socialist would transfer to the government the ownership of the larger agencies of production, such as mines, oil wells, factories, insurance companies, railroads, banks, and telegraph and telephone lines. The more moderate reformers are content with the continuance of private property under increasingly strict regulation by government as to its use.

The law of property covers the many details of its possession, use, rental, and sale. The owner is entitled to the protection of his property against trespass and damage; on the other hand, he is under obligation not to use it so as to injure others. The law also covers the many ways by which title to property may be acquired and lost, the details being best known to the skilled lawyer.

INHERITANCE · The laws of inheritance are of great social importance, for they determine in what manner the lands and goods of one generation pass on to the next. That the property of parents should go to their children has been the preferred rule in most civilized countries. As the child is the heir of the parents' physical and mental qualities, shares their immediate social surroundings, and is trained in their way of life, so it seems best that he should succeed to their lands and chattels. The progressive inheritance tax of today in effect questions the justice of permitting the child to inherit great wealth and makes the government a joint heir of every large estate. The common law of England, which based the preference in inheritance on closeness of kinship, is the basis of the American law; but each State of the Union has its own peculiar variations.

CONTRACTS · A contract is "an agreement, upon sufficient consideration, to do or not to do a particular thing."[22] Its two essential elements are an agreement between the parties, which means an offer, its acceptance, and a mutual assent; and a valuable consideration, which may be either tangible property or any right or benefit. It is said that the device of contract bears a resemblance to the institution of government. The latter is a means of ordering human conduct by means of rules of law; the former, a means of securing a course of conduct on the part of the two parties, which also is enforceable by the state. Without the device of contract civilized society could hardly exist. It is essential at almost every turn in the operations of trade and commerce. Plato had one of his characters in the opening paragraphs of the *Republic* define the just man as one who "kept his contracts."

[22]Ibid. Bk. II, p 442.

Naturally the law of contracts is a basic part of the system of the common law. Among the matters with which it is concerned are these: who is competent to enter into contracts, what constitutes an offer and an acceptance, what is a valuable consideration, what contracts may be oral and which must be written, and what constitutes misrepresentation, fraud, or duress. The statutes of the States increasingly restrict the ancient common-law freedom of contract, in the interest of health, safety, order, and the economic well-being of the less fortunate classes.

THE LAW OF TORTS · The positive side of the administration of justice is the establishment and the enforcement of rights; its negative side is the prohibition of wrongs or the requirement of satisfaction for those committed. A wrong, or tort, is the violation of another's right, a breach of duty for which the person injured is entitled to obtain damages in a court of law. Private wrongs are an infringement of the rights of persons considered as individuals and are known as civil injuries. If the breach of duty is such as to be considered an offense against the whole community, then it is a crime or misdemeanor, and the perpetrator is punished by the state in its own name.

The usual classification of torts is into (1) personal wrongs, those which affect the personal security of individuals, and (2) wrongs to possession and property. Among the former are *assault*, an attempt by force or violence to inflict bodily injury on another; *battery*, the unlawful beating or even touching of another willfully or in anger; *slander*, the injury of a person's good name or standing by the utterance of "malicious, scandalous, and slanderous words"; and *libel*, the setting of a person in an odious or ridiculous light by "printed or written libels, pictures, signs, and the like."

Blackstone remarked that if the law did not protect wrongs against property, "all property would soon be confined to the most strong or the most cunning, and the weak and simple-minded part of mankind . . . could never be secure of their possessions." The law consequently defines comprehensively the wrongs against property and its use, such as *trespass*, and the compensation due for the injury. Some torts are injuries to both persons and property; for instance, *negligence*, or the failure to use ordinary care and diligence, and *nuisances*, or acts which interfere unlawfully with the enjoyment of one's rights.[23]

## *THE COURTS*

The laws of a nation reflect its concepts of right and wrong and set the standard for its system of justice. The justice expressed in a book, however, may be quite different from that actually administered day by day. The good laws of the statute books are mere abstractions and promises unless their benefits actually are applied to the persons concerned. The American

[23]Blackstone, op. cit. Bk. I, pp. 123, 125.

tribunals vested with this important task are the Federal and the State courts. Courts, even to a greater degree than executive and legislative institutions, owe their character and methods of work to influences of the historic past. The courts of the countries of continental Europe generally reflect the spirit of the Roman law which they administer. The American courts, on the other hand, were fashioned to meet the peculiar character of the Anglo-American common law. The Continental courts traditionally were closely tied in with the executive arm of the government; the English, while similarly an offshoot of the royal power, began as early as the seventeenth century to assume an independent position. The common law which they administered, with its emphasis on the rights of the citizen, was a bulwark against royal tyranny. Warned by executive domination in the colonies and backed by the Montesquieuan doctrine of separation of powers, it was natural that the framers of the Constitution should provide an independent judiciary of rank equal with the executive and legislative departments.[24]

THE DUAL SYSTEM OF COURTS · Had the framers decided in favor of a single system of courts, unquestionably they would have allotted that system to the States. To the States fell the administration of the common law, as well as such statutes as their legislatures might pass, while Federal justice was concerned only with the statutes passed by Congress, which it was thought would always be few in number. If a choice had to be made, the State courts could much more easily administer the few cases arising under the acts of Congress than the Federal courts could administer those arising under the common and statute laws of the States. But the decision was made in favor of two systems, each of which as a unit has a share of the jurisdiction over every person and bit of territory in the United States. Except in the field where the two overlap, each is independent of the other, and neither has a general superiority.

The maintenance of two separate systems of courts in the United States may be defended on three principal grounds. First, it is logical that a system of government dual as to its legislative and executive branches should also be dual as to its judicial branch. Secondly, the dual system is a guarantee that both Federal and State laws will have an equal chance at enforcement. Thirdly, the Federal courts, under the leadership of the Supreme Court, ensure an interpretation of the United States Constitution and laws uniform throughout the United States. In general it seems proper that the standards of justice embodied in the laws of the State should be administered by courts under State control; those embodied in the Federal statutes, by Federal courts.

BASIS OF THE AMERICAN COURTS: FEDERAL · The framers did not leave the establishment of Federal courts to chance. Article III of the Constitution provides that "the judicial power of the United States shall be vested

[24]R. Pound, *Organization of Courts* (1940), chaps. i–iv.

in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[25] Congress may determine the size of the Supreme Court and the salaries of its members, and what inferior courts shall exist, as well as their number and names and the salaries of the judges; but in no case may it make the term of office less than for life or good behavior. While the general field of Federal jurisdiction is defined by the Constitution, Congress is free to divide it among the inferior courts.

BASIS OF STATE COURTS · The State judicial systems rest upon their respective constitutions or laws or both. In some the entire range of courts is set up in the constitution; in a few it is left mostly to the legislature; on the average two or three ranks of courts are named, and the legislature is left a discretion as to the creation of more. The Virginia constitution, for instance, provides:

> The judicial power of the State shall be vested in a supreme court of appeals, circuit courts, city courts, and other courts, inferior to the supreme court of appeals, as are hereinafter authorized, or as may be hereafter established by law. The jurisdiction of these tribunals and of the judges thereof, except so far as conferred by this Constitution, shall be regulated by law.[26]

The Ohio constitution, on the other hand, leaves little to the legislature. A supreme court, and courts of appeal, of common pleas, and of probate, are provided for; but the legislature may add more judges to the common-pleas court of any county, set the salaries of all judges, and create such other judicial districts inferior to the courts of appeal as may seem necessary.[27]

## *THE FEDERAL JUDICIARY*

The regular courts of the United States are the numerous district courts, the circuit courts of appeals, and the Supreme Court. There is a second group, sometimes referred to as "legislative courts" because created by Congress under its general powers. These are chiefly courts for special matters or for the territories. They are the Court of Claims, the United States Customs Court, the Court of Customs and Patents Appeals, district courts in the incorporated territories, and certain consular and extra-territorial courts.[28]

THE DISTRICT COURTS · At the base of the Federal judiciary are the eighty-four district courts. These are trial courts of general jurisdiction, comparable to the common-pleas or district courts of the States and the

[25] *United States Constitution*, Art. III, sect. 1.
[26] *Constitution of Virginia* (1928 ed.), Art. VI, sect. 87.
[27] *Constitution of Ohio*, Art. IV.
[28] For the United States courts and the definition of their respective jurisdictions cf. *United States Code*, Title 28, "Judicial Code and Judiciary."

"courts of first instance" of some of the countries of continental Europe. To them originally come almost all cases of violations of the Federal criminal laws; those involving admiralty and maritime law; and civil cases of a great range, including patents and copyrights, bankruptcy, interstate commerce, labor relations, banking and currency, public lands, Indians, and so on. The United States is divided into judicial districts, at least one for each State, designated as "the District of Montana," "the Middle District of Pennsylvania," "the Eastern District of Iowa," "the Western District of Texas," etc. The district court is presided over by a single judge; but the more densely populated districts have two or more divisions. The Southern District for New York, for instance, which includes roughly greater New York City, has twelve judges. The total of district judges is now more than one hundred and sixty. The annual salary is ten thousand dollars.

THE CIRCUIT COURTS OF APPEALS · Immediately above the district courts are the circuit courts of appeals, one for each of the ten districts into which the country is divided. The plan was to create as many circuit courts as there were members of the Supreme Court, one member being assigned to each of them for duty. In 1863 the membership of the Supreme Court was increased to ten, and a tenth circuit was created, which today necessitates the assignment of one Supreme Court justice to two circuits. From three to seven judges are appointed for each circuit court. A sitting court consists of three judges, two of whom constitute a quorum. These three may be drawn from the circuit judges, district judges assigned by the Chief Justice, or the justice of the Supreme Court assigned to that circuit. The salary is $12,500 a year.

As the name suggests, the jurisdiction of these courts is entirely appellate. Cases come up from the United States district courts, and the supreme and district courts of some of the territories; and the orders of the great administrative commissions, such as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board, are there subject to review. The circuit courts were originally established to relieve the Supreme Court of a substantial part of the appeals from the district courts; this end was still further advanced in 1925 by an amendment to the Judiciary Act. The decisions of the circuit courts are final in cases arising from diverse citizenship and in those where the sum involved is not in excess of one thousand dollars. However, the Supreme Court, in its discretion, upon petition of either party, may order any circuit court case sent up for review.

THE SUPREME COURT · At the apex of the pyramid of Federal courts is the Supreme Court of the United States. This is the only court specifically provided for in the Constitution, but its size, structure, and appellate jurisdiction are left to the discretion of Congress. The membership has varied from five to ten. The first Court was composed of a Chief Justice

and five associate justices. Reduced to five by the Jeffersonian party in 1801, the membership of the Court was gradually increased until it reached nine in 1837, at which figure it has since remained except for the period of 1863 to 1869, during which the number at various times was ten, eight, and seven.[29] The proposal of President Roosevelt in 1937 to appoint a new justice for each member on his attaining the age of seventy years would at that moment have increased the number to fifteen. The term of office is life or good behavior, and members may be removed only by the impeachment process. Members may retire, however, at the age of seventy years upon a full salary, subject only to such service in a circuit court as may be assigned them by the Chief Justice. The salaries of the associate justices is $20,000; and that of the Chief Justice, $20,500.

PRESTIGE OF THE SUPREME COURT · The Supreme Court, in its century and a half of existence, has enjoyed a prestige unrivaled by similar courts of other nations.[30] This has been due to several things: the unique position given it by the Constitution as one of three independent and coordinate departments of the government, its guardianship of the Constitution, and the eminence of many of its members. The Court has the privilege of saying the last word in the interpretation of the Federal Constitution and laws, thereby giving them a uniform meaning throughout the United States, and in the interpretation of the State constitutions and laws in so far as they impinge on the Federal realm of law. The long tenure of the members has tended to give a consistency to its work. Whereas in the period 1789 to 1941 thirty persons served as head of the executive branch of the government, only eleven have held the office of Chief Justice, with an average tenure of nearly fourteen years.[31] Only three times in the history of the Supreme Court have the changes in the number and character of its personnel been sufficient to constitute anything like a break in the continuity of its work: during the administrations of Andrew Jackson, Abraham Lincoln, and F. D. Roosevelt.

OUTSTANDING JURISTS · Of the seventy-five men who had sat as members of the Court down to 1937, a surprising number have been rated as distinguished jurists. Among these are James Wilson, 1789–1798, the original "Philadelphia lawyer," whose sound judgment and learning enabled him to make distinguished contributions both as a member of the Philadelphia convention of 1787 and as a justice of the Supreme Court; Chief Justice Marshall, 1801–1835, who, coming early, had a clean slate upon which to write a great line of opinions laying the foundations for a strong central government; Joseph Story, 1811–1845, John Marshall's "right arm"; Chief Justice Roger B. Taney, politician turned jurist, who presided during the stormy days of the slavery controversy and turned the tide toward

[29]C. Ewing, *The Judges of the Supreme Court* (1938).
[30]C. Warren, *The Supreme Court in United States History*, Vol. I, introductory chapter.
[31]K. B. Umbreit, *Our Eleven Chief Justices* (1938).

States' rights; Stephen J. Field, 1863–1897; John M. Harlan, 1879–1911; Chief Justice Morrison R. Waite, 1874–1888; Chief Justice William Howard Taft, 1921–1930, the only person ever to head both the executive and the judicial department of the Federal government; and Oliver Wendell Holmes, 1902–1932, whose opinions are known both for their literary quality and their emphasis on the social as against the individual point of view.[32]

QUALIFICATIONS · The membership of the Supreme Court has been chosen, as a rule, from men who have had considerable experience in public life.[33] In the Court's first seventy-five years more than half the appointees had served in State offices, usually in the legislature; in the second the appointments more often went to persons who had served the Federal government as members of Congress, members of the cabinet, or judges. Since prior service on the bench would seem the best of all qualifications, it is remarkable that down to 1937 one third of all the appointees were without such experience. Jackson, Lincoln, and F. D. Roosevelt particularly disregarded judicial experience in making their appointments to the Supreme Court bench. Neither of the two justices rated at the top, Marshall and Story, had ever served on the bench; nor had Taney, Chase, Waite, Hughes, Brandeis, and Stone. In sharp contrast were William Cushing, of the first Court, and Oliver Wendell Holmes, with twenty-nine and twenty years of previous judicial experience, respectively, which in both instances was rounded out to fifty years by service on the Supreme Court.

Until the Civil War the legal education of nearly all appointees had been acquired by "reading law" with a practicing attorney; since 1897 all appointees have held law degrees from academic institutions, and most of them also degrees in the liberal arts. More striking than the educational change from early times to the present has been the change with respect to age. The average at the time of appointment for the period 1789–1829 was approximately forty-seven and a half years; for the period 1897–1937 it was over fifty-seven years. Iredell at thirty-eight, Bushrod Washington at thirty-six, William Johnson at thirty-three, and Joseph Story at thirty-two have since had no counterparts. At the other extreme were Taney, appointed at the age of fifty-nine, who died in service at the age of eighty-seven; Duval, appointed at fifty-nine and retired at eighty-three; Field, appointed at forty-four and retired at eighty-one; Marshall and Nelson, appointed at forty-four and fifty-three, respectively, and ending their service at eighty; Brandeis, appointed at sixty and retired at eighty-two; and Holmes, who began his distinguished career of thirty years on the Supreme Court bench at the age of sixty-one.

[32]M. Lerner, *The Mind and Faith of Justice Holmes* (1943), chaps. xxxii, xxxiii.

[33]The data under this heading follow closely the monograph by C. Ewing, *The Judges of the Supreme Court, 1789–1937* (1938).

## *THE SPECIAL, OR LEGISLATIVE, FEDERAL COURTS*

The judicial power of the United States, according to Article III of the Constitution, can be exerted only by a series of courts organized by Congress, with judges appointed for life or good behavior. These were described in the foregoing section. Congress from time to time, however, has established courts outside Article III to administer specialized matters, and this the Supreme Court has recognized as legitimate under the "necessary and proper" clause of the Constitution. These are the Court of Claims, the Court of Customs and Patents Appeals, the United States Customs Court, the courts of the District of Columbia and of the territories, the Court for China, and various consular courts. Congress is free to organize them and set the terms of their judges as it thinks best.[34]

THE COURT OF CLAIMS · The ancient maxim of English law "The king can do no wrong" was translated into American jurisprudence as "The government cannot be sued without its consent." The establishment in 1855 of a United States Court of Claims was an acknowledgment of undue harshness in the rules which absolved the government from all legal responsibility for its injuries, as well as of wastefulness in a system which encouraged the presentation of claims for injuries to Congress, where the settlement was likely to be made without proper scrutiny and on political lines. The Court of Claims is composed of a Chief Justice and four associate justices, appointed for life or good behavior and receiving salaries of $12,500 a year. The court is given authority in general to hear and pass upon all claims against the United States which would ordinarily be cognizable in a court of law if the United States were suable as an ordinary person or corporation. This includes claims arising under the Constitution and laws or from contracts with the United States. Certain claims are excepted, however, including those in tort, war, and pension claims and those growing out of treaties. Any claim pending before an executive department or either house of Congress may be referred for decision to the Court of Claims if the claim falls within the scope of the court's jurisdiction. The court is open to aliens whose home governments afford American citizens a similar privilege. Its close dependence on Congress is shown by the frequent changes made in its jurisdiction, the requirement of annual reports of all judgments rendered, and the necessity for Congressional appropriations to pay for the court's awards. Members of Congress are forbidden to practice law before it.

UNITED STATES CUSTOMS COURT · The United States Customs Court consists of a presiding judge and eight associate judges, appointed in the usual way. An importer, dissatisfied with the appraisal of his merchandise made by the collector of customs, may take an appeal to this court. The case is assigned to a single judge; but if a further appeal is made, it is as-

[34] R. J. Harris, *The Judicial Power of the United States* (1940), pp. 182–217; *United States Code*, Title 28, sects. 241–300.

signed to a panel of three judges of the court for determination. The court's official seat is New York City, but single judges or panels of three may be sent to any port of entry to hold hearings. The salary of the judges of the Customs Court is ten thousand dollars a year.

COURT OF CUSTOMS AND PATENTS APPEALS · If still dissatisfied, the importer may take an appeal to the Court of Customs and Patents Appeals. This court has a presiding judge and four associate judges, each receiving a salary of $12,500 a year. The usual grounds of appeal are questions of the nature and classification of the merchandise, and the rates which apply. This court also hears appeals from decisions of the Commissioner of the Patent Office on questions concerning the granting or renewal of patents and trade-marks. Formerly these matters were within the jurisdiction of the regular United States district courts; but the highly specialized field of law which they involve, and, in the case of customs questions, the necessity for speed, made necessary the creation of courts especially adapted to the work.

COURTS OF THE DISTRICT OF COLUMBIA AND OF THE TERRITORIES · Congress, in the exercise of its power of "exclusive legislation" over the District of Columbia, has established a series of courts comparable to those of the States. At the bottom are municipal, police, and juvenile courts, which deal with misdemeanors and petty civil cases. The "Supreme Court," in spite of its name, is a court of first instance, comparable to the common-pleas courts of the States and the Federal district courts; while the court of appeals not only hears appeals from the lower courts of the District of Columbia but is given jurisdiction to review the orders of some of the great administrative bodies and officials, such as the Securities and Exchange Commission, the National Bituminous Coal Commission, and the Secretary of Agriculture.

In the course of the colonization of lands beyond the Alleghenies, Congress established territorial governments and judicial systems much resembling those of the older States. When Alaska and the overseas territories were acquired, they too were given governments and systems of courts appropriate to the conditions of their respective peoples. In addition to the local territorial courts there are United States district courts in Alaska, Puerto Rico, Hawaii, the Canal Zone, and the Virgin Islands, with jurisdiction in general comparable to that of the district courts of the mainland. The term of office of their judges is ordinarily four years. Appeals, in certain matters, may be taken to specified circuit courts of appeal on the mainland or to the United States Supreme Court.

EXTRATERRITORIAL COURTS · By treaty agreement with various Asiatic and North African states the United States ministers and consuls in those countries were empowered to hold court with jurisdiction over resident American citizens in both civil and criminal matters. The extent of the jurisdiction in each instance depended on the terms of the treaty, but it

usually extended to controversies between Americans and between Americans and natives. The laws applicable were those of the United States. The President was empowered, with respect to some countries, to suspend the exercise of such jurisdiction upon receiving information that the courts of those states were likely to give impartial justice. The jurisdiction of the consular courts in China was restricted to petty matters, the more important cases, as well as appeals, going to the United States Court for China. This court, located at Shanghai, also held sessions in three other Chinese cities. Its judge, marshal, and clerk were appointed by the President of the United States and served at his pleasure.[35]

CENTRAL ADMINISTRATION OF THE COURTS · While the judiciary constitutes one of the three co-ordinate and independent departments of the Federal government, it has never, like the executive and the legislative, had the appearance of a unified and integrated body. The Chief Justice, unlike the President, is not the head of a hierarchy of offices and tribunals extending down to the localities. The Supreme Court, of course, has a position of superiority, in that its rulings on questions of law are binding on all the inferior courts, and its directions to them with respect to the cases which have been appealed must be obeyed. An important step in the direction of unity, however, was taken by the act of 1939, which created the Administrative Office of the United States Courts.[36] At its head is a director, appointed by the Supreme Court, and an assistant director, similarly appointed. This office, under the supervision and direction of the Conference of Senior Circuit Judges, has charge of the administrative matters relating to the clerks and other administrative personnel of all the Federal courts except the Supreme Court. It examines their dockets and secures information as to their need for assistance; directs the disbursement, through the United States marshals, of the funds appropriated for the maintenance of the courts; provides accommodations for their use; prepares and submits their budgets; and exercises supervision over the Federal probation officers.

CONFERENCE OF CIRCUIT JUDGES · An earlier step toward unity in the Federal judiciary was the establishment in 1922 of the Conference of Circuit Judges. Late in September of each year the senior judges of the judicial circuits assemble at Washington under the chairmanship of the Chief Justice of the Supreme Court.[37] Previously the condition of the business of each district court has been reported by the senior district judge to the respective circuit judges. At this meeting the condition of the business in the various district courts is reviewed, and plans are made for the assignment and transfer of district and circuit judges in order that the business of overloaded dockets may be expedited. At the same time the

[35] *United States Code*, Title 22, sects. 141–202.
[36] 53 Stat. 1223 (August 7, 1939).
[37] 42 Stat. 838 (September 13, 1922).

Attorney-General reports to the conference on the cases, pending or to be brought in the courts, to which the United States is a party. This conference, instituted on the initiative of Chief Justice Taft, has been an important factor in co-ordinating and expediting the work of the lower courts.

## *THE STATE COURTS*

While differences among the States in density and character of population, historical background, economic resources, and climate have produced interesting adaptations, the features of uniformity in their judicial systems are more striking than the differences. All, with the exception of Louisiana, derive their law in substance and in procedure from the English common law, and their courts partake of the same character. Generally speaking, the courts of the States, as they were successively admitted to the Union, were drawn on the lines of the courts of neighboring States or of those from which the more influential settlers came. All the States have as a minimum three levels of courts: (1) at the bottom the petty courts, or justice-of-the-peace, magistrates', and mayors' and police courts; (2) the chief trial courts, of original and general jurisdiction; (3) at the top a supreme court, chiefly for appeals.[38]

JUSTICES OF THE PEACE · The court of the justice of the peace is of ancient origin. It was the custom of the English kings to give a "commission of the peace" to one or more men of wealth and influence in each neighborhood, typically to one of the country gentry, or "squirearchy." Usually the chief qualification for holding such an office was the knowledge of practical affairs usually possessed by men of that class, which seldom included a knowledge of the law. The jurisdiction was confined to petty civil disputes and breaches of the peace. The office, with its typical jurisdiction, was very generally established in the American States and has persisted to the present day. The justice of the peace is now usually a township or town officer; the attendant of his court, the township or town constable. The justice of the peace is usually given exclusive jurisdiction in civil cases where the amount claimed is one hundred dollars or less, and concurrent jurisdiction with the district court in amounts up to three hundred dollars. He is authorized to perform a variety of legal functions, such as the acknowledgment of mortgages, deeds, and other papers; the administration of oaths; the issue of attachments against property; and the solemnization of marriages. His criminal jurisdiction is confined to petty misdemeanors, such as breach of the peace, assault and battery, and traffic violations. In many instances it has been extended to cover cases involving some laws of a police character, such as those prohibiting child labor, the sale of adulter-

[38]C. N. Callender, *American Courts—Their Organization and Procedure* (1927), pp. 17–35; B. R. Miller, *The Louisiana Judiciary;* R. Pound, *Organization of Courts* (1940), chap. vi; A. F. Macdonald, *American State Government and Administration* (1934), chap. xiv.

ated foods, the sale of intoxicating liquors to minors, short weighing, and violations of the sanitary and safety codes for workshops and factories. Secondly, the justice of the peace has the general duties of an examining magistrate. He may order the arrest of anyone charged with a felony or misdemeanor, cause him to be brought before him for examination, and discharge him or bind him over to the proper court for trial.[39]

OTHER PETTY COURTS · Other courts of this level are found in the villages and cities. The chief types are the mayor's court, those of the police magistrates, and the municipal courts. The level of their jurisdiction is normally that of the justice of the peace, but includes offenses arising under the city or village ordinances. Municipal courts now existing in most of the larger cities are an outgrowth of the police courts, their criminal jurisdiction remaining about the same, but their civil jurisdiction extending to many matters formerly belonging to the State courts of general jurisdiction. The mayor's court is an interesting example of the fusion of executive, political, and judicial powers.[40] It furnishes rough and ready justice, and operates with all the informality of the justice-of-the-peace court. Among the best-known of the petty courts are the magistrates' courts of New York City, before which over a half million persons arrested by the police are arraigned annually. As "sifting agencies" to determine which charges brought by the police are substantial and should be prosecuted further and which should be dismissed, they are the "city's first line of defense against the unjust and improper use of the police power." The magistrates, appointed by the mayor, have operated consistently, however, as a part of the political machine of the party in power.[41]

COURTS OF ORIGINAL AND GENERAL JURISDICTION · Courts of original and general jurisdiction are the trial courts before which come the mass of the civil and criminal cases arising in the States. They are variously designated as "district," "circuit," "county," or "common pleas" courts. In the populous States there is one court in every county, with as many judges or "divisions" as the business of the county may require. In the States of intermediate and smaller size all but a few of the judicial districts include three or more counties, the judges "riding circuit" to hold court in turn at the various county seats. Nebraska, for instance, has eighteen districts made up of from one to eleven counties each.

INTERMEDIATE APPELLATE COURTS · Since appeals are freely granted from the courts of general jurisdiction, the supreme courts of the more populous States, if unrelieved, would be faced with work beyond their capacity. About one third of the States have met the difficulty by creating

[39]R. Pound, *Organization of Courts* (1940), pp. 152–155, 186–191; S. E. Baldwin, *The American Judiciary* (1905), pp. 126, 129, 130; C. N. Callender, op. cit.; P. F. Douglass, *The Justice of the Peace Courts of Hamilton County, Ohio* (1932), p. 70.

[40]P. F. Douglass, *The Mayors' Courts of Hamilton County, Ohio* (1933), pp. 1–3.

[41]R. Moley, *Tribune of the People* (1932), p. 3.

intermediate courts, whose decisions are final in a large percentage of the cases. Generally these courts are made up of three judges. Indiana's appellate court, of a chief judge, a presiding judge, and four associate judges, sits in two divisions, of three members each. Ohio has nine appellate districts, in each of which there is a division of the appellate court composed of three judges.[42]

SUPREME COURTS · Every State has a single supreme court, known variously by that name or as "the Court of Appeals" or "the Court of Errors and Appeals." The size of the supreme court is generally fixed by the constitution of the State. In several of the thinly populated States the supreme court has only three members, but five and seven are more typical. This court is a tribunal of last resort for all cases arising under State laws, unless there should also be a question involving the United States Constitution and laws. Its interpretations of the State constitution and laws are binding on all the lower State courts, and also on the Federal courts in so far as they do not violate the Federal Constitution. Judges of the supreme court are popularly elected in thirty-five States, and in the remaining they are appointed by the governor or selected by the legislature. In the great majority of the States the judges are selected from the State at large, but in a few they are popularly chosen by districts or chosen from districts by the voters of the entire State. In a few instances the supreme court is required to hold terms in several cities.

THE NEW YORK COURTS · The judiciary of New York, the most populous of the States, is unique in its organization.[43] The court of last resort is called the Court of Appeals, and consists of a chief judge and six associate judges, who are popularly elected for terms of fourteen years. The salary of the chief judge is $22,500 a year, and that of each associate judge $22,000, besides which each receives $3000 a year for expenses. The supreme court is the trial court of general jurisdiction. For purposes of administration the State is divided into nine judicial districts, in each of which are from six to thirty-six supreme-court judges, making a total of one hundred and twenty-five. Although elected by the people of the respective districts, their jurisdiction extends over the entire State. The salary of each justice is $15,000 a year, but those sitting in New York City are paid an extra $10,000. The work of intermediate appeal is in the hands of appellate divisions of the supreme court, of seven or five members, one in each of the four judicial departments into which the State is divided. The governor designates which of the judges of the supreme court shall sit as justices and as presiding justice. There are various courts of petty jurisdiction and specialized courts, such as the Court of Claims.

OTHER STATE COURTS · Courts to perform specialized work are found in nearly all the States. As a rule, the courts administer both law and equity,

[42]R. L. Mott, "The Judiciary," *Book of the States, 1943–1944*, pp. 284–295.
[43]State of New York, *Legislative Manual* (1936), pp. 904–919.

but seven States have one or more courts of chancery. Matters of probate, relating to the recording and execution of wills, and the care of minors are usually given to special county courts; and other special courts, for the settlement of small claims, the conciliation of disputes, and the trial of juvenile offenders, are widely found. In the larger communities either special courts or divisions of the regular district court are established to hear divorce cases. In addition the States usually provide courts of claims, or administrative bodies with quasi-judicial powers, to hear claims against the State.

OFFICERS OF THE COURT · The chief peace officer of the district in which the court is located serves as its executive officer.[44] In the case of the State courts this is the sheriff; in the case of the towns and townships, the constable; and in that of the Federal courts, the United States marshal. He summons the parties and witnesses, keeps order in the court, and executes its judgments. The clerk of court keeps the official record of the court's proceedings, including the rulings and charge of the judge, the testimony of witnesses, and the judgment. In cases of appeal the record in whole or in part goes to the appellate court. There is also a miscellaneous corps of other officers and attendants, bailiffs, stenographers, interpreters, probation officers, and psychologists.

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[44] R. Moley, *Our Criminal Courts* (1930); W. F. Willoughby, *Principles of Judicial Administration* (1929), pp. 142–144, 340–342; C. N. Callender, *American Courts—Their Organization and Procedure*, pp. 33–35.

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CHAPTER XXXVIII

# *The Administration of Justice: How the Courts Operate*

By this time the student may have grasped the idea that the administration of justice is one of the most difficult and complex of all the functions of government. Its essential, however, may be simply stated: the giving to each person of what is his due under the law. The right to his "day in court" was regarded by the Founding Fathers as one of the most precious of all the rights of citizenship. The Maryland Declaration of Rights, for instance, adopted in 1776, declared "that every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."[1] Obviously the two chief elements in any scheme of justice are the law, which defines and establishes the rights and obligations of every person, and the courts, which award the rights to the persons concerned. In the preceding chapter a general survey of these two was given: of the law, its scope and classifications, and of the courts, their number, types, and organization. How the courts perform their work is the subject of the present chapter. The inquiry falls under three chief headings: the jurisdiction of the courts; their procedure, or fixed methods of work; and certain miscellaneous problems.

## *THE QUESTION OF JURISDICTION*

The term *jurisdiction*, as applied to a court, means the cases which it is entitled to hear and decide. The jurisdiction of a court may be defined territorially or by subjects. For instance, the jurisdiction of a State court of common pleas may extend to all cases arising in the county where it is located; a juvenile court may have jurisdiction only over crimes committed by persons under sixteen years of age; a United States district court, over cases arising on navigable waters, but not over cases of homicide or robbery. The jurisdiction of the United States courts is defined in part by the Constitution and in part by acts of Congress; while the jurisdiction of the State courts is defined by the respective State constitution and laws. Naturally the question often arises in the course of suits at law as to whether the court has properly accepted jurisdiction, and this the trial court must decide subject to review in an appellate court.

[1] *Constitution of Maryland* (1934 ed.), Declaration of Rights, Art. XIX.

FEDERAL AND STATE JURISDICTIONS · One of the inherent weaknesses in a federal state is the inevitable clash between the respective authorities of the two governments, executive, legislative, and judicial; and to this the United States is no exception. It was explained in an earlier chapter how the United States Supreme Court had come to act as arbiter to determine the line separating Federal and State functions. The basic rule, in short, is that Federal courts try cases which arise under the Constitution and acts of Congress, and State courts those which arise under the State constitution and the acts of its legislature. There is the difficulty, however, that in many cases both Federal and State laws are involved. If the prosecution is begun under a State law and the defendant claims a right under Federal law, the case before final decision may be transferred to a Federal court. Again, an act may be a crime under the laws of both jurisdictions, such as the passing of counterfeit coins or the sale of adulterated food. In such a case the government which first begins prosecution may go through to the conclusion of the case or by agreement may turn the prisoner over to the other government for prosecution.

THE FIELD OF FEDERAL JUSTICE · The Fathers carefully set up the outer boundaries of the jurisdiction of the Federal courts in Article III of the Constitution, but left Congress considerable leeway in dividing this field among the various courts. The field has two parts: (1) that where the jurisdiction is due to the nature of the subject, and (2) that where the jurisdiction is due to the nature of the parties.

1. *Jurisdiction due to the nature of the subject.* There are five items in this category.[2]

"All cases arising under the Constitution." This accounts for a very comprehensive jurisdiction. A case arises under the Constitution when a party to a suit claims a right or a protection dependent on that instrument, such as immunity from involuntary servitude, the right of freedom of speech and of the press, or the right to engage in interstate commerce or to assemble to petition the government for the redress of grievances. It includes also cases arising directly under State laws which incidentally involve the Federal Constitution. The famous clause of the Fourteenth Amendment forbidding State legislation which deprives persons of "life, liberty, and property without due process of law" is accountable for Federal jurisdiction over hundreds of cases annually.[3]

"All cases arising under the laws of the United States." The bulk of the cases in the Federal courts are due to this item. Here, for example, come the cases, both civil and criminal, under the antitrust, pure-food-and-drugs, postal, currency and banking, espionage, patent and copyright, and bankruptcy laws.

[2]United States *Constitution*, Art. III, sect. 2.
[3]Ibid. Amendment XIV, sect. 1.

"All cases arising under treaties." Many treaties mutually guarantee the rights of the nationals of the two contracting countries in the territories of the other. These may involve the right to carry on business, to inherit, own, or dispose of property, and other rights of personal freedom. Alleged violations of treaty rights by State laws confer jurisdiction on the Federal courts. A celebrated instance was the California law forbidding Japanese nationals to own land in that State.

"All cases of admiralty and maritime jurisdiction." In Great Britain the Court of the Admiral of the Navy had jurisdiction over all cases respecting seagoing vessels and acts committed at sea. In the American colonies this jurisdiction had been exercised by local vice-admiralty courts, and upon the adoption of the new Constitution was conferred on the Federal courts. For several decades the American courts had followed the English rule that maritime jurisdiction extended only to salt water; but beginning with the case of *Genessee Chief* v. *Fitzhugh*, in 1852, the courts have held that it extends to the Great Lakes and other fresh navigable waters of the United States.[4] The maritime law applied is international in character, being derived from the various "laws of the sea" developed by the states of western Europe.

"All cases between citizens of the same State claiming lands under grants of different States." At the time this clause was inserted, there were many controversies concerning land grants by the rival State authorities. New Hampshire had exercised jurisdiction over lands in Vermont; Massachusetts, in Maine; and Virginia, in Kentucky. It has ceased to be the basis of much Federal jurisdiction.

2. *Jurisdiction due to the nature of the parties.* Jurisdiction in four classes of cases is given to the Federal courts not because of the issue or the law involved but because of the character of the parties.

"All cases affecting ambassadors, other public ministers, and consuls." This, in short, applies to the diplomatic and consular officers of foreign states resident in this country. To subject the representatives of foreign states to the jurisdiction of our State courts, it was feared, might conceivably be the occasion of incidents endangering our peaceful relations. The Supreme Court was given original but not necessarily exclusive jurisdiction. It is the source of very few cases, since, through the international practice of extraterritoriality, diplomatic officers accused of crimes are sent back to the home country for trial and punishment.

"Controversies to which the United States is a party." It was evidently the belief of the framers that to submit the United States to suit in a State court would be inconsistent with its dignity and position. Enforcement of a judgment against the United States anyway would present a difficult problem. In spite of the general wording of the clause, the courts consistently have held that while the United States may enter suit against a

[4] *The Genessee Chief* v. *Fitzhugh*, 12 Howard, 443 (1852).

State, a corporation, or individuals in a Federal court, it may never be made party defendant without its consent.

"Controversies between two or more States." This is one of the two classes of cases in which the Supreme Court has original jurisdiction, and the only one in which it is exclusive. The provision ensured that the States would be entitled to a hearing in a neutral court and one consistent with their dignity. This branch of the work of the Supreme Court has been of great interest to students of government, since in its performance the Court acts as a sort of international tribunal. Some profess to see in its notable success a good augury for the success of a world court.

No session of the Supreme Court goes by without one or more such State cases. By far the greatest number involve boundaries, an issue which has been one of the most prolific causes of war between nations.[5] These arise because of the shifting of the beds of interstate rivers, because of inaccurate surveys, or because of disputed interpretations of treaties or boundary descriptions. Controversies over the allocation of the waters of interstate rivers for purposes of irrigation have been the cause of a number of suits.[6] The respective rights of the six States bordering the Colorado River have several times been before the Supreme Court.[7] The most long-drawn-out and most bitterly contested suit between States was that over the nonpayment by West Virginia of its portion of the public debt of Virginia assumed at the time of the division of the States during the Civil War. The Supreme Court in 1918, a half century later, rendered judgment against West Virginia in the amount of $12,393,029.50.[8]

DIVERSITY OF CITIZENSHIP · Federal jurisdiction was given to cases involving diversity of citizenship because it was thought that the courts of one State might be prejudiced against suitors who were citizens of another State. There are several categories of such cases, in none of which Federal jurisdiction has been made exclusive. Suits between citizens of different States may be taken to the Federal courts only if the amount in question is twenty thousand dollars or more. Other instances of diverse citizenship are those between a State or an individual and a foreign state or its subjects. The Supreme Court has consistently given a narrow interpretation to this type of jurisdiction. In 1934, for instance, it denied leave to the principality of Monaco to sue the State of Mississippi for a sum of money, on the grounds that the latter had not given consent to be sued.[9]

[5]Cf. H. A. Smith, *The American Supreme Court as an International Tribunal* (1920); J. B. Scott, *Judicial Settlement of Controversies between States of the American Union* (1919). For example, on May 18, 1944, the Supreme Court, in the case of *State of Kansas* v. *State of Missouri*, 64 S. Ct. Rep. 975, handed down a decision in favor of the defendant in a controversy over the location of the boundary in the Forbes Bend of the Missouri River.

[6]*Kansas* v. *Colorado*, 206 U. S. 46 (1907); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

[7]*Arizona* v. *California*, 283 U. S. 423 (1931); ibid. 292 U. S. 341 (1934).

[8]*Virginia* v. *West Virginia*, 246 U. S. 565 (1918).

[9]*Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934).

## *JURISDICTION OF THE STATE COURTS*

The jurisdiction of the State courts is more easily defined than that of the Federal courts. In general it covers all suits arising under the State constitutions and laws and the municipal charters and ordinances. The allocation of this wide field of jurisdiction among the various State courts is a matter taken care of by the State constitution and acts of the legislature. All levels of the State courts to some extent hear cases arising under acts of the legislature, but the municipal and police courts are concerned chiefly with the settlement of cases arising under the local ordinances.

## *THE QUESTION OF PROCEDURE*

All governmental bodies, except the most petty, have well-established methods of conducting their work. The body of rules which defines these methods constitutes what is called procedure. Parliamentary law sets up the procedure by which legislative bodies do their work. Administrative boards and commissions have procedures for performing the various functions which are allotted to them, in some cases laid down in the organic statutes, in others by the administrative body itself. Governmental bodies, including the courts, have an inherent power to create their own procedure if the statutes are silent on the matter. The reasons for an adherence to a fixed procedure are much the same for all governmental bodies, legislative, executive, and judicial: to let all interested parties know in advance how they may best assert their causes or defend themselves; to prevent arbitrary acts and snap judgments by officials; in short, to maintain a "government of laws and not of men."

NATURE OF JUDICIAL PROCEDURE · The courts are noted for the reliance which they place on procedure.[10] Stories of how a prisoner has been released because of failure to dot an *i* or cross a *t* in the indictment or of how a just cause was lost because of a technical error in presenting the case are partly responsible for the widespread feeling that the courts are more interested in the form than in the spirit of the law. Allowing for the excesses of individual judges, however, the person who has a case in court soon begins to see the reasons for the insistence on form. The rules of procedure have as ancient a lineage as the substance of the law itself. Their due observance may be of the essence of justice. A considerable portion of the Bill of Rights is taken up with guaranteed procedures, such as the right of the accused person "to be confronted with the witnesses against him."[11] The judgment of a court, moreover, has a character of finality which demands that it shall not be imposed without the observance of all formalities

[10]M. Radin, *The Law and Mr. Smith*, pp. 62–95; C. N. Callender, *American Courts—Their Organization and Procedure* (1927).

[11]*United States Constitution*, Amendments IV–VIII.

and safeguards. By judicial decree a person's status may be fixed as married or unmarried, sane or insane, or that of a citizen or an alien; his character may be labeled as criminal or innocent; or, in a property case, he may be made a millionaire or a pauper.

SUPREME-COURT PROCEDURE · The procedure used by the United States Supreme Court in performing its work is in part its own creation and in part that of Congress. The procedure of appellate courts is much simpler than that of trial courts, which necessarily must involve the use of witnesses and juries and the other paraphernalia of a trial. The task of the supreme appellate courts is chiefly to pass on questions of law which are submitted to them, often only a single point. The Supreme Court of the United States, as the chief tribunal of a federated state, is unlike any other court in the world. Not too closely bound by tradition or the Constitution, it has enjoyed a large freedom in developing its way of doing things.

JURISDICTION · An understanding of the Supreme Court's methods of work requires a somewhat more detailed understanding of its jurisdiction than is afforded by the general terms used in the Constitution. There it was simply stated that "in all other cases before mentioned [except those concerning diplomatic officers and those where a State was a party] the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[12] The Judiciary Act of 1789 gave a broad right of appeal from the lower courts; but even then, with few Federal laws and consequently little litigation, its docket was not crowded. Only 10 cases were decided in the first term of the court under Chief Justice John Marshall, and only 120 during his first five years.[13] Gradually, however, the docket grew in length; moreover, much of the justices' time was taken up with "riding the circuit" of the circuit courts. In 1850 there were 253 cases pending; in 1870, 636; and in 1880, 1212.[14] By 1890 the number had increased to 1816, and the time between the docketing of the case and its being disposed of by the Court had lengthened to about four years. Several acts of Congress thereafter, restricting the appellate jurisdiction, somewhat relieved the situation; but by the early 1920's the Court again was far behind in its work. Owing in large part to the initiative of the new Chief Justice, William Howard Taft, Congress in 1925 passed the so-called Judges Bill, which gave the Court permanent relief.

REQUIRED JURISDICTION · This act brought about a revolution in the position of the Supreme Court. It now was able to confine its work to cases of broad national concern, leaving the circuit courts of appeal as the courts of last resort for most cases. The Supreme Court is obliged to hear appeals from the State courts in only two contingencies; from the district

[12]Ibid. Art. III, sect. 2.
[13]C. E. Hughes, *The Supreme Court of the United States*, p. 55.
[14]F. Frankfurter and J. M. Landis, *The Business of the Supreme Court*, p. 60.

courts in only five; and from the circuit courts of appeal in only one. As a rule these include cases where a United States law or treaty has been declared invalid, and others involving the interpretation of certain important Federal statutes, including the Antitrust Act, the Interstate Commerce Commission Act, and the Packers and Stockyards Act.

DISCRETIONARY JURISDICTION · The greater part of the Supreme Court's work now comes from its authority to pick and choose the cases which it believes of national importance. At the end of the 1924 term twelve hundred cases decided in the circuit courts of appeal had been referred to the Supreme Court; thereafter the Court could refuse to hear the greater portion of them.[15] It is interesting to see how the Court makes its choice. There are five principal steps in the process.

A party dissatisfied with the decision of a lower court files a petition with the Supreme Court asking for a writ of certiorari.[16] This is simply an order from the upper court requiring the lower to send up a certified copy of the record of the case for review. The petition contains only a brief statement; but it must be accompanied by a brief, which may be voluminous, giving data sufficient to enable the Supreme Court justice to decide whether or not to grant the appeal, and a printed transcript of the records of the case in the lower court. The Supreme Court rules are very meticulous in their requirements for the petition and briefs: as to the form and organization, the number of pages, and even the size and quality of the paper. At least eleven of the printed copies of the petition for the writ and the brief must be filed, and forty copies of the transcript of record of the trial. The next step is the notification of the other party to the suit, called the "respondent," of the application for the writ; then follows the filing of a brief by the respondent, giving reasons why the Court should not grant the writ of certiorari. On the basis of these briefs and records the Supreme Court makes its decision as to whether to grant the writ; in other words, whether to hear the case. The reading of the briefs and records and the conferences on them do not occur in open court but this work is done by the individual judges at home or in chambers. Monday noon, if the Court is in session, announcement is made of the cases in which certiorari has been granted, and the case awaits its turn on the docket.

TERMS AND SESSIONS · Each year the Supreme Court holds one term, which begins in June immediately after final adjournment of the previous one; but since the Court is not in session until the first Monday of the following October, the terms are designated as "the October term of 1945" and so on. From October to June the Court has a schedule of alternate sessions and recesses, with usually about five sessions. The recesses are

[15]F. Frankfurter and J. M. Landis, *The Business of the Supreme Court*, p. 298.

[16]For a general account of the procedure in the United States Supreme Court cf. R. Robertson, *Appellate Practice and Procedure in the Supreme Court of the United States* (1928), chap. 1.

necessary to allow the justices to do their home work and hold their conferences. Saturday mornings are regularly set aside during the sessions for conferences.

Promptly at twelve o'clock the justices, in black silk robes, file into the room through their private entrance, and the court crier announces: "Oyez, oyez, oyez! All persons having business with the Supreme Court of the United States are admonished to draw near and give their attention; for the Court is now sitting. God save the United States and this honorable Court!" The Chief Justice occupies the seat in the middle of the bench, with the justices arranged on each side of him alternately, in the order of the seniority of their appointment. At this time motions relating to the cases are filed by attorneys, announcement is made of the granting of certiorari, and opinions are read, after which the clerk begins to call the roll of cases on the docket.

HEARINGS OF CASES · When the case is called, the justices have before them the briefs and other papers pertaining to it. Only one hour is allowed each side for argument, and only two attorneys. The attorney for the appellant is entitled to open and close the argument. Instead of set speeches, common in trial courts, much of the time is taken up with questioning by the justices, who call for explanations of difficult points in the briefs and records.

DELIBERATIONS OF THE COURT · The next stage in the disposal of the case is its consideration in conference. These are held Saturday mornings and at various times of the day during the recess of the Court. This, according to Chief Justice Hughes, is the most arduous and responsible part of the justice's work.[17] The case is called and its chief issues are stated by the Chief Justice, after which it is open for discussion, at the end of which the question is put whether the decree of the lower court shall be sustained or reversed. Voting begins with the junior member of the Court and progresses in the order of seniority. The Chief Justice, if he has voted with the majority, then assigns one of the majority to write the opinion of the Court; if he has voted with the minority, the senior member of the majority does the assigning. The assignment is controlled somewhat by the arguments presented by the individual members in conference or by their field of specialization. To Justice Holmes, for instance, were assigned many of the cases on personal liberty; to Hughes, during his first term as an associate justice, railroad rate cases; and to Brandeis, labor cases. The Chief Justice, when he is with the majority, may retain any case he pleases for himself. Justices who have previously had any connection with the case which would tend to prejudice them, such as acting as attorney for one of the parties or personal or business relationships, do not participate in the decision. One of the most sweeping decisions of recent years, that of *the United States* v. *the South Eastern Underwriters Association*, declaring the

[17] C. E. Hughes, op. cit. pp. 59, 60.

insurance business to be interstate commerce and hence subject to the anti-trust laws, was made by a court of seven justices voting four to three.[18]

OPINION OF THE COURT · The opinion of the court is an argument stating the grounds for the decision. Sometimes a member who has voted for the decision disagrees with the grounds on which it was based as stated in the opinion, and to vindicate his stand he writes what is called a "concurring opinion." A member who has voted in the minority may state his grounds in a "dissenting opinion." Others in the minority may subscribe to this or may write separate dissents. These opinions and other data respecting the various cases are published in the volumes of the *United States Supreme Court Reports*.[19] The Supreme Court's work is thus subject to the scrutiny of all interested persons, and hence exposed to a battery of professional and popular criticism beyond that to which any other branch of the government is subjected.

## *JUSTICE IN THE TRIAL COURTS*

The person who applies to a court for the vindication of his legal rights quickly learns that the path to justice is thickly strewn with formalities. The method characteristic of primitive civilizations, at first blush, has much to commend it. Let the injured go to one of the elders of the village, distinguished by high character and wisdom, as is done in the Chinese villages, and tell his story; have the person complained of called in to give his story; then abide by the elder's decision. While such a common-sense method of disposing of controversies fits reasonably well the needs of people in a primitive civilization and a simple rural economy, no one would regard it as adequate for the America of today. The forms of property have multiplied; social life is a maze of intertwined relationships; and the injuries and wrongs which one person may commit against another have increased proportionately. Acts which may be innocuous in themselves, such as the playing of a phonograph record at a paid concert, the use of a trade name resembling that of a competitor, the hiring of women or children for more than forty hours a week, the sale of a trade-marked article below the price set by the manufacturer, may constitute injuries for which the perpetrator is liable. Court procedure has kept pace with the increased artificialities of life.

[18]64 S. Ct. Rep. 1162.

[19]The reports of Supreme Court decisions reached 245 with the October, 1944, term. For nearly a century they were published under the names of the court reporters, namely: Dallas (4 vols.), 1790–1800; Cranch (9 vols.), 1801–1815; Wheaton (12 vols.), 1816–1827; Peters (16 vols.), 1828–1842; Howard (24 vols.), 1843–1860; Black (2 vols.), 1861–1862; Wallace (23 vols.), 1863–1874; Otto (17 vols.), 1875–1882. Thereafter the volumes were designated as *United States Supreme Court Reports*, beginning with No. 107. *Dred Scott* v. *Sanford*, 19 Howard 393, means that the case is in Volume 19 of the series by Howard, at page 393. *West Coast Hotel* v. *Parrish*, 300 U. S. 379, locates the case in volume 300 of the United States Supreme Court Reports at page 379.

By the time the United States was settled, the English judicial procedure had reached a high degree of formality and complexity. Its forms were used with little modification in the American courts until the middle of the last century. Today all the States and the Federal government have what is called "code procedure," which means a procedure established by the code of laws of the legislature. Since, however, this is but a modification of the original common-law procedure and affects chiefly the steps preparatory to the trial, it is better understood in the light of that which inspired it. Three kinds of procedure were embodied in the English system: common-law civil procedure, the procedure in equity, and common-law criminal procedure.

CIVIL PROCEDURE · The steps in the administration of justice according to the common law must be thought of in connection with the three overall objectives of the whole proceeding: to arrive at a clean-cut statement of the matter in controversy; to establish the facts, that is, what happened, where, and how; and to find the law and apply it to the situation. With these accomplished, the court then may proceed to pronounce judgment.[20]

1. *Application for the Original Writ.* A person who had suffered an injury from another, and who thought it worth while to seek redress in the courts, made application to the king for an original writ. Upon payment of a substantial fee this was issued under the king's seal and directed to the sheriff, who was ordered to command the wrongdoer to do justice to the injured party or to appear in court and answer the accusation. This amounted to an authorization for the applicant to use the king's court and for the king's judges to take jurisdiction. The writ indicated the form of action which the court was authorized to entertain, whether of trespass, debt, ejectment, or any other. In the early days the forms of action were very numerous, but these long since have been reduced in the American courts to ten.

2. *The Original Process.* The original process was the step by which the defendant was compelled to put in an appearance. The sheriff's messengers gave him a summons, by word of mouth or in writing, to appear in court at the time of the return of the original writ. Anciently the notice was read on Sunday before the door of the parish church; or, if the case involved real estate, it was given by erecting a white stick or wand on the disputed lands. Failure to appear resulted in an order from the court to the sheriff to seize the defendant's goods or lands as satisfaction to the suitor. Today the usual procedure is to make application to the clerk of the court, who issues the writ of summons, which is served on the defendant by the sheriff. Failure of the defendant to put in an appearance results in an entry of judgment against him by default.

[20]For a brief account of the procedure in the trial of cases in the courts cf. W. Blackstone, *Commentaries on the Laws of England* (Chitty ed., 1832), Bk. III, chaps. xxii-xxvii.

3. *The Pleadings.* In the early days of the common law the plaintiff and defendant faced each other informally in court, the one stating his complaint, the other making a denial or perhaps asserting a counterclaim. It was the purpose of the judge to bring the two to a definite issue, after which the trial might proceed; but if it became clear that no legal question was involved, perhaps only a neighborhood feud, then the case was dismissed. As the law became more formal and the legal profession came into its own the pleadings of the two parties all were reduced to writing, following technical rules which no lay suitor could well utilize. The common-law pleadings might be strung out to considerable length.

*a.* The plaintiff first filed a *declaration*, in which he set forth his complaint at length, amplifying what had been stated in the application for the original writ. The defendant then might do either of two things.

*b.* He might file a *demurrer*, which tacitly admitted the facts alleged but denied that they constituted a cause of action, and pray for a judgment for want of sufficient cause. The plaintiff then "joined" in the demurrer, which gave the court the duty of deciding the question of law presented after argument by the attorneys for the two sides. If the court sustained the demurrer, the action was at an end; but if it was overruled, the action proceeded to the next step.

*c.* Instead of filing a demurrer the defendant might file a *plea*, which was an answer to the facts alleged. This might be a plea of *traverse*, a general denial of the facts of the declaration, or a plea of *confession and avoidance*, which admitted the facts of the declaration but added new ones which altered their legal effect.

*d.* To this the plaintiff filed a *replication*, either one of traverse or one of confession and avoidance. The pleadings might go on at some length, the defendant next filing a *rejoinder*, which the plaintiff answered with a *surrejoinder*, these being followed by the defendant's *rebutter* and the plaintiff's *surrebutter*. Finally the legal issue was drawn, and the case was ready for trial. To the student these proceedings may seem involved; but long experience had shown that they were well adapted to serve the two purposes of preventing matters from going to trial for which there was no legal redress and of defining sharply the matter in controversy between the two parties.

CIVIL PROCEDURE UNDER THE FEDERAL AND STATE CODES · The State legislatures and Congress have adopted greatly simplified codes specifying the steps by which the case shall be brought to court and the pleadings made. While there are differences in details, they generally agree on the following steps.[21]

The plaintiff files a *complaint*, setting forth his claims, with the clerk of the court, who immediately issues a summons which, together with the

[21]Cf. the codes of the various States; for instance, Ohio, *General Code*, Title IV.

complaint, is served by the sheriff on the defendant. The defendant then files with the clerk of the court his *answer* to the various claims of the plaintiff, denying or admitting them, and serves it on the plaintiff. Provision is made for the filing of counterclaims and the amending of the original complaint, but the common-law technicalities of demurrers, pleas, and exceptions are no longer permitted.

THE TRIAL · On the day set for the case the judge calls the trial list; and if both plaintiff and defendant are present and ready, the trial proceeds. The records of the case, including the pleadings, are handed the judge, and the jury is brought in.

1. *Impaneling the Jury.* Previously a panel of jurors, traditionally forty-eight in England and usually thirty in the United States, have been brought in by the sheriff or other officer provided by law. Their names are written on separate slips of paper and placed in a wheel, which is turned to mix them, and then twelve are drawn as a jury for the case.

The attorneys, who meanwhile have investigated the entire panel, are given an opportunity to challenge any member. The "challenge for cause" questions the fitness of the juror to serve, owing to lack of general competence or to prejudice, bias, or a personal interest in the case. A "peremptory challenge," of which from two to six are permitted each side, requires the giving of no reason. Sometimes the impaneling of the jury is considerably delayed because of the large number disqualified for "cause." When twelve eligible jurors have been seated, they then take the oath "well and truly to try the issue." Before them is to be marshaled the evidence from which they must make a decision on the facts.

2. *The Opening Speech for the Plaintiff.* Since the burden of proof lies with the plaintiff, his attorney makes the opening speech. This is a brief summary of facts which the court and jury should know: who are the parties, the form of action, the purpose of the suit and the issue as drawn in the pleadings, the nature and extent of the evidence which is to be presented, and the amount of the damages claimed. In some courts this is immediately followed by the opening speech of the counsel for the defendant, but in most by the production of evidence for the plaintiff.

3. *The Production of Testimony.* It is the purpose of the plaintiff to bring forward evidence sufficient to prove the truth of his claims. The means employed are, in general, the same as those which a person normally employs in discovering truth in the ordinary tasks of life. Physical objects, numbered Exhibit A, B, C, and so on, may be introduced before the jury, or, if they cannot be moved, the jury may be taken to view them. Witnesses to the acts in question are brought in to give their testimony. Persons with special qualifications for understanding things and events, usually referred to as "expert witnesses," such as physicians, chemists, physicists, and psychiatrists, are often called in to give testimony. Unwilling witnesses

may be compelled to appear and testify by use of the court's writ of subpoena. What constitutes evidence is hedged about with elaborate safeguards: many things which a person might ordinarily use in making up his mind are excluded from the jury. The object is to base the jury's conclusions only upon those evidences which human experience has shown to be valid and significant, and not too easily susceptible to abuse, prejudiced views, and hearsay statements.

4. *Testimony for the Plaintiff.* Witnesses give their information in response to questions by the attorneys. Those for the plaintiff are given "direct examination" by his attorney, after which each is turned over to the attorney for the defense for "cross-examination." The object is to elicit from the witnesses what they know or actually have seen respecting the matter in question. Each question put is closely watched by the opposing attorney to see that it is not "leading," that is, does not suggest a desired answer, and that it does not call for answers which are not admissible as evidence or which are entirely irrelevant to the issue. When an objection is made, it is the duty of the judge to rule as to whether the question may be put, or, if the question and answer already have been made, as to whether both should be stricken from the record. After the cross-examination the attorney for the plaintiff may call his witnesses back for "redirect examination" upon the new matters brought out in the cross-examination.

5. *The Opening Speech and Testimony for the Defense.* The next step is the opening speech for the defendant, the purpose of which is to outline the case for the defense and explain the nature of the evidence which will be presented. The attorney for the defense then proceeds to call his witnesses and examine them, and to submit such exhibits as he may have prepared and which are admissible. His witnesses may be cross-examined by the opposing attorney and finally given a redirect examination. The rules of evidence and the procedure are generally the same as in the production of testimony for the prosecution.

6. *The Plaintiff's Rebuttal.* Since the burden of the proof rests with the plaintiff, he is given the advantage of presenting evidence last. If he believes that some statements of the defendant's witnesses require rebuttal, at this point he may call back one or more of his witnesses for examination; but his questions must be confined to the matters brought out by the defendant's witnesses.

7. *The Closing Arguments.* The evidence has now all been placed before the jury, and it may indeed be a tangled web. It is the purpose of the attorneys to present a favorable picture of the case by piecing together the various bits of testimony, attempting, if the facts presented have been voluminous, to conduct the jurors' minds through its mazes so that they may see it as a coherent whole. The attorneys at this point are assured a wide latitude in the choice of methods of presentation. Experience and skill will dictate whether this is the type of case for careful analysis of facts

or for the use of humor, flattery, or any of the other approaches to the human mind and emotions. The attorney for the plaintiff leads off, followed by the attorney for the defense; but the former is allowed a closing speech to rebut the arguments raised by the defense.

8. *The Judge's Charge to the Jury.* The judge now instructs the jury on the law involved in the case. He also sums up the testimony of both the prosecution and the defense, taking care to make no prejudicial comment and reminding the jury of their duty to decide the case on the facts presented. He gives a brief summary of the simpler rules of evidence, pointing out which kinds are the more credible and reminding the jury that a verdict must be brought in in accord with the weight of the evidence. He may instruct them that if they find a certain set of facts to have been established, they must bring in a corresponding verdict. Frequently the attorneys have prepared a set of points which they wish the judge to include in his charge; and if he refuses or consents, one or the other may take "exceptions" to his actions as the basis for an appeal.

9. *The Verdict.* The jury now retires to its room to deliberate upon the case. A unanimous vote is required in most jurisdictions, although in civil cases a two-thirds or three-fourths vote is allowed in some jurisdictions. Usually a "straw" vote is taken first. If this shows a majority for the plaintiff, an attempt is made to win over the minority. Often a bargain is struck by which the amount of damages is reduced and a unanimous vote then assured. At a signal the door is unlocked, and the twelve are led back to the jury box, where the verdict and the amount of damages are announced.

10. *The Judgment of the Court.* Within a period set by law an appeal to a higher court may be taken, or permission may be given for a new trial because of some defect in the proceedings; but unless either of these contingencies arises, the court will pronounce judgment according to the findings of the jury, and order it entered upon the record. It is assumed that the judgment is never the personal mandate of the judge but a conclusion that follows inevitably from the provisions of the law.

11. *Execution of the Judgment.* The court may issue one of several writs, depending upon the nature of the judgment, directed to the sheriff for execution. If the suit is over the ownership of real estate or particular goods, it is the duty of the sheriff to put the rightful owner in possession; if a matter of debt, to seize and sell sufficient goods of the defendant to satisfy it. In earlier days the person of the debtor might be seized and placed in jail until the debt was paid.

SUMMARY · So ends the process of justice. By such means, lands and chattels are restored to their legal owners; intruders upon the property of others ousted and forced to make amends; children returned to their parents or rightful guardians; and those injuring others in property, person, or reputation forced to repair the injury so far as this can be done

by the payment of money. How often this procedure fails to give the injured their dues under the law, to what extent cost and technicalities stand in the way of a proper redress of wrongs, are questions which cannot be answered accurately. At least the underlying conceptions and the basic features of the procedure are sound.

PROCEDURE IN EQUITY · It has been explained how a body of law known as equity came into being to supplement the common law, and how it grew directly out of the power of the king to dispense justice irrespective of the rules and remedies of the common law. With this growth came the general rule that equity is to be used only in those cases where the common law does not afford an adequate remedy.[22]

*The Pleadings.* The ancient English equity procedure bore the impress of its original executive character. The pleadings started with a "petition," or a "bill of complaint," since originally this was the informal way in which a distressed subject addressed the king. The pleadings were simple. The complaint was followed by the defendant's answer, to which there could be a replication by the plaintiff if the answer had been in the nature of a denial.

*The Hearing.* With the pleadings complete there is a "hearing" rather than a trial. No jury is used, the chancellor or judge deciding both the facts and the law, although, in the modern development of the system, in some jurisdictions questions of fact may be presented to a jury. The remedies in equity are chiefly "in personam," consisting in directions to persons requiring or prohibiting the performance of specified acts. Failure to obey constitutes contempt of court and may be summarily punished. The writ of injunction is a frequently used equitable process, directed to the defendant, enjoining the acts complained of. Decrees of specific performance require a person to fulfill his obligations when the payment of damages would not be an adequate remedy. Equity may order the cancellation of a contract fraudulently obtained, the reframing of a written agreement when mistakes have been made by both parties in its drawing, the redrawing and execution of a contract which has been lost, the appointment of a receiver to take charge of property which is in litigation, the supervision of trust estates, or the conveyance of property under a foreclosure.

THE PROCEDURE IN CRIMINAL CASES · Civil procedure provides the means by which Smith may seek justice as against Jones. What are the steps by which the state, representing organized society, proceeds against a person suspected of conduct which it forbids under pain of punishment? It is clear that a procedure which suitably protects both the interests of society and of the person accused is a matter of the first importance. The peace, order, and well-being of society, on the one hand, and personal security

[22]E. Jenks, *A Short History of English Law* (1912), pp. 207–236.

and freedom, on the other, are at stake. The importance of a fair procedure was keenly realized by the Fathers when they wrote in the Bill of Rights that neither the life nor the property of the accused might be placed in jeopardy in the Federal courts without "due process of law," which meant established law and procedure as opposed to arbitrary action. The Fourteenth Amendment years later laid down the same requirement for the State courts. Both Federal and State bills of rights are as much concerned with procedural as with substantive rights. Trial by jury, indictment by a grand jury, a hearing in open court, and the right to confront the accusers are all procedural in character.

THE STEPS IN CRIMINAL PROCEDURE · Criminal procedure developed in the common-law courts side by side with civil procedure; but, beyond discarding certain medieval methods of trial, it has suffered fewer modifications to the present time. The following steps are typical of the proceedings in criminal cases in American courts today.

1. *Arrest of the Suspect.* It has been seen that the defendant in a civil suit need not appear in court if he is willing to let the judgment go against him by default. The situation is very different, however, when the offense is one against society. It is necessary and prudent that the person of the offender be secured in order that he shall not flee punishment. The first step, therefore, is his arrest, which may be performed by any peace officer, such as the sheriff or his deputy, the city or State police, the United States marshal, the constable, or even a private citizen. Tracking down the suspect in this highly mechanized age is often one of the most difficult tasks in the process of justice. A warrant is a writ, issued by a peace officer or by a court, ordering the arrest of the suspected person; but the arrest may be made by an officer without a warrant if the crime was committed in his presence or if he has strong reasons to believe him guilty. The common law recognized an extraordinary method of apprehension and arrest by raising the "hue and cry." If a felony had been committed, the discoverer or a neighborhood officer, such as a justice of the peace or constable, by horn and voice summoned the countryside to join in the pursuit. In rural America the adaptation of this method was commonplace: the sheriff or his deputy on horseback, followed by a posse of citizens whom he had summoned.

2. *Commitment and Bail.* The arrested person is next taken before a magistrate, justice of the peace, police judge, or mayor, and given a preliminary examination. If it appears that no crime has been committed or that the charges against the prisoner are groundless, he is discharged; otherwise he is committed to prison unless he is able to give bail, which is a monetary security for his appearance before the court for trial.

3. *Formal Accusation.* In order that a person may not be brought to trial for light and trivial reasons, the law prescribes methods for considered ac-

cusations. The device used in early England was the grand jury. Upon the occasion of the coming of the king's judges from Westminster to the rural counties, the sheriff was ordered to summon twenty-four "good and lawful men" whose task it was to make inquiry whether crimes had been committed in the county and to present accusations against the probable perpetrators. A jury of at least twelve and not more than twenty-three was made up from this panel. A *presentment* by a grand jury is an accusation based upon the jury's own knowledge of the offense; an *indictment* is an accusation based upon a written complaint of the state's attorney or some other person. The terms are now generally used interchangeably. That the character of the grand jury has not greatly altered since the earliest days is evident from the oath now administered to grand jurors in Ohio. It pledges them as a "grand inquest" to "diligently inquire, and true presentment make" of all the matters given them in charge; to present no person "through malice, hatred, or ill-will" or leave any person unpresented "through fear, favor, or affection, or for any reward or hope thereof."[23]

After being sworn the grand jurors are given a charge by the court explaining their duties and obligations under the law, and a foreman is appointed. They then meet in secret to conduct their inquiries. In practice these are mostly restricted to the consideration of cases placed before them by the State's attorney, in the course of which witnesses for the State are heard. After the evidence is in, if the accusation appears groundless, they endorse on the back of the bill "No true bill"; but if they are satisfied of the truth of the accusation, the endorsement is "A true bill."

The alternative method of bringing a person to trial, used in a number of the States, is by an "information." The prosecuting attorney files the "information" with the court, setting forth the charges against the accused, and this is sufficient to bring him to trial. One of the chief reasons for the use of the grand jury is to save persons from the disrepute of trial for a crime without a substantial basis. The power to bring a person into court on a serious charge or to fail to prosecute when crimes have been committed is thought by many to be too great a responsibility to entrust to any one individual.

4. *Arraignment.* This stage corresponds to that of the "pleadings" in civil cases. A copy of the indictment is served on the accused, who through his attorney may file exceptions to it by means of a motion to quash, a plea in abatement, or a demurrer. The accused's exceptions, if sustained by the court, end the proceedings. If the exceptions are overruled, the indictment is read to the accused in open court, at which point he has the choice of several pleas which, if upheld, would end the case. Failing in this, he is asked to plead "Guilty" or "Not guilty." If he stands mute or answers evasively, he is recorded as pleading the latter.

[23] *Ohio General Code*, Pt. Fourth, Title II, sect. 13436–3; *Book of the States, 1941–1942*, Vol. IV, p. 152.

5. *Trial.* As in a civil case, the issue has now been drawn, and the case is ready for trial. Medieval England recognized five different methods of trial, the first three of which were based upon divine intervention. These were trial by ordeal, using fire or water; trial by the "morsel of execration," a piece of consecrated bread or cheese, to be eaten by the accused, which would give him health and nourishment if innocent, convulsions and paleness if guilty; the trial by battle, or duel; trial by the House of Lords; and, lastly, trial by a jury. In the United States, except for impeachments and offenses against the military and naval codes, trial for crimes is in the civil courts, a jury being required in all the Federal courts.

The steps in the trial of a criminal case are generally the same as those in a civil one, from the impaneling of the jury to the verdict. Judge, jury, and attorneys play the same parts; and the same or analogous motions, safeguards, and rules of evidence are applicable.

6. *Execution.* The execution of the judgment brings other problems. If the charge was a misdemeanor, the punishment might be only the payment of a fine or the infliction of a brief imprisonment, both at the hands of the sheriff. If it was a felony, the sheriff hands the prisoner over to the State authorities, either for long imprisonment or for the infliction of the death penalty. Problems of penology, namely, those of correction and punishment, probation and parole, intrude here; but they will be left for examination at another point.

## *PROBLEMS IN THE ADMINISTRATION OF JUSTICE*

The preceding pages have described the instrumentalities used in the administration of justice: the law, the courts, and their auxiliaries and procedure. At any point of this organization or at any step in the procedure defects may develop which thwart their purpose. Legal institutions, like all others, tend to lag behind the needs of the day in their organization and methods of work. It is often said by competent students that our legal machinery is too cumbersome and expensive for poor suitors; that justice is too long delayed and often denied; and that there is a general lack of competence to deal effectively with criminal activities. President Taft stated that "the greatest question before the American people is the improvement of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use."[24] Some of the chief problems, as they affect both organization and procedure, will be considered in the succeeding pages.

QUALIFICATIONS FOR THE BENCH · There is little disagreement on what the qualifications of the judge ought to be. First, he should possess high personal integrity; for he has a considerable latitude in the power which

[24]C. G. Haines and B. M. Haines, *Principles and Problems of Government* (1926), p. 399.

he wields over the property and personal interests of suitors. Next, he should have sound legal learning; for questions come before him involving the whole range of the law. Dean Wigmore, writing on the basis of a life-long study of judicial administration, concluded that judges generally were weak in their acquaintance with legal science, and that the philosophy of the law and jurisprudence were almost entirely unknown to them.[25] Again, a judge should possess a judicial temperament, a disposition to weigh meticulously the evidence and the law, and a will to see that justice is impartially meted out. That a person has been a successful practicing attorney does not mean necessarily that he is qualified to serve on the bench. As a lawyer, he has been an advocate, a partisan, devoted to special interests and perhaps is proficient only in a narrow field of the law, the reverse of what is required of a judge. Finally, he ought to have a sympathetic understanding of the social and economic conditions of the people of the community and State in which he acts.

The statutory qualifications for the bench are naturally directed chiefly to matters which are more easily measured. All but a few States require that judges shall be "learned in the law," the test of which is admission to the bar. Somewhat more than half require American citizenship; about two thirds, residence in the State of from one to five years. A minimum age requirement is found in about two thirds of the States, with thirty years the more common. Otherwise the appointing or electing authority is untrammeled in its choice.[26]

METHODS OF CHOOSING JUDGES · Three methods of choosing judges are employed in the United States: election by the people, choice by the legislature, and appointment by the chief executive with the consent of the senate or a council. The first may be called typical, since thirty-six of the States use it. In four, Rhode Island, South Carolina, Vermont, and Virginia, the legislature does the choosing; in six, Connecticut, Delaware, Massachusetts, Mississippi, New Hampshire, and New Jersey, the governor appoints by and with the consent of the senate or the executive council; in Florida both popular election and appointment by the governor are used. California and Missouri lately have instituted a new system of appointment, to be noted hereafter. All Federal judges of the regular judiciary are appointed by the President and the Senate for life or good behavior, while judges of the territorial and military courts are appointed for a term of years.

EFFECTS OF POPULAR ELECTION. The many expert studies which have been made of the administration of justice are in general agreement as to its greatest weaknesses. These are chiefly two: the mediocre abilities of the judges and the political pressures to which they are subjected. For this

[25] J. H. Wigmore, "The Qualities of Current Judicial Decisions," *Illinois Law Review*, Vol. IX, p. 529.

[26] *Book of the States, 1941–1942*, Vol. IV, p. 152.

situation popular election is chiefly responsible. Persons of neither learning nor judicial temperament do not hesitate to offer themselves for even the highest judicial offices of the State, and they suffer no handicaps in the campaign if good partisans or clever politicians. The results are what might be expected. The uncertainties give a nuisance value to suits with little legal foundation, which makes it more prudent for those with good causes to make settlements out of court. In the weeks preceding elections judges sidestep or postpone cases where pressure groups are involved. The errors of the judges, by encouraging appeals, make justice slow and expensive.[27]

WHY JUDGES SHOULD BE APPOINTIVE · Few rules have been more clearly demonstrated by the experience of democratic government than that officers with broad policy-making powers should be popularly elected, whereas those whose duties are primarily administrative and technical should be appointed. Generally the same qualities that make men good campaigners make them good legislators and, to a smaller extent, good chief executives. On the other hand, choice by the voters of those who administer policy, such as engineers, geologists, physicians, or purchasing agents, seldom results well; for the qualities which make a good campaigner, such as attractive personality, effective speaking, and the ability to organize voters, quite overshadow the requisite technical qualifications.

The work of the judge falls chiefly in the field of technique and training. He should be not only learned but a craftsman of the law. His task is not to formulate policies but to ascertain what the law is and to apply it; not to follow local currents of opinion but to enforce the law even contrary to the will of a temporary majority if that will runs contrary to the law and the Constitution. Appointment by a chief executive, checked by a council or popularly elected body, therefore has the most to commend it for securing well-qualified judges. Furthermore, to assure independence and impartiality the appointment should be for a long term or for life.

EFFORTS AT REFORM · Efforts to mitigate the evils of the elective system and even to abolish it have been attempted widely. In some States public opinion frowns upon the partisan control of judicial elections, and good judges are elected term after term without serious opposition. In others the names of the candidates are placed on ballots without party designation, which does not entirely eliminate voting on party lines but decreases it.

In 1937 the House of Delegates of the American Bar Association drew up a modified plan of appointment.[28] Its chief features are: (1) the appointment of the judges by the chief executive from a list submitted by an agency composed of high judicial officers and laymen; (2) if a further

[27]On this subject cf. A. A. Bruce, *The American Judge* (1924); S. E. Baldwin, *The American Judiciary* (1905); M. C. Moos, "Judicial Elections and Partisan Endorsement of Judicial Candidates in Minnesota," *American Political Science Review* (February, 1941), Vol. XXXV, pp. 69–75.

[28]American Bar Association, *Reports*, Vol. 62 (1937), pp. 893–897.

check is desired, confirmation by the State senate or other legislative body is recommended; (3) after one term of service the judge is eligible to reappointment, or to stand for election with the question "Shall Judge —— be retained in office?" but with no other name on the ballot. If the popular vote is negative, an appointment is made from a new list of names.

THE CALIFORNIA PLAN · An amendment to the California constitution in 1935 follows in general the proposal of the American Bar Association.[29] Judges of the supreme court and of the courts of appeal are appointed for terms of twelve and six years, respectively, by the governor and a commission of three members consisting of the attorney-general, the chief justice of the supreme court, and a judge of one of the courts of appeals. At the end of their terms the judges run on the basis of their own records, with no other names on the ballot. The voters of any county, by referendum, may adopt the provisions of the law for the judges of their superior court.

THE MISSOURI PLAN · Missouri's plan for judicial appointments, adopted in 1940 as an amendment to the constitution, is the most sweeping and successful of the reforms adopted by any State up to that time.[30] It was made applicable to the supreme court, the courts of appeals, and the circuit and probate courts of St. Louis County and Jackson County (Kansas City), and may be adopted for any county by a referendum of the voters. The governor is required to appoint from three names submitted to him by a nonpartisan unpaid commission. The commission for the supreme court and the courts of appeals is composed of seven members: the chief justice, one elected from each of the five courts-of-appeals districts by resident members of the bar, and a nonmember of the bar appointed by the governor. Commissions to nominate for the lower courts are made up of five members: the presiding judge of the court of appeals, two elected by the members of the bar of the county or judicial district, and two nonmembers of the bar appointed by the governor. Within a short time the plan showed gratifying results. Proposals for a like reform have been made in six other States; and in seventeen others similar movements were under way by 1945.

UNIFICATION OF STATE COURTS · The judicial and the civil administrative systems of the States have had the same life history. Beginning with simple and meager organizations, new units were added from year to year as some need became pressing.[31] After several decades or longer the sys-

[29]C. Aikin, "A New Method of Selecting Judges in California," *American Political Science Review* (June, 1935), Vol. XXIX, pp. 472–474; *Constitution of the State of California* (adopted November 6, 1934) (Paul Mason, ed., 1941), Art. VI, sect. 26.

[30]John P. Wood, "Missouri Speeds National Judicial Selection Reform," *Journal of American Judicial Society* (1943), Vol. 26, pp. 142–143; T. F. McDonald, "Missouri's Ideal Judicial Selection Law," ibid. (April, 1941), Vol. 24, pp. 194–198; W. W. Crowdus, "The Operation of the Missouri Non-Partisan Court Plan," ibid. (April, 1944), Vol. 27, pp. 160–170.

[31]R. Pound, *Organization of Courts* (1940), chap. v.

tem became complex, decentralized, uncoördinated, and inefficient. In 1909 a committee of the American Bar Association drew up a plan whereby all the courts of a State should be merged into one court, with proper divisions to take care of special needs. There would be, for instance, divisions for appeals, final and intermediate, for trial courts of general jurisdiction placed in convenient territorial units; specialized county courts; and metropolitan courts for administrative purposes. At the head would be a chief justice acting alone or with a judicial council, over which he would preside. Among the duties of this central body would be the assignment of judges to the various divisions, with suitable consideration of their peculiar qualifications and the pressure of work; the prescription of uniform records for both the civil and the criminal divisions; the formulation of rules of procedure for the immediate use of the judges or for recommendation to the legislature; and the making of biennial reports to the legislature.[32]

No State so far has adopted any such unified system, although it has been proposed in several. In a few instances the chief justice of the supreme court has been given power to assign judges from counties in which there is little pending business to others where the docket is overloaded. However, in many municipal courts a degree of unification has been carried out under the chairmanship of a presiding judge.

JUDICIAL COUNCILS · As a substitute for unification, judicial councils or conferences, made up of representatives of the various grades of courts, sometimes including representatives of the attorney-general's office, of the bar, or of lay citizens, have been established in about half the States.[33] A step in that direction was taken by Wisconsin in 1913, when it established a board of circuit judges. A Massachusetts legislative commission in 1921 recommended the creation of a judicial council which was carried into execution in 1924. Ohio's judicial council, established in 1922, was the first. That of Indiana, dating from 1935, is representative. It is composed of nine members selected as follows: one judge or ex-judge of the supreme court, selected by that body; one judge or ex-judge of the appellate courts, selected by the members of those courts; two circuit-court or superior-court judges, selected by the supreme court; the chairman of the judiciary committee of each house of the legislature; a member of the law faculty of the University of Indiana; and two members of the bar with at least ten years' practice in the State, selected by the governor. All have terms of four years except the two chairmen of judiciary committees, whose terms coincide with that of their chairmanship.

[32]R. Pound, "Principles and Outline of a Modern Unified Court System," *Journal of American Judicial Society* (April, 1940), Vol. 23, pp. 225–233.

[33]J. A. C. Grant, "The Judicial Council Movement," *American Political Science Review* (November, 1928), Vol. XXII, pp. 136–146; L. S. Saxe, "The Judicial Council of the State of New York," ibid. (October, 1941), Vol. XXXV, pp. 933–940; E. D. Sunderland, "The Judicial Council as an Aid to the Administration of Justice," ibid. (October, 1941), Vol. XXXV, pp. 925–933; M. E. Pirsig, "Judicial Councils," *Book of the States, 1941–1942*, pp. 159–166.

The duties of the council are to make a continuous study of the administration of justice in the State, including the volume and condition of judicial business, the methods of procedure, and the character of the results; to receive and consider suggestions from judges, members of the bar, and citizens as to the remedy of faults in the administration of justice; to make recommendations to the judges and the legislature for changes in the rules of procedure, the methods of administration, or the organization of the courts; to collect and compile judicial statistics; and to make an annual report to the governor and to the supreme court.

SPECIALIZED COURTS · The court system inherited from England consisted chiefly of a series of trial courts of general jurisdiction: the county, district, and common-pleas courts. Beneath these were those of petty jurisdiction, the justice-of-the-peace courts, and above them were one or more levels of appellate courts. In some of the early States there were separate courts of equity, a few of which still exist. These constituted an adequate system for a rural but not for an urban economy. The wage system, the high mobility and massing of population, which break down the neighborhood spirit, the passing of the semipatriarchal family, and the emergence of a more highly class-conscious society required changes, in the direction of greater specialization, both in the ancient common-law rights and in the court system.

SMALL-CLAIMS COURTS · Principles of fairness and equality were written into the original judicial system; but the expensiveness of litigation very generally amounted to a denial of justice where the amount at issue was small, say under fifty dollars.[34] Poor people to whom were owed small sums often found it better to let the claim go or to accept a settlement for considerably less than the debt rather than sue. The courts are operated on a fee basis, the idea being that those who benefit directly from their work should pay a substantial portion of the costs of justice. There are fees for the filing and serving of papers, and for witnesses, jurors, and the attorneys, all of which must be paid promptly.

The justice-of-the-peace court originally served as a sort of small-claims court, as indeed it still generally does in the rural regions. To say that these courts became inadequate for this task is an understatement. Ignorance of the law and arbitrariness and bias in making judgment characterize all too many of them. Compensated only by fees, they frequently admit cases which have little foundation or go out into the highways and byways to drag in business. By collaboration with the constables, the bondsmen, and the plaintiff, many justices are able to build up an income of several thousand dollars a year. Poor defendants, deterred by the costs of an appeal, frequently find it to their advantage to pay the judgment. *J. P.* in many communities bears the popular interpretation "judgment for the plaintiff."[35]

[34]R. H. Smith, *Justice and the Poor* (1924), chaps. i–vi.

[35]P. F. Douglas, *The Justice of the Peace Courts of Hamilton County, Ohio* (1932), pp. 33–47; A. Lepawsky, *The Judicial System of Metropolitan Chicago (1932)*, pp. 116–126.

Beginning with the Kansas small debtors' courts in 1913, courts adapted to such needs were instituted in many of the larger cities. These ordinarily agree in their essential features. Lawyers have little or no part in the conduct of the cases, and a simple and inexpensive procedure is adopted. Organically they are attached to one of the regular courts. The Kansas law freed the judge from slavish adherence to the precedents of the law, requiring him to "give judgment according to the very right of the cause." Portland (Oregon), Cleveland, Chicago, Philadelphia, and Spokane were early in the establishment of such tribunals. Massachusetts in 1920 instituted the first State-wide system, and was soon followed by California, South Dakota, Nevada, Idaho, and Iowa.[36]

PROCEDURE IN THE SMALL-CLAIMS COURT · The procedure of the Cleveland court of this type, known as the Conciliation Branch of the Municipal Court, is typical. As the name suggests, conciliation methods are combined with a simplified judicial procedure. A person having a claim goes to the clerk, with whom he may talk over his case informally. If it appears that there is a fair chance of a prompt settlement, the clerk telephones or writes the defendant. If that does not succeed, a docket entry of the plaintiff's claim is made, and the defendant is summoned by mail. A date is set, the defendant being entitled to three days' notice. At the hearing each of the parties is asked to tell his story. Lawyers are not excluded by law, but their presence is frowned upon by the court. No pleadings or other formal procedural steps are employed, but the established law is the standard by which the judgment is made. While some courts of this class are limited to matters of contract and debt, the Cleveland court covers all kinds of small matters, including torts if the claim is not in excess of fifty dollars, and matters involving as much as one hundred dollars in the case of indigents or of work or labor claims. If one or both parties appear with lawyers and witnesses, or issues arise which would be difficult for the court to handle, the case is transferred to the regular trial division of the municipal court. The judgment of the court is final on the facts, and an appeal on the law, if taken, goes directly to the court of appeals.

The Cleveland court has fulfilled well the purpose for which it was instituted. In the year 1943, 6269 claims were filed in the court for a total of $138,440.46, or an average of $22.08 each.[37] Of these, 2526 were settled by the court informally; 1939 were abandoned or taken to the trial division of the municipal court; and the remaining 1804 went to the regular conciliation docket, where they were disposed of at a total cost to the parties of $3435.27, or $1.90 per case. The minimum cost of a case is $1.40 where

[36]W. F. Willoughby, *Principles of Judicial Administration*, p. 316; C. G. and B. M. Haines, op. cit. pp. 418–422; R. H. Smith, op. cit. chap. viii.

[37]Statement of W. J. Banning, Deputy Clerk of the Conciliation Branch of the Cleveland Municipal Court. For an account of the Pennsylvania small-claims courts cf. L. Kennedy, "The Poor Man's Court of Justice," *Journal of American Judicial Society*, Vol. 23, pp. 221–223.

there is only one defendant, and $1.65 where there are two or more; while the maximum cost for any case is $2.15.

War conditions were responsible for a drop in the claims filed from 9878 in 1942 to 4892 in 1944. By a ruling of the municipal courts made in 1938, corporations, including department stores, are excluded as parties plaintiff from the jurisdiction of the conciliation branch. The Cleveland small-claims court has no statutory basis but was established by order of the municipal court, of which it is a branch, and is presided over by its judges in rotation of three months' periods.

JUSTICE FOR THE YOUNG · The English common law recognized the special status and needs of children. A male at the age of twelve was competent to take the oath of allegiance to the king; at fourteen, to agree or disagree to a marriage, choose a guardian, or make a will; at seventeen, to be an executor of an estate; at twenty-one, to order his own personal affairs and dispose of his property. It also determined the ages of criminal responsibility. The ancient Saxon law declared that a person could not be guilty of a crime if under twelve years of age; but the common law used the test of actual physical and mental capacity, holding in some cases that it extended to those of the tender age of seven. The theory was that the king, through the chancellor and his court of equity, was the general and supreme guardian of all infants (persons under twenty-one years of age), parents and guardians exercising their authority subject to this supreme power. The American equivalent was the grant to the State of the ultimate and, if necessary, the immediate responsibility for the lives, well-being, and education of children.

Until recently this authority was little used, since the rural and small-town family was generally competent to care for its own. The wage system of capitalism, however, by dispersing the members of the family in varied employments, had the effect of weakening the bonds of parental control. A study for the Wickersham Commission showed that in Chicago the juvenile delinquents were markedly concentrated in the areas surrounding the downtown business district, around the stockyards, and in the chief industrial centers. Studies made in six other large cities revealed analogous conditions. The explanation was that such areas, with a high rate of population movement, were in a state of social disorganization. Juvenile delinquency constituted the normal group behavior; the play groups of the boys took their character from the low code of the community. Juvenile delinquents sent to the ordinary jail or penitentiary with adult criminals were soon committed, as a rule, to a lifetime of crime. Of the 9243 delinquent boys dealt with in Chicago in 1926, 55 per cent were charged with some form of stealing, ranging from petty thefts to breaking into stores or factories.[38]

[38]C. R. Shaw and H. D. McKay, *Social Factors in Juvenile Delinquency*, Pt. II, chap. ii, in National Commission on Law Observance and Enforcement, *Reports*, Vol. VI.

JUVENILE COURTS · The traditional American courts were not qualified to handle this class of cases. The ordinary trial judge is accustomed to the run-of-the-court cases involving property rights and adult crimes. Juvenile cases require, over and above a knowledge of the law, a knowledge of social, family, and neighborhood problems and of the psychology of youth. Recognition of the need for specialization finally led to the very general establishment in urban centers of so-called "juvenile courts." The first of the kind was the "Juvenile Court of Cook County" (Chicago), established in 1899. This introduced into the American scheme of justice the conception "that the child who broke the law was not to be regarded as a criminal but as a ward of the State, to receive the care, custody and discipline which should have been given by his parents."[39]

The Illinois statute gave the courts for juveniles the character of equity rather than of criminal proceedings. No complaint or indictment or accusation of crime was filed against the child, but a petition alleging his condition of delinquency or dependency. The hearings were informal, the appearance and atmosphere of a courtroom were avoided, and the case was handled throughout primarily with a view to the welfare of the child. The court was given wide discretion as to the action which it might take. No sentence was pronounced. The child might be returned to its own home, under the care of a probation officer; it might be placed in another home, committed to the care of a child-helping society; or it might be sent to a reformatory. The court retained a general guardianship.

By 1925 every State but one had adopted general legislation authorizing such courts, and every city of a hundred thousand or more had established them. In some States these courts stand independently; in others they are branches of the regular courts of the district or the municipality. They now deal with between 200,000 and 250,000 children annually. To facilitate their work a reorganization of the police force is usually found desirable. In Chicago a special division, known as the Juvenile Police Probation Officers, was set up, and many of the cases coming to its attention are disposed of without recourse to the juvenile court.[40]

DOMESTIC-RELATIONS COURTS · The law has much to say about the respective rights of husband and wife and of parent and child; but the reasons which called forth the juvenile courts hold in general for the field of domestic relations. More than an assertion of the "rights" of the individuals is at stake. Good social policy dictates that justice be administered with an eye to the harmony, integrity, and vitality of the family.

Here again the traditional court was not equal to the needs. Buffalo in 1910 took the lead by establishing a domestic-relations court, as a branch of the municipal court. The following year a court of domestic relations

[39]G. Cosulich, *Juvenile Court Laws in the United States* (1939), p. 7.

[40]K. F. Lenroot and E. O. Lundberg, *Juvenile Courts at Work*, Children's Bureau Publications No. 141, p. 41; H. I. Clarke, *Social Legislation* (1940), chap. xiv, pp. 334–364.

was established at Chicago as a branch of the municipal court; and in 1913 a similar one was set up at Detroit. The movement has spread until nearly all the large cities have courts devoted to this special field, to which judges with special qualifications for dealing with the problems of the family are assigned. An informal procedure is employed; a continuing authority over the case, supplemented with the system of probation, is vested in the judge; and a close working relationship with the social agencies is maintained. Some of the matters coming under the jurisdiction of these courts are divorce, the annulment of marriages, wife desertion and nonsupport, the custody and guardianship of children and the legalization of their adoption, the supervision of incorrigibles, and violations of the compulsory education laws. It is plain that the competency of these courts is dependent upon considerably more than the legal learning of the judges.[41]

PROBATE COURTS · One of the earliest of the special courts was that for matters of probate. In States of sparse population such jurisdiction remains in the district courts; in other states there is generally a special probate court for each county. The typical duties of probate courts are to take the proof of wills and admit the wills to record; to appoint administrators and executors and order the distribution of the estates of decedents; to appoint and remove guardians and supervise the discharge of their work; and to make inquests of persons subject to guardianship, such as the mentally incompetent, the deaf and dumb, and persons under twenty-one years of age.[42]

The probate courts, as the media through which the property of one generation passes to the next, in the middle-sized and large centers bear a considerable responsibility for the administration of huge amounts of property. The appointment of administrators and guardians has often been used as a reward to political friends; for these positions may carry liberal salaries and, in the management of estates, give substantial monetary advantages. The probate court usually is vested also with the power to appoint administrators under the State insolvency laws.

ATTORNEYS AT LAW · The intricacies of the law render the administration of justice an involved task. The respective rights of the litigants are hidden in a maze of statutes and court decisions, which the parties to the case are not qualified to penetrate. The judge's position is only slightly better; for even if it were his duty, he would not have time to marshal the facts or disentangle the law applicable to the numerous cases coming before him. King James I admonished his Parliament and judges that both his royal prerogative and the law were mysteries: the former known only to the king; the latter, only to the select few.[43]

Here both duty and opportunity beckoned to those who had received

[41]W. F. Willoughby, op. cit. pp. 324–330; H. I. Clarke, op. cit. pp. 364–368.
[42]R. Pound, *Organization of Courts* (1940) pp. 250, 251.
[43]C. H. McIlwain, *The Political Works of James I*, p. 332.

the revelation, the lawyers. Early in the history of the English judicial system the need for men learned in the law was fully recognized; and they were made adjuncts of the court, with the duty of helping the judge to find the law. In accordance with this reasoning, admission to the practice of law in the United States was never recognized as a personal vocational right but as a franchise to be given or withheld by the courts. Moreover, admission to the bar carries with it the dignity of an officer of the court. A member of the bar is under obligation, when appointed by the court, to plead the case of an indigent person. Again, when not employed as an advocate by one of the parties, he is entitled to intervene in a suit as *amicus curiae*, or friend of the court, by giving his opinion and advice on the legal questions at stake.

THE LAW AS A PROFESSION · Of course, the law is a profession, in the same sense as medicine and engineering. The lawyer has for sale legal counsel and skill in placing a client's case before the court. The work of the legal profession has steadily widened by the progressive addition of duties performed outside the courts, chiefly of a mixed legal-economic nature. The law is a sort of common denominator of all phases of modern life, for which reason competent lawyers are in demand in the capacity of counsel, managers, or members of boards of trustees or directors in a wide variety of institutions from big business to churches and charitable societies. The high percentage of Presidents of the United States, governors, and members of Congress and State legislatures drawn from the legal profession is evidence of its primacy as a training school for public service.

LEGAL ETHICS · The lawyer's opportunities for using his knowledge to defeat the ends of justice lie ready at hand; but that the profit motive has been more of a perverting influence in the law than in other professions or vocations seems unlikely. The derelictions which occur are particularly conspicuous because of his semiofficial status and position of trust. The clergy, as the only learned profession in the Middle Ages, performed many services which today would be counted as legal; and when the newly emerged practitioners of the law entered the competition, their rivals rightly or wrongly ascribed to them many sorts of unethical practices. That such a belief was ingrained in the folklore of England of the sixteenth century is indicated by various passages in Shakespeare. In the churchyard scene of the last act of the play, Hamlet quips as the refuse is thrown up.

> Why may not that be the skull of a lawyer?
> Where be his quiddits now, his quillets,
> His cases, his tenures and his tricks?[44]

The American Bar Association, on August 27, 1908, adopted a Code of Professional Ethics for the guidance of the profession. Assuming that "the future of the Republic, to a great extent, depends upon our mainte-

[44]William Shakespeare, *Hamlet, Prince of Denmark*, Act V, Scene 1.

nance of Justice pure and unsullied," the preamble stated that no such ideal could be reached unless the conduct and motives of the members of the legal profession were "such as to merit the approval of all just men." With subsequent amendments the code of nearly fifty articles covers a wide range. Among its injunctions are those that the lawyer should maintain a respectful attitude toward the judge and not attempt to communicate with him privately as to the merits of a pending case, or with a juror on any matter; should give his entire devotion to the interest of the client, but without the violation of law or any manner of fraud or chicanery; should refrain from volunteering advice to bring a lawsuit and stirring up strife and litigation; should not purchase any interest in the subject matter of the litigation which he is conducting, or take any other action whereby for personal gain he takes advantage of the confidence reposed in him by his client. "Ambulance chasing" and other solicitation of employment by means of circulars or advertisements are forbidden.[45]

BAR ASSOCIATIONS · Associations of members of the bar exist in every State and in all the larger cities. Meetings are held annually or more frequently for the consideration of matters of regional or local interest to the profession. In 1878 the American Bar Association was organized, one of whose objects is "to promote the administration of justice and uniformity in legislation and of judicial decision throughout the Nation." At its head are a president and a board of governors, ten of whom are elected by members of the bar living in each of the Federal court circuits.[46] The business of the annual meeting is conducted through an interesting organization. Bar Association members in attendance constitute the assembly; and there also is a smaller body, the house of delegates, composed of representatives from the State and local bar associations and certain other legal associations and conferences. The two houses together "legislate" on many matters respecting law and the courts. The most important work of the association, however, is done by its sections and standing committees. There are sections, for instance, on criminal law, municipal law, and international law, and committees on Federal law, American citizenship, labor, and professional ethics. Many of the reforms accomplished in the administration of justice, Federal and State, originated in the studies and recommendations of the Association.[47]

THE INTEGRATED BAR · Members of the legal profession in Great Britain are solicitors or barristers. The former confine their work to the giving of legal counsel and such other services to their clients as the drawing of

[45]American Bar Association, *Annual Report* (1937), Vol. 62, pp. 1105–1121; American Bar Association, *Canons of Professional Ethics* and *Canons of Judicial Ethics* (1943).

[46]For its constitution and by-laws cf. American Bar Association, *Annual Report* (1937), Vol. 62, pp. 1059–1075, 1078–1091.

[47]For a comprehensive summary of the influence of the American Bar Association on standards of professional service, judicial organization, and legislation in general cf. M. L. Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation* (1937).

legal papers; the latter conduct trials before the higher courts. The privilege of practicing law is given by the court only after the applicants have served an apprenticeship and passed examinations given by the Incorporated Law Society, a private organization of solicitors. The barristers, all members of one of the four ancient Inns of Court, form an aristocratic organization. The system tends to throw a considerable degree of responsibility for self-government on the profession, to restrict the number entering it, and at the same time to maintain a relatively high character for the profession.[48]

Similarly the movement in the United States for what is known as the "integrated bar," which by 1944 had found acceptance in twenty-four of the States, is based on the idea of delegating a degree of control over the entire profession to the members of the bar. In some States the reform has been instituted by an act of the legislature; in others, by orders of the supreme court. The State bar association ceases to be a purely voluntary body and takes on a semiofficial character. This results from the requirement that no one shall practice in a court unless he is a member of the State bar association. One of the bar association's important duties is the investigation of unprofessional conduct of members of the bar and the making of recommendations to the courts for disbarment. Benefits attributed to the scheme where it has been in operation include the raising of the standards for admission to the bar; the elimination of unworthy members from the practice of law; and the drafting of many proposals for the improvement of the law and the procedure of the courts.[49]

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[48] A. L. Lowell, *The Government of England*, Vol. II, pp. 468, 469; D. Plunket Barton, *The Story of the Inns of Court* (1937).

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CHAPTER XXXIX

# *Detection and Prosecution of Crime*

Neither the Federal government nor those of the States have an organization with general powers of superintendence over matters of justice such as exists in most continental European countries, particularly in France, with its Ministry of Justice. Various reasons exist for this lack, one of which is the permeating influence of the separation-of-powers theory, which precludes an extensive influence of the administration over the courts; another is the doctrine of local self-government, which so far has prevented the establishment of a general department of justice in any of the States. Indeed, not until 1870 was there a centralized system of prosecution for the Federal government itself.

## *THE UNITED STATES DEPARTMENT OF JUSTICE*

The present head of the Department of Justice, the Attorney-General of the United States, dwells in marble halls, with more than eighteen thousand "vassals and serfs" at his side or scattered throughout the United States. The position, however, was a long time developing to such a stage of magnificence. Edmund Randolph, Washington's first Attorney-General, received a salary of fifteen hundred dollars and furnished his own quarters, fuel, and stationery. His plaintive request for just one clerk was refused; but at length, in 1818, the heart of Congress softened, and one clerk and five hundred dollars for office rooms and expenses were granted. The act of 1789 required that the Attorney-General be a "meet person learned in the law"; but the office was at first of so little importance that its incumbent did not need to reside at Washington and was permitted to engage in the practice of law on the side.[1]

ESTABLISHMENT OF THE DEPARTMENT · Until 1870 the Attorney-General was an officer without a department. There was no supervision or coordination of Federal prosecution until 1861, when the exigencies of the Civil War brought forth a statute empowering the Attorney-General to "exercise general supervision and direction over the attorneys and marshals of all districts in the United States and the territories as to the manner of discharging their respective duties, and to require reports of the state and condition of their respective offices."[2] In 1870 he was made the head of

[1]H. Cummings and C. McFarland, *Federal Justice*, chaps. i–iii; Department of Justice, *The United States Department of Justice* (mimeographed, September, 1941).

[2]*United States Code*, Title 5, sect. 317.

a Department of Justice; in 1896 he was empowered to appoint assistant United States attorneys; and in 1909 his power of direction over Federal prosecutions was fully established. In 1934 the Department moved into a new twelve-million-dollar building covering an entire city block.

FUNCTIONS OF THE DEPARTMENT · In the beginning the duties of the Attorney-General, as the name signifies, were chiefly those of an attorney for the United States government. Today these remain the central function, but others have been added. Under the direction of the Attorney-General the department renders legal opinions to the President and the heads of the executive departments; prosecutes violations of Federal laws, directly from Washington or through the ninety-four district attorneys; supervises all litigation in the courts, civil and criminal, to which the United States is a party; and administers twenty-nine penal institutions, ranging from jails and camps to penitentiaries and the famous Alcatraz prison at San Francisco. Numerous other special duties have been imposed on the department by the exigencies of wartime.

GENERAL ORGANIZATION · The Attorney-General, of course, has general direction of the department. Directly associated with him are the Assistant to the Attorney-General and seven Assistant Attorneys-General and the Solicitor-General. The work of the department is allocated among fifteen major divisions, each in charge of an Assistant Attorney-General, a Director, or other officer. Ten of these are concerned chiefly with the prosecution and defense of cases to which the United States is a party, while the others have various specialized duties. The office of the Administrative Assistant is in general charge of the business organization of the department; the Pardon Clerk prepares data on pardons to be submitted to the President of the United States; the Bureau of Prisons supervises all Federal penal institutions and sponsors a nationwide jail-inspection service for the States and localities; the Neutrality Laws Unit co-operates with other Federal and State agencies in the enforcement of the neutrality laws; and the librarian is in charge of the departmental library of seventy thousand volumes. The Public Relations Section, now a feature of all Federal agencies, explains the work of the department to the general public. Several of the other divisions deserve special consideration.

LAW ENFORCEMENT · The Department of Justice is doubtless the largest law-enforcement office in the world. It holds the discretionary power, common to such offices large and small, to prosecute or not to prosecute. In the hands of a politically appointed policy-making officer such as the Attorney-General this is a powerful weapon, which might be used to punish the enemies or reward the friends of the administration.

The Solicitor-General appears for the United States and argues cases before the Supreme Court, and his consent is necessary before the government may appeal any case. In the year 1942–1943 the United States was a party to one hundred and nineteen cases before the Supreme Court, in-

cluding such cases as *Hirabayashi* v. *United States*, involving the wartime restrictions on American citizens of Japanese descent, and *Schneiderman* v. *United States*, dealing with the cancellation of the naturalization of a member of the Communist party.[3] Specialized divisions, such as the Claims, Tax, War, and Antitrust divisions, are set up to enforce particular laws allotted to them; and the Federal Bureau of Investigation (FBI) has general charge of the investigation of all offenses against the United States, with certain exceptions, and gathers evidence as the basis for prosecution. The Immigration and Naturalization Service was transferred from the Department of Labor in 1940. Besides the immigration and naturalization laws, it administers the registration of aliens under the act of 1940, and is in charge of the Border Patrol.

THE ANTITRUST LAWS · The Antitrust Division is much in the limelight, because the extent and vigor of its prosecutions depend greatly on the policies of the President and the fluctuations of public opinion. Besides the Sherman, Clayton, and other antitrust acts, it is in charge of prosecutions under about thirty other regulatory acts, including such famous ones as the Interstate Commerce Act, the Tennessee Valley Authority Act, the Packers and Stockyards Act, the Securities Exchange Act, and the Agricultural Adjustment Act.

THE CRIMINAL DIVISION · The Criminal Division works in close cooperation with the various United States district attorneys in the enforcement of the greatly expanded field of Federal criminal laws. Prosecutions cover such offenses as counterfeiting, obstruction of the mails, bank robbery, the adulteration of food and drugs, the sale of narcotics, and the white-slave traffic. A Civil Liberties Unit handles such matters as peonage, interference with the ballot, and violations of constitutional rights.[4]

LEGAL ADVICE · Legal advice for the President and the heads of the executive departments is prepared in the division of the Assistant Solicitor-General. The formal opinions are published in a series of volumes known as the Opinions of the Attorney-General, which now total forty volumes and constitute one of the important sources of American constitutional and administrative law. That the opinions of the first nine Attorneys-General, from 1789 to 1838, were contained in one volume, while the output is now one volume every three years, is eloquent testimony to the growth of complexity in government. Government by executive order, a marked development since 1933, throws another burden on the department, which may be called to rule first on the validity of the proposed order and next on its form and content. President F. D. Roosevelt's order transferring fifty "over-age" destroyers to Great Britain in 1940 was based on an opinion rendered by Attorney-General Jackson.

[3] *Annual Report of the Attorney-General, 1943*, p. 37; 320 U. S. 81; 320 U. S. 118; A. C. Millspaugh, *Crime Control by the Federal Government* (1937).

[4] T. W. Housel and G. O. Walser, *Defending and Prosecuting Federal Criminal Cases* (1938).

## *PROSECUTION IN THE STATES*

Despite the enlarged Federal criminal field, most evil and violent acts are offenses against one of the States. So the great responsibility for the detection and punishment of crime rests on forty-eight independent jurisdictions. More striking yet is the high degree of decentralization within each State, where the responsibility is generally thrown on the several counties, with little if any central State supervision. The system was inherited as a natural adjunct of the common law and has been sustained since by public opinion. Rightly or wrongly, crimes are not generally punished according to the strict definitions of the law. The jury, representing the neighborhood, and the popularly chosen prosecutor afford a sliding scale of justice gauged by the sentiment or the clamor of the community. The cause of even-handed justice would doubtless be promoted by the adoption of a State agency comparable to the Federal Department of Justice; but as a rule the people of the communities still seem unwilling to forgo the right of treating their criminals according to their own prescriptions.

GENERAL ORGANIZATION · Every State has an attorney-general, whose duties are chiefly those of attorney for the State and of legal adviser to the governor and the chief executive officers and administrative boards. In forty-three of the States he is elected by the people; in three, New Hampshire, New Jersey, and Pennsylvania, he is appointed by the governor; in Maine he is chosen by the legislature, and in Tennessee by the supreme court. In about one third of the States he has some supervisory power over the work of the county prosecutors.[5]

The chief responsibility for criminal prosecutions everywhere, however, except in Rhode Island, rests with an elective county officer known variously as "county prosecutor," "county attorney," "district attorney," "State's attorney," or "attorney for the commonwealth." At the bottom of the scale are the city attorneys or police prosecutors, whose field includes the civil cases to which the city is a party and criminal prosecutions before the municipal courts.

CHARACTER OF THE DISTRICT ATTORNEYS · Popular election, which subjects district attorneys to political pressure, shortness of tenure, and low salaries, places in the local prosecuting offices a personnel unequal to its responsibilities. In the rural counties the office is often held by a young and inexperienced man. The Missouri Crime Survey reported that prosecutors were "largely drawn from the younger and more inexperienced members of the bar. It would seem that 40 per cent have not graduated from any law school and that preliminary education of many is quite limited."[6] The great majority were under thirty-five years of age, the

[5] *Book of the States, 1942–1943*, p. 316.

[6] The Missouri Association for Criminal Justice, *The Missouri Crime Survey* (1926), p. 157.

median being thirty, and salaries in counties of one hundred thousand population or fewer ran from one thousand to six thousand dollars. The Illinois Crime Survey revealed that the median age of district attorneys in that State was forty-one, which was thought to represent "a fairly definite middle ground between youth and age and experience and inexperience"; and the salaries in the counties outside Cook County ranged from twelve hundred to six thousand dollars.[7]

HANDICAPS · With local exceptions the machinery of prosecution in the States generally is inadequate in size and in organization. In most instances not only is the district attorney largely independent of the State attorney-general but he must share responsibility for the local work with others. Criminal investigations may be conducted independently by the sheriff, the police, the coroner, or the prosecutor's office, not to mention the gratuitous detective work of newspaper reporters. In notorious cases, where the advantages of publicity are promising, two or more separate investigations may often be in progress at the same time, frequently working at cross purposes. To complicate matters, a new prosecutor may come into office at the moment, bringing with him an entirely new staff of assistants. The prosecutor's facilities for investigation usually are either nonexistent or very limited, leaving him dependent on the local police or sheriff. Even in a city of the size of Cleveland, the county prosecutor in 1944 had only one detective on his staff.[8]

THE CALIFORNIA PLAN · California has gone beyond any other State in strengthening prosecution. A constitutional amendment adopted in 1934 declared that the attorney-general should be the "chief law officer of the State" and that it was his duty "to see that the laws . . . are uniformly and adequately enforced in every county of the State." Means for carrying through these powers are given. The attorney-general has "direct supervision" over every district attorney and sheriff, who are required to make written reports to him concerning all their law-enforcement activities.[9] Whenever, in his judgment, any law is not being adequately enforced, he may step in as district attorney for the time and prosecute such cases. Finally, when directed by the governor or required by the public interest, he may assist any district attorney in the discharge of his duties.

URBAN COUNTIES · In some of the large urban counties the prosecutor's office is better organized and equipped. Moley rated that of New York County as the most efficient prosecuting machine in the United States.[10] With over one hundred thousand complaints a year and two hundred and

[7]Illinois Association for Criminal Justice, *The Illinois Crime Survey* (1929), p. 251.

[8]The Ohio law allows the county prosecutor to employ only one detective. Any other assistance which he may have is at the pleasure of the city police department. Statement of County Prosecutor Frank T. Cullitan.

[9]*Constitution of the State of California*, Art. V, sect. 21.

[10]R. Moley, *Politics and Criminal Prosecution* (1929), pp. 62–64.

fifty telephone calls each hour of the business day, it had of necessity to organize elaborately. The work is divided among about a dozen specialized sections, among which are those dealing with process-serving, indictments, trials, appeals, and bail, and the homicide division, which "never sleeps." Complaints are handled by a bureau with separate units for complaints against fathers who abandon children, the sellers of spurious securities, and quack doctors, and for those relating to frauds against banks. The physical equipment includes a large law library and a photostatic and photographic studio. The district attorney has been given authority to direct the flow of cases into the nine divisions of the Court of General Sessions.

BEGINNING THE PROSECUTION · A criminal prosecution begins with an arrest by the police or a complaint by the injured party or by his friends. In rural counties the prosecutor often takes the initiative. In cities the police or the complainant goes to the prosecutor for an affidavit charging the person with an offense. If the offense is a misdemeanor, an informal summons is issued to the person so charged to appear at the prosecutor's office. Here usually he meets his accuser, and after an informal discussion the prosecutor is able to determine whether the case is serious enough to warrant prosecution. Normally more cases are dismissed in this way than are placed on the court dockets. If an affidavit is issued, it becomes the duty of the county prosecutor to prepare the case for presentation to the grand jury. Normally his office has small facilities for the work of gathering evidence and interviewing witnesses. Unless the case is a conspicuous one, the grand jury normally takes the prosecutor's recommendation. Poor preparation of the evidence for the grand jury, and reluctance of the prosecutor to push the case, result in the elimination of many prosecutions for offenses at this stage. Very rarely does the grand jury return a true bill contrary to the recommendation of the prosecutor.

When the case of an indicted person is called in court, the prosecuting attorney may enter a *nolle prosequi* if in his judgment the evidence is insufficient to sustain a prosecution. While generally the statute prescribes that the consent of the court is necessary, this is given as a matter of course. Public opinion doubtless has more weight in determining such action than does the attitude of the court. The study of criminal-justice administration in Cleveland showed that 12.33 per cent of all cases in the common-pleas court were "nolled" after indictment, that is, dismissed by the prosecutor without trial.[11] There is yet another device in some jurisdictions by which the prosecutor may dismiss a case without trial. A case called in the magistrate's court after an arrest, but before an affidavit or complaint has been prepared, may be dismissed by announcing "No papers," which means that in the prosecutor's judgment not enough provable facts have been brought forward to justify the issuance of an affidavit.

[11]Cleveland Foundation, *Criminal Justice in Cleveland* (1922), pp. 99, 180; C. E. Gehlke, *Criminal Actions in the Common Pleas Courts of Ohio*, chap. iii.

PREPARING THE CASE · It is the prosecutor's duty to prepare all criminal cases for trial. This preparation involves the gathering of testimony, the discovery and summoning of witnesses, and the drawing of the necessary papers. Frequently an inexperienced prosecutor and his inadequate staff are pitted against highly paid attorneys who have had ample time and money to prepare the defense. Failure to make adequate preparation may mean the dismissal of the case or an acquittal and the consequent miscarriage of justice. The Illinois Crime Survey revealed that, of seventy-three State's attorneys who answered its questionnaire, only twenty-five gave all or most of their time to the office, the others devoting from 10 to 80 per cent to the private practice of law. Twenty-six stated that additional help was needed for the preparation of their cases.[12]

THE PROSECUTOR AS JUDGE · Few persons realize that the great discretion lodged in the prosecutor places him virtually in the position of judge and jury in making acquittals and of the governor in granting pardons. This aspect of the prosecutor's power was explained by a former prosecuting attorney of St. Louis County, Missouri.

> The prosecutor is to the public a person who must prosecute all who fall into the toils of the criminal process. This conception is far from correct. In fact the prosecutor makes most of the decisions; he terminates most of the cases, and upon him falls the responsibility of freeing most of those who are charged with crime. Acquittals by juries and by direction of the court after trial are wholly insignificant compared with acquittals by the prosecutor before trial.[13]

PROSECUTION IN MISSOURI · The prosecutor's part in the scheme of criminal justice is well illustrated in the study made in Missouri. Of the 7032 cases, chosen at random throughout the State, in which warrants for arrest had been issued, only 849 finally went to trial, resulting in 526 convictions. What happened on the "assembly line" in between is interesting. Want of sufficient evidence or lack of prosecution was responsible for the dropping of 1834 at the preliminary hearing. Nine others next were dropped because the grand jury found "No true bill"; 220 more, because the prosecutor failed to file an information against the alleged criminal. This left 4969 to go to the trial court. Of these, 1106 were "nol-prossed" by the prosecutor; 251 were dropped by action of the court; and 609 were otherwise disposed of. Only 3003 now remained. Of these, 2154 were concluded on pleas of guilty, leaving 849 to be tried in the courts.[14]

The striking fact is that over 70 per cent of the persons were brought to punishment through pleas of guilty rather than through the use of the mills of the courts, a large proportion after bargaining with the prosecutor. Overburdened with work, the prosecutor naturally looks with favor on a

[12]Illinois Association for Criminal Justice, op. cit. p. 267.
[13]Arthur V. Lashly, in Missouri Association for Criminal Justice, op. cit. p. 125.
[14]Ibid. pp. 126–128.

method which saves the time, expense, and uncertainty of a trial. That this often results in a miscarriage of justice is evident; for often he is willing to accept a plea of guilty for a lesser offense rather than carry through a prosecution for that named in the indictment. It is evident that negotiations with the accused, with the indictment as the basis, are a larger part of the prosecutor's work than the conduct of trials. But of course the threat of prosecution is the loaded musket behind the door.

## *POLICE ORGANIZATION*

The first step in the process of justice is to find and arrest the offender. This is an act which calls for force, that "last argument of kings." The old query as to whether government is based on reason or on force cannot be answered categorically. Every modern state, no matter how democratic, has found it necessary to have an armed force at hand, even though sparingly used. This force is needed constantly for the small minority who would obey no law, and occasionally for the great majority who ignore a few laws. Without an armed force the depredations of the few would make life, property, and the ordinary pursuits hazardous or insecure; and even the best of citizens need an occasional reminder of its presence. The chronicles of western Europe indicate that banditry and robbery long were commonplaces of social life. Not until early in the last century was an effective "peace" of the state established even in the better-ordered countries.

FUNCTIONS OF THE POLICE · The police of today bear little resemblance to those organizations which early in the last century brought a semblance of safety and order to the people of the large municipalities. Their greatly expanded functions fall into four chief classes: (1) the detection of crime and the apprehension and arrest of criminals; (2) the suppression of violence; (3) the prevention of crime; and (4) the promotion of order, safety, and welfare.

The organization of the various American police forces, their methods and respective fields of work, will be considered hereafter.[15]

## *UNITED STATES POLICE*

The need for a national investigative and police force and the threat to political liberty which an efficient one inherently presents constitute something of a quandary. The part played by the state police in Europe, conspicuously the Gestapo in Germany and the OGPU in Russia, in punishing enemies of the administration is well appreciated in America.

[15]B. Smith, *Police Systems in the United States* (1940); B. Smith, *Rural Crime Control* (1933); B. Smith, *State Police* (1925); A. Vollmer, *The Police and Modern Society* (1936); R. B. Fosdick, *American Police Systems* (1921); National Commission on Law Observance and Enforcement, *Report on Police*, No. 14 (1931).

The efficient Federal Bureau of Investigation must do its work warily and tactfully lest it suffer abbreviation or extinction at the hands of a Congress and public apprehensive of politically controlled espionage. The power to prosecute or not, whether in civil or criminal matters, or to order or withhold police investigation, may be made into a powerful political weapon. The income-tax suit filed by the incoming Democratic administration against Andrew Mellon, the retiring Republican Secretary of the Treasury, and others filed against certain members of the Huey P. Long organization of Louisiana and later dismissed, were widely regarded as actuated by political motives. Particularly in view of the greatly augmented power of the office of President, public opinion would not support an all-inclusive national police force subject to the orders of his political appointee, the Attorney-General. Federal police and investigators, consequently, are spread about in a number of uncoördinated organizations.

MISCELLANEOUS FEDERAL POLICE · The United States marshals were the first of what has remained a scant national police force.[16] There is a marshal for each of the judicial districts into which the country is divided, each having as many deputies as the needs of the region seem to demand. Like the sheriff for the State, he is the chief peace officer of the United States for his district and is the executive officer of the district court. The office, by nature and traditions, is not fitted to perform the variety of functions demanded of a modern police force.

Under the administration of the Treasury Department are half a dozen police agencies with functions of detection and arrest. The Secret Service has in its care a variety of vital matters, including counterfeiting, bank and treasury protection, and the guarding of the President and his family. There are special units to deal with infractions of the laws taxing and regulating the sale of alcohol and narcotics; with the enforcement of the internal-revenue and income-tax laws; and with offenses against the customs laws, such as smuggling and undervaluation. The important Coast Guard unit, described at another point, is organized on a military plan and in wartime operates as a part of the navy. Its chief function in peacetime is that of marine lifesaving and rescue work. It is given also the important duty of enforcing the laws with respect to smuggling, navigation, quarantine, and illegal entry into the country. In the Post Office Department is a force of inspectors with the duty of protecting the mails and enforcing the various laws regulating their use. The Department of Justice has its Immigration Border Patrol, with the function of patroling the land borders and preventing the unlawful entry of aliens into the United States.

THE FEDERAL BUREAU OF INVESTIGATION (FBI) · The best-known of the Federal police agencies is the Bureau of Investigation of the Department of Justice. This was established by departmental order in 1908 for

[16]B. Smith, *Police Systems in the United States*, pp. 205–220.

the purpose of centralizing all the investigative activities of the department. Besides its general duty of aiding prosecutions it is charged specifically with the enforcement of certain laws, including the White Slave Act of 1912, the Kidnaping Act of 1932, the Extortion Act of 1932, the Motor Vehicle Theft Act of 1919, the National Stolen Property Act and the Bank Robbery Act of 1934, and the antitrust acts. By making arrests under the Federal Fugitive Felon Act, which makes it a Federal offense to flee from one State to another to avoid prosecution, it renders a distinct service to the States hampered by the extradition laws. Among its wartime duties is that of surveying the war-production plants for the prevention of espionage and sabotage. For the year 1941 its investigations of offenses under thirty-eight categories of laws led to 6182 convictions, or 96 per cent of the total brought to trial.[17]

ORGANIZATION · The bureau has a main office at Washington and fifty-seven branch offices scattered throughout the country. At its head is a director with a peacetime force of between six and seven hundred men. It acts as a police force within limits, not as patrol police but to investigate lawbreaking and apprehend offenders. In furtherance of this work it maintains a National Police Academy for the training of police, a laboratory for the study of criminal detection, and an identification division with a fingerprint section; and it publishes semiannually a bulletin, *Uniform Crime Reports*, as a service to peace officers throughout the United States.

CO-OPERATION WITH THE STATES · One of the Bureau's greatest contributions to the war against crime is its fingerprint file, which in 1941 contained 21,741,008 cards. This was made possible by the co-operation of 11,348 law-enforcement agencies. A special file contains cards with the fingerprints, photographs, physical descriptions, and crime records of 14,390 known extortioners, kidnapers, and bank robbers. The Confidence Men File contains 3103 such cards.[18] When a crime has been committed anywhere in the country, no matter how remote, the fingerprints, if any are found, may be sent posthaste to the bureau, which maintains a twenty-four-hour service. A sorting machine speedily separates out the original if it is there. In 1941 the fingerprints of 64 per cent of all persons arrested were identified in this way with previous criminal histories.

The National Police Academy holds three sessions each year and is open to selected police officers from all the States and localities. Up to 1941 eighty-nine thousand persons had received this training. The men, on their return home, often establish similar training courses or are placed in positions of greater responsibility. The uniform system of crime reports devised by the bureau has generally been adopted by law-enforcement

[17]Federal Bureau of Investigation, *Annual Report, 1941*, p. 1. C. R. Cooper, *Ten Thousand Public Enemies* (1935), gives an account of some of the important criminal cases investigated by the bureau.

[18]Ibid. pp. 19, 29.

agencies throughout the country.[19] This includes a classification of crimes into two groups and twenty-seven categories. The first group includes the seven more serious offenses: criminal homicide, rape, robbery, aggravated assault, burglary, larceny, and automobile theft. Of 230,740 persons arrested by the bureau in the first half of the year 1943, 193,998 were men and 36,742 were women; of these 109,045 already had fingerprint records on file.

## *POLICING IN THE STATES*

It is within the competence of the several States, by making the necessary constitutional and statutory adjustments, to set up whatever system of police they please. This might consist of a single unified force for the entire State; a division of the field between a State-wide force and local police; or no State-wide force at all, a condition which would throw the entire work of policing on the various political subdivisions. Of course each State has always had its trained militia, or National Guard, which is used only in case of disturbances beyond the power of the local police.

THE ORIGINAL SCHEME · The first States laid down a police pattern which in time was extended throughout all the Union. In each county was the sheriff, the chief peace officer of the State, usually elected by popular vote, and regarded as a full-time officer; in the towns, villages, townships, and county districts there were constables, popularly elected and regarded as only part-time officers, and in the cities professional police forces. The duties of the constables were light, usually no more than an occasional arrest for a neighborhood or tavern fight or other disturbance of the peace. For the more serious offenses the sheriff and his deputies were called in. If a still larger force was needed, the sheriff might summon the *posse comitatus*. Frequently the range of a criminal was not beyond the bounds of one county; but if so, the aid of the sheriff of the next county might be sought. The hard-surfaced road and the automobile greatly changed the technique both of criminal activities and of policing. Criminals of the cities easily extended their depredations to the countryside and the smaller cities. The perpetrator of crime in Indiana might be within a few days in Florida or Arizona. The sheriff and constable as amateur policemen now were entirely inadequate to the duties required of them.

STATE POLICE · The republic of Texas in 1835 set up three companies of rangers, which, with several reorganizations, were continued under Statehood as a border patrol. The territory of Arizona, in 1901, and that of New Mexico, in 1905, organized similar border patrols. The first step toward the Massachusetts State police, established in 1921, was a statute of 1865 providing for the oppointment of a few State "constables."[20] The

[19]Federal Bureau of Investigation, *Uniform Crime Reports* (1943), Vol. XIV, No. 1. Cf. also J. E. Hoover, *Persons in Hiding* (1938).

[20]B. Smith, *State Police*, p. 37; B. Smith, *Police Systems in the United States*, pp. 178–205.

Connecticut State-police force was established in 1903; but it remained for the Pennsylvania State constabulary, created two years later, to set the model generally followed by the States. Its chief features were a semi-military organization under a superintendent, given extensive administrative powers; a mounted and uniformed force assigned to districts and operating from district headquarters; an extensive system of patrol; and the general authority to enforce laws.

In 1944 all the States had some sort of police or highway patrol, but in about one fourth of them its strength was inconsiderable.[21] The Pennsylvania force had a personnel of 1370, with 1288 patrolmen; that of Michigan 330, with 250 patrolmen. In thirty-five States the organization had full police or general law-enforcement authority; in the remaining it was confined to the enforcement of the motor-vehicle laws, with a vague duty to "assist" in the enforcement of others, or a specific one, upon the call of the governor, to enforce the criminal laws. Generally the force is administered by a separate department or bureau of "state police," "public safety," or "highway patrol."

THE INDIANA STATE POLICE · The Indiana State-police organization may be taken as representative of the full-fledged type of police system in an average-sized State.[22] Its personnel of three hundred and fifty men is under a superintendent, who acts as an executive assistant to the governor and is advised by a bipartisan board of four. A captain is in charge of the field force, which is divided among four districts, each in command of a field lieutenant. The districts contain two posts or barracks, each in command of a sergeant. About one third of the patrol force are mounted on motorcycles, and the rest assigned by pairs to motorcars. These have the task of providing a patrol for an improved highway system of ten thousand miles. The motor equipment and two-way radio system are largely responsible for its effectiveness. The eight posts put the men within easy call for smaller matters; while for serious outbreaks fifty or more uniformed men may be concentrated at one point within an hour and a half. Other divisions are the detective force, most of whom work from headquarters, while two or three are assigned to each of the eight posts; and the communications force, composed of radio operators who man the headquarters and four district stations.

At the Indianapolis headquarters is a supervising lieutenant in charge of the maintenance of personnel and equipment and the monthly inspections of the eight posts. Here also are the identification bureau, equipped with handwriting and fingerprint experts and a file of more than 165,000 fingerprints, and a criminological laboratory equipped to make scientific analyses of specimens submitted as evidence. An accident-prevention

[21] *Book of the States, 1943–1944*, pp. 461–463; A. Vollmer and A. E. Parker, *Crime and the State Police.*

[22] Indiana State Police, *Report, 1921–1937.*

bureau carries on a program of public education by distributing literature and furnishing speakers for radio and other audiences. Under its leadership a system of standardized accident reports was worked out for sheriffs, constables, and city and State police.

## *POLICING THE CITIES*

In 1944 America's first city, New York, had a uniformed police force of eighteen thousand men, about two thirds the size of the regular United States army at the outbreak of the Spanish-American War. In equipment, training, and specialization of services they are a far cry from the feeble law-enforcement agencies of our early national history. The transformation was wrought by slow degrees.

BEGINNINGS · At the time of the break with Great Britain in 1776 the ancient system of policing had shown its inadequacy in the newly enlarged English cities. The parish constable was the chief reliance, an unpaid office at which every parishioner was expected to take his turn for one year at a time. By the eighteenth century, when the task had become markedly distasteful and onerous, a system of paid deputies was introduced. This proving little better, London instituted a night watch, which was held in still lower esteem than the constables. Generally only the old, feeble, and decrepit were found on the force, as it was thought below the dignity of an able-bodied man. In times of stress this entirely inadequate body was supplemented with private citizens summoned by "hue and cry," the militia, or the regular army. Use of the national defense forces, however, was unwise; for not only were they unfitted to the task but the character of the work brought them into disrespect. What was needed was an organization halfway between the army and the constable or night watchman. Englishmen of all classes, however, saw a threat to their liberties in such a force; and fifty years of riots, disorder, and an alarming increase in crime occurred before they yielded. A bill prepared by Sir Robert Peel and passed by Parliament in 1829 made provision for a uniformed force of a semimilitary character, the first of the modern urban police organizations. Its number, first set at one thousand, soon was increased to three thousand. A storm of protest ensued. Peel was hailed as a tyrant, and his police were given such opprobrious names as "Blue Lobsters," "Peelers," and "Peel's Bloody Gang." It required nearly five years of increased security of person and property to end the opposition.[23]

The American cities of colonial and early national times closely followed the British system of policing. New York and Boston, for instance, had their constables, marshals, and night watchmen, much on the London plan. It was not until 1845 that New York City abandoned them in favor of a day and night uniformed police.

[23]C. Reith, *The Police Idea*, pp. 221–253.

CONTROL OF THE POLICE · Control of the municipal police may rest with the State or with the municipality itself. In this matter there has been considerable experimentation. The first city police systems were municipally controlled, but instances of political favoritism and of the alliance of the police with crime reversed the trend. In some instances the State legislature, controlled by a party different from the one in power in the city, used the plea of police corruption as a pretext for seizing this important source of patronage. In 1857 the New York legislature passed an act setting up a metropolitan police force for New York City, Brooklyn, and three adjoining counties, under the control of a board of five commissioners appointed by the governor. State control lasted for seventeen years. In 1861 the police of St. Louis and Kansas City, Missouri, were placed under State control, and later that of St. Joseph, Missouri. In the two decades following the Civil War the same fate fell successively to Detroit, Cleveland, New Orleans, Cincinnati, Indianapolis, Omaha, and Boston, but in none did it last longer than a few years.[24]

It was soon apparent that State control did not remove the police from partisan politics but only from one machine to another. By 1944 only two cities were left of those which had had central State control, namely, Baltimore and Boston. In both the system seems to have had favorable results; but generally it not only has failed to abolish the evils complained of but has raised complicated conflicts of administration between the State and the city.

SINGLE OR MULTIPLE HEADS · Of the eighty-two cities rated in 1944 as of one hundred thousand population or more, eighteen placed the control of their police in a board or commission; the others, in a single head called a chief, director, or commissioner of police.[25] Those favoring multiple-headed control argued that it supplied the necessary civilian or layman's cushion between the semimilitaristic police organization and the public; that its decisions in cases of emergency or drastic action would evoke more popular confidence than those of a single police chief; moreover, that where the board was bipartisan, it would serve to check the use of the police by the dominant political party for its own selfish purposes.

Experience generally has shown the small validity of these claims. It was found difficult for boards to make prompt decisions; membership on the board was a part-time task of persons whose main interest was elsewhere; clashes of authority were frequent between the board and the police chief; and the board became the dumping place for professional politicians, placed there to serve some selfish interest. Nor did its bipartisan character solve the problem of political influence; for city machines and rings often are bipartisan affairs. These considerations and the growth of the idea of responsible administrative centralization, as embodied in the

[24] R. B. Fosdick, op. cit. pp. 80–90.

[25] *The Municipal Year Book of 1944* (C. E. Ridley and O. F. Nolting, Eds., 1944), pp. 486–489.

numerous strong-mayor and city-manager charters, led to a rapid decrease in the number of cities with multiple-headed police departments until now they are nearly nonexistent. A civilian director or commissioner, responsible to the mayor or the city manager, and acting directly through a chief of police, is the typical setup in the larger American city today.

POLICE ORGANIZATION: THE OLDER TYPE · In the decades following the Civil War a type of police organization grew up which became well-nigh universal throughout the United States for cities of a given size and remained without fundamental alterations until the advent of the cheap motor vehicle.

While the modern urban police force derives much from the organization of the army, and police and army are alike in using force to oppose force, they differ sharply in the manner of its application. The first element of military strategy is the concentration of superior force against the enemy, and military organization is fashioned to bring about that end. Except in the rare cases of mobs or gangs the force which the police must meet is that of individual marauders or twos or threes. The first principle of police strategy, therefore, is a wide and thin distribution of the force in order to meet and cope with the evil in all nooks and corners of the area. Hence patrolling is the first function of the police, and their organization and methods have been built around it. It was estimated by a reliable authority that about two thirds of the entire personnel of American urban police in 1915 were engaged in this duty.[26]

ORGANIZATION OF PATROL · The typical police organization of a large city was about as follows. The entire territory was divided into precincts, in each of which was a station house with a police captain in charge. The captain was an important part of the machine. As superior officer in the precinct he was responsible for the prevention and detection of crime; the enforcement of ordinances, laws, and rules and regulations of the police department; and the maintenance of discipline in his subordinates. Some of the larger cities grouped the precincts into inspection districts, each directly in charge of an inspector of police, who reported to headquarters.

The precinct itself was laid out into patrol beats, each covered by a policeman sent out from the precinct station house. The size of the beats was obviously dependent upon the character of the neighborhood. Most of the patrolling was done on foot, although mounted and motor patrol were introduced in areas where they might be particularly effective. Sergeants or roundsmen were placed in supervision of the patrolmen, their duty being to go from post to post, observing the condition of affairs and reporting to the station. The next officer in rank, the lieutenant, acted as the captain's first assistant, taking charge in his absence. He was in direct charge of the sergeants and patrolmen, often performed clerical work at the station house, and received, transmitted, and entered orders.

[26]E. D. Graper, *American Police Administration* (1921), pp. 123–158; B. Smith, *Police Systems in the United States* (1940), pp. 251–290.

OTHER UNITS · The realization that men of special qualifications were needed for the work led to the organization in all the larger cities of detective, or plain-clothes, divisions of the police. The detectives' function is the ferreting out of serious offenses against the law and the detection of the offenders. In some cities detectives are assigned to each precinct or district; in others all work from headquarters under the direction of a lieutenant or captain. Other specialized police divisions, such as traffic, vice, and health squads, had appeared in some cities under the old system of organization, but are more typical of the new motorized regime.

POLICE ORGANIZATION: THE NEWER TYPE · As the motor vehicle changed the methods of criminals, a corresponding alteration in police organization and methods was called for. Patrolling remained the basic function, but criminal identification, crime prevention, and other specialized duties such as traffic control received greater emphasis. The established ranks of captain, lieutenant, sergeant, and patrolman remained, but with many alterations in duties. Generally speaking, the entire geographical organization of the police force was altered, with much greater emphasis upon centralization. The precincts were abandoned, and the city was divided into fewer and larger administrative districts.

POLICE ORGANIZATION IN LOS ANGELES · The police organization of Los Angeles, the nation's fifth city, is an example of the newer type.[27] At its head is an advisory board of six members appointed by the mayor, but actual administration is vested in the chief of police. The force is organized in five main operational groups, each under a deputy chief: functional operations, including the headquarters division; field operations, chiefly patrol; traffic, including accident prevention and safety education; investigation, with specialized units for auto thefts, homicides, narcotics, forgery, and other crimes; and war activities, including the bomb squad and air-warden units.

In the place of the traditional patrol precincts the four hundred and fifty square miles of the city's area is divided for that purpose into twelve districts, which range from little more than twenty thousand population to ten times that number, each in charge of a captain. Here operate also the important juvenile and vice-control units. The city is divided into two detective areas, each in charge of an inspector. The traffic division is subdivided into a motorcycle squad and an unmounted traffic squad, each under a captain. At headquarters are eight or nine divisions in charge of specialized work, such as personnel recruitment and training, record-keeping, communication, identification, and jail.

It is significant that out of a total of 1958 policemen only 924, or about one half, are engaged in the work of patrolling. The residential regions are ordinarily patrolled by motorcar, the downtown and congested areas being reserved for foot patrol. Four hundred and sixteen men are as-

[27] City of Los Angeles, *Annual Report of the Police Department, 1942.*

signed to traffic control, 367 to the detective division, and, significantly, 117 to juvenile control.

POLICE TRAINING · In the early days of the American municipal police the ranks were filled chiefly through partisan appointments, and that consideration has still not lost its importance. Then the merit-system reform movement swept the cities, and entrance to the police forces was based on competitive examination. However, the most that could be expected at first from the merit system was the elimination of political favoritism in recruitment and discharge, and the choice of men with the physical and mental qualities requisite for the building of good policemen. The policeman's primary functions, the preservation of peace and order and the enforcement of the laws, remained, but now he was expected to be something of a social worker, amateur scientist, lawyer, and traveler's aid. This suggested that the efficiency of the service might be promoted by the institution of a formal course of training.

Training schools for police now exist in most of the larger and in some of the smaller cities. New York City was the first municipality to establish such a school; and those of Berkeley (California), Detroit, and Philadelphia were among the earlier and better ones.[28] The National Police Academy of the Federal Bureau of Investigation already has been mentioned. The State of New York maintains a school for police, which not only trains for its own force but admits peace officers of the localities. California has a Peace Officers' Institute of Technical Training, maintained by a group of agencies, which holds short-term institutes at various places throughout the State. The subjects taught include practical civics; elementary criminal law, including criminal evidence; dying statements; elementary court procedure; description of the various types of crime; methods of criminal investigation; and fingerprinting, photography, and report-writing. There are specialized courses in such technical matters as ballistics and firearms; composition of tear gas and other noxious gases; and radio, teletype, and other communications apparatus.

BUREAUS OF IDENTIFICATION · A means for the accurate identification of individuals is of great importance in the task of suppressing crime. Criminals often go under assumed names, and the ease with which the identities of persons may be confused is an encouragement to the manufacture of false alibis. Two things, our dual system of justice and high decentralization of police administration, have been a boon to criminals. A crime might be committed in one State, and no record of the act or the criminal might be available in other States where the criminal subsequently might operate. Even within the State there was no organized means of co-operation.

Two methods of scientific identification have been widely employed. The Bertillon system, originated by M. Alphonse Bertillon in 1881, com-

[28]City of Los Angeles, op. cit. pp. 165–172, 197–198, 319–326; E. D. Graper, op. cit. pp. 108–122.

bines the use of various photographs of the person with a standardized set of body measurements. This lately has rapidly given way to the fingerprint method, which is more accurate, is less expensive, and lends itself better to use on a mass scale. Galton and Herschel in England discovered that the patterns of fingerprints seen under the magnifying glass were different for every individual; that these patterns could be classified so that they might easily be sorted; and that they were practically indestructible and unalterable.

New York City's police department in 1906 began to collect and file fingerprints of criminals and was shortly followed by similar bureaus in other large cities.[29] The identification system of the Federal Bureau of Identification, begun in 1924, served as a model and finally as a clearing-house for law-enforcement authorities throughout the country. Twenty-four of the States in 1924 had central bureaus of identification, usually in connection with the State police. Those of New York, California, Michigan, New Jersey, and Massachusetts were among the earlier and more complete.

CRIME LABORATORIES · The purpose of the crime laboratory is to apply the methods of science to the analysis of evidence. It includes facilities for the analysis of various substances, such as clothing, hair, and liquids, by microscope and magnifying glass and by chemical and physical tests; the examination of explosives and of firearms, so as to identify the gun from which a shot was fired; handwriting analysis; and the use of plastic material for making models of footprints, tire marks, and even wounds. A small piece of cloth or other material dropped at the scene of a crime, when subjected to chemical and physical tests, may be the means of bringing the criminal to justice.

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CHAPTER XL

# *Government and the Public Welfare: Education and Health*

The term *general welfare* appears twice in the Constitution: in the Preamble, as one of the reasons for its adoption; and in Article I, as one of the three purposes for which Congress may lay and collect taxes. It might plausibly be argued that all the functions which government performs are for the general, or public, welfare. While this may be true in a broad sense, there are certain ones which traditionally have been classed as "welfare" because they contribute more directly than others to the well-being and happiness of society. The most conspicuous of these are activities in the fields of education, health, recreation, scientific research, the fine arts, and the provision of relief to the needy. It was some time after the arrival of universal suffrage before the masses realized that government and its treasury might be used to provide many things which previously only the wealthy had been able to enjoy. Government may confine its welfare activities to giving aid to private organizations in that field or may extend them to the operation of such services itself. Government offers many services, aids, or gratuities which the citizen may avail himself of or not, as he pleases; but the use of others is compulsory.

## *PUBLIC EDUCATION*

Education in 1940 ranked as the second most expensive of all the functions of government in the United States, and its officers and employees the second in number. The expenditures for that year, including all schools from the elementary to the university, were $2,866,039,000; and the teachers, principals, and superintendents of the elementary and secondary schools alone numbered 875,477.[1] These figures seem modest when compared with those for national defense in times both of peace and of war. Far removed as they are from each other in method, war being the embodiment of force, and education the embodiment of reason and moral suasion, it is not surprising that they stand together at the top of the column of costs. War is the instrument for preserving the nation's land, people, and property from physical destruction; education, the instrument for transmitting its intellectual heritage from one generation to the next.

[1]For colleges and universities the expenditures were $521,990,000; for the public elementary and secondary schools, $2,344,049,000. Bureau of the Census, *Statistical Abstract of the United States, 1942*, pp. 136, 137, 141.

GOVERNMENT AND EDUCATION · The intimate connection between government and education has long been generally recognized. The character of the government is reflected in the system of education, and the quality of the educational system helps to determine the character of the government. Aristotle, writing two thousand years ago in his *Politics*, said:

> No one will doubt that the legislator should direct his attention above all to the education of youth, or that the neglect of education does harm to states. The citizen should be molded to suit the form of government under which he lives. For each government has a peculiar character which was originally formed, and which continues, to preserve it. The character of democracy creates democracy, and the character of oligarchy creates oligarchy; and always the better the character, the better the government. [The tyrant, for instance,] must not allow common meals, clubs, education and the like; he must be on his guard against anything which is likely to inspire either courage or confidence among his subjects; he must prohibit literary assemblies or other meetings for discussion [that is, free assembly, free discussion, and general education].[2]

It was inevitable that men capable of planning the American scheme of government should not fail to realize its dependence on a generally educated citizenry. Jefferson, after the Revolution, devoted himself to the establishment of a system of general elementary education in Virginia, and, in his old age, to the establishment of a State-supported university. Writing from Paris in 1786 to a friend in Virginia, he said:

> I think by far the most important bill in our whole code, is that for the diffusion of knowledge among the people. No other sure foundation can be devised, for the preservation of freedom and happiness. . . . Preach, my dear sir, a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that the people alone can protect us against these evils, and that the tax which will be paid for this purpose, is not more than the thousandth part of what will be paid to kings, priests and nobles who will rise up among us if we leave the people in ignorance.[3]

John Adams wrote:

> The instruction of the people in every kind of knowledge that can be of use to them in the practice of their moral duties as men, citizens, and Christians, and of their political and civil duties as members of society and freemen, ought to be the care of the public, and of all who have any share in the conduct of its affairs, in a manner that never yet has been practiced in any age or nation.[4]

[2]Aristotle, *Politics*, Bk. VIII, 1; Bk. V, 5, 6.

[3]Letter to John Wythe, August 13, 1786, *The Works of Thomas Jefferson* (Ford, Ed.), Vol. V, pp. 153, 154.

[4]*The Works of John Adams* (C. F. Adams, Ed.), Vol. VI, p. 168.

The preamble to a school law enacted in Illinois in 1825 began:

To enjoy our rights and liberties, we must understand them; their security and protection ought to be the first object of a free people; and it is a well-established fact that no nation has ever continued long in the enjoyment of civil and political freedom, which was not both virtuous and enlightened.[5]

JURISDICTION OVER THE FUNCTION OF EDUCATION · Since the subject of education is not found among the enumerated powers of Congress, it consequently was among those reserved to the States. Each has gone its own way, developing an educational system to suit its peculiar needs. Not only have the States acted independently, but each has fostered a highly decentralized system of administration, so that counties, cities, and villages, and even rural districts, have followed educational policies peculiar to themselves. While this has had some disadvantages, it has avoided the regimentation of methods and ideas characteristic of continental European countries. Not only are there no official national doctrines to be followed by all teachers but no State doctrines. Furthermore, in many States the school authorities are separate from the city and village administrations, and therefore largely free from political pressure by the local governments. It will be seen that while the Federal government has embarked hardly at all upon general education, it has lent its financial aid and its fact-finding and standardizing agencies to the promotion of State schools.

PUBLIC AND PRIVATE SCHOOLS · In the older States private schools of all grades generally preceded those of the government. As the years went by, however, tax-supported schools tended to increase at the expense of the private ones. The American educational system therefore may be characterized as one of mixed government-private enterprise. As in the economic field, private initiative in education enters fields experimentally and supplies services for which public support is lacking. The competition between the two systems is mutually beneficial; while each is in a position to make contributions denied the other. In 1940 there were 25,433,542 pupils enrolled in the elementary and secondary public schools, and 2,611,047 all told in the same grades of the private and parochial schools.[6]

That government may not give itself a monopoly in the matter of education was decided by the Supreme Court in its invalidation of the Oregon Compulsory Education Act of 1922, which required that all children between the ages of eight and sixteen be sent to the public schools.[7] "The child is not the mere creature of the State," the Court contended; "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." The

[5]Quoted in E. P. Cubberley, op. cit. p. 154.
[6]Bureau of the Census, *Statistical Abstract of the United States, 1942*, p. 135.
[7]*Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

State, however, may require the attendance of all children at some school, and may require all private schools to meet its educational standards and to include certain subjects in the curriculum. Such requirements, however, must be reasonable and cannot go to the point of forbidding the teaching of legitimate subjects, such as foreign languages.[8]

FOUNDING OF THE STATE SCHOOL SYSTEMS · A Massachusetts law of 1642 directed the officials of each town to ascertain if the parents were attending properly to the education of their children and to impose fines in cases of neglect.[9] This, according to a leading authority, was the first instance in the English-speaking world where a legislative body ordered that all children should be taught to read. A law five years later required that every town of fifty householders should appoint a teacher of reading and writing, and that every town of one hundred householders should establish a Latin school (or high school). Thus early in the nation's history one of the States adopted the principle that the universal education of the youth was essential to the well-being of the community, and placed the responsibility on the parents, in default of which it was laid on the taxpayers of the community. The example of Massachusetts was generally followed by the other New England States; but otherwise education remained until after the Revolution in private hands except for some free "pauper" schools, mostly in the Southern States. By 1700 the New England schools had been largely freed of clerical domination and had become enterprises of the civil town or township, a unit which was now subdivided into several "districts" for the accommodation of the pupils from the farms.

DEVELOPMENT AFTER INDEPENDENCE · The breaking of the political bonds with England seemed to give a new impetus to the idea of universal education. The Northwest Ordinance of 1787, which amounted to a charter of government for that vast area, stated, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."[10] This was the first commitment of the national government in the field of education. In 1802 Congress legislated to give Ohio one section of land out of every township for the maintenance of schools; and this policy was extended to every State, subsequently admitted to the Union, in which there were public lands. With the admission of California in 1850 the gift was raised to two sections. A sound financial basis for its schools was thus assured each new State as it was colonized. Of the sixteen States existing in 1800, seven had made some kind of constitutional provision for schools; but the authority existed in all by reason of their reserved powers.

[8] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

[9] E. P. Cubberley, op. cit. p. 17; United States Commissioner of Education, *Annual Report, 1904*, Vol. II, pp. 1782–1989.

[10] F. N. Thorpe (Ed.), *Federal and State Constitutions*, Vol. II, pp. 957 ff.

THE ATTAINMENT OF FREE STATE SCHOOLS · The struggle for free State schools went on through several decades.[11] The Jacksonian political movement gave it impetus; the new workingmen's associations, various philanthropists, benevolent associations, and many politicians threw their support behind it. The objective, however, was attained only by degrees. At first the laws under which communities might organize schools were permissive in character; then "rate bills" were passed which allowed the imposition of a special tax on those persons who had children of school age; finally, all property was made taxable for school purposes. In the beginning, taxation was sometimes confined merely to the upkeep of the school, the land and the school buildings being donated by individuals of the community. Also, nonresident taxpayers were exempted from school taxes, but this exemption was soon abandoned in favor of a tax on all property situated in the district or county. Roughly by the middle of the nineteenth century the older States outside the South had generally arrived at the point of free public schools supported by taxation; while all States subsequently admitted to the Union began their existence with such a scheme. The Southern States generally had laws for optional free schools which in most cases after the close of the Civil War became mandatory.

UNITS OF SCHOOL ADMINISTRATION · The units of school administration today are the special district, the town or township, the county, and the State. In many States all four are used with varying emphasis.

The district has been a characteristic institution of American school administration. Still in use in about forty States, in about half it is the smallest unit of self-government. The annual "school meeting" was a mass meeting of the local voters to elect the school board, vote the school levy, and transact other business. District self-government had both the virtues and the vices of a high degree of decentralization. Before the countercurrent set in, these districts chose their own schoolbooks, established their own courses of study, and hired their own teachers, with little or no interference from the county or the State. While each city and sizeable village constitutes a separate school district, the rural districts, outside the sparsely settled West, were typically areas of about twelve square miles, which permitted most of the pupils to walk to school. Better transportation has struck a hard blow at the district as a school unit, but it still retains its primacy in about half the States.

THE TOWNSHIP. The township or town is the chief unit of school administration in about a dozen States, including New England, New York, and Indiana. It is permissive in others, where the districts may vote to merge their functions in a consolidated township school. Control is vested in a board, committee, or commission.

THE COUNTY · The New England States and New York make little use of the county as a unit for school administration, but in all others, except

[11] E. P. Cubberley, op. cit. chap. vii.

Delaware and Nevada, the county is of high significance. Generally the cities are independent of the county school administration. The officers in a county typically are a board of education and a superintendent of schools. The latter, besides his supervision of teaching, has duties connected with the certification of teachers, the allocation of funds to the districts, the inspection of school property, and the gathering and publication of statistics. The duties of the county boards of education in the thirty States which have them vary somewhat with the strength of the local district boards, and may consist chiefly in setting examinations for teachers, choosing textbooks, and other financial and supervisory functions.

THE STATE · The occasion for the first extension of State control over education was the need for a central body to allocate and supervise the spending of State funds obtained from the sale of school lands. In 1812 New York established the first State superintendent of common schools in the United States.[12] Today all have such an officer, in most cases known as the "superintendent of public instruction" or "commissioner of education."[13] Actual administrative centralization, still little advanced, did not begin until after the Civil War. The superintendent's duties are more statistical than supervisory, but include the apportionment of the State and county school funds, the inspection, standardizing, and accrediting of the schools, and the quasi-judicial duty of deciding controversies and making rulings on the school laws.

In most of the States there is also a State board of education, which varies greatly with respect to its appointment, term of office, and duties. In some States the board elects the commissioner of education, and aids him in his general powers of school management and supervision. Prominent among these boards is the Board of Regents of the University of the State of New York, whose chief duty until 1904 was the overseeing of the various colleges of the State; after that time it was extended to include the supervision of the elementary and secondary schools of the State. Today a majority of these boards have an extensive rule-making power in such matters as the granting of certificates and diplomas to teachers, the approval of courses of study, and the general control of the school systems of the State.

FINANCING THE STATE SCHOOLS · The upkeep of the schools is now the largest item of State expense, rivaled only by that of the highways. The establishment of endowment funds derived from the sale of school lands was undertaken by the States early in our national history. It has been seen that the Ordinance of 1787 began the policy of setting aside lands in the Western States for school purposes. Connecticut sold its empire of the Western Reserve in Ohio for $1,200,000, which was added to its school fund. By 1834 nearly all the States had established such funds. Owing to

[12]E. P. Cubberley, op. cit. p. 214.

[13]Council of State Governments, *The Book of the States, 1939–1940*, pp. 370–372.

mismanagement, the decline of return on the investments, and the greatly increased costs of the schools these funds by 1940 bore only an insignificant percentage of the cost of the schools. The average for the United States in 1920 was only $1.23 per pupil, ranging from 1 mill in South Carolina to $17 in Wyoming. Direct property taxes, levied in each district, became the main reliance.[14] Supplementary State and county taxes, however, were found necessary in order to level inequalities in wealth and taxable property. One district might have much rich farm or mineral lands; another, very poor lands. The rate of taxation which would provide a nine months' school and good equipment in one district might provide only three or four months' schooling, poor equipment, and a low-salaried teacher in another. State taxes for school purposes are now mostly excises on luxuries, utilities, or production. Distribution of the State funds to the districts is upon the basis of the number of pupils, the population, or the number of teachers employed, or a combination of all. In some States a special reserve fund is set aside for the poorer districts.

THE PUBLIC SCHOOLS IN THE TWENTIETH CENTURY · The public elementary and secondary schools in the year 1941–1942, with 24,502,473 enrolled pupils, numbered 208,233, of which 107,692 were of the rural one-teacher "little red schoolhouse" type.[15] Six States, Illinois, Iowa, Missouri, New York, Pennsylvania, and Texas, had more than 10,000 schools each. The privately controlled elementary and secondary schools numbered 13,296, with an enrollment of 2,663,617. The average annual expenditure for current expenses per pupil in attendance was lowest in Mississippi, at $32.98, and highest in New York, at $181.21; while the average value of the school property per pupil was $103 in Alabama and $670 in New York. The nation's total expenditures for its public elementary and secondary schools in the year 1941–1942 were $2,322,697,688.

In 1939–1940 there were 1751 colleges and universities and other institutions of higher learning in the United States, with 1,493,203 public and private students enrolled in their regular sessions. Their expenditures totaled $521,989,757, the private institutions alone having properties and endowments amounting to $3,038,793,638.

## *FEDERAL EDUCATIONAL ACTIVITIES*

The only academic institutions directly administered by the Federal government are the United States Military Academy at West Point; the Naval Academy at Annapolis; the Naval War College at Newport, Rhode Island; the Army War College at Washington, D.C.; and certain other highly specialized schools for defense training. This, however, is a far

[14]E. P. Cubberley, *State School Administration*, p. 409.

[15]Federal Security Agency, United States Office of Education, *Biennial Survey of Education in the United States, 1940–1942, Statistical Summary of Education, 1941–1942*, Vol. II, chap. ii, pp. 2–8.

from complete picture of Federal influence on education. The Federal government conducts schools in the Indian reservations, has indirect control of the schools in the territories and the District of Columbia, and, much more important, exerts a great influence on the State schools by subsidies and the standardizing activities of the Bureau of Education.

THE UNITED STATES BUREAU OF EDUCATION · The United States Bureau of Education, headed by the Commissioner of Education, falls far short in prestige and duties of the typical Ministry of Education of the leading European countries. Since education under the American Constitution was left as a State function, any such Federal agency must act primarily as a fact-gathering, research, standardizing, and stimulating instrumentality. The act of July 12, 1870, establishing the bureau, made clear that its purpose was not to establish and administer a system of national schools but to "aid the people of the United States in the establishment and maintenance of efficient school systems, and otherwise promote the cause of education throughout the country."[16] True to the plan, it collects and publishes statistics, makes educational surveys for cities and districts, publishes an imposing list of educational studies, and establishes standards for the classification of schools. Proposals to advance the bureau to the level of a national department of education have often been made, but the fear that it might grow into a political instrument dominating the educational systems of the country has been a bar to favorable action by Congress. In 1939, however, the bureau, by Presidential order, was transferred from the Department of the Interior to the Federal Security Agency.

FEDERAL SUBSIDIZATION OF STATE SCHOOLS · The land grants to the States of the trans-Allegheny region and their stimulus to the establishment of free common schools have been noted. No strings as to educational policy were tied to these grants. The Morrill Act of 1862, which laid the foundation for colleges and universities in the new States, gave the Federal government a limited control over the course of study. The Hatch Act of 1887 and its subsequent amendments appropriated Federal moneys for the support of scientific research in agriculture. The Agriculture Extension Act of 1914 established a system of extension education for the rural population, to be administered by the colleges established under the Morrill Act. As a condition to receiving the subsidy, each State must match the Federal appropriations dollar for dollar and submit to Federal supervision. The Smith-Hughes Act of 1917 was another fifty-fifty Federal subsidy plan for the payment of the salaries of teachers of home economics, agriculture, and trade and industrial subjects in the high schools. Thus the Federal influence over State education was extended to the level of the secondary schools. Administration of the Smith-Hughes Act is in the Federal Board for Vocational Education, of which the United States Commissioner for Education is a member. These acts undoubtedly contributed to the rapid

[16] 14 Stat. 434.

advance in these lines of instruction; but criticisms emphasize the hardships and sometimes waste resulting from the application of rigid rules and requirements to a country as vast as the United States.

PROSPECTS FOR FURTHER NATIONALIZATION · In 1939–1940 Federal subsidies to the amount of $99,066,724 were made to the public elementary and secondary schools, which suggests that the program might be carried further.[17] Might the Federal government constitutionally establish and administer a system of general elementary, secondary, and university education for the country as a whole? While the answer probably is No, there is no doubt that the subsidies might be increased to the point where the greater part of the school funds were supplied nationally, leaving the administration nominally in the States but the general control in the Federal government. The doctrine of the Supreme Court in the *Steward Machine Co.* v. *Davis*, holding that Federal financial pressure is not "coercion" but "temptation," furnishes a likely basis for such an exercise of Federal power.[18] Large Federal appropriations under the Federal Works Administration during the depression, for the construction of buildings and facilities for State and municipally supported colleges and universities, were a step toward national control, even though no right of educational direction was tied to the aid given. It is safe to conclude, however, that the future rests not with the courts but with public opinion.

CHARACTER OF AMERICAN PUBLIC EDUCATION · The schools are administered with the idea that a certain amount of formal book knowledge is necessary to civic life. The opportunity for all grades of education is offered to everyone. The object of compulsory school attendance is to see that even the less able or ambitious acquire the education necessary to the prudent conduct of their everyday affairs. The present-day school is viewed as a miniature society in which the child learns to do his part. The student is to acquire not only the tools necessary to civic life but the art of living. The schools, furthermore, attempt to meet the needs of the community by furnishing training for all its diverse needs. Elementary training in industry, agriculture, literature, the fine arts, languages, the manual arts, and home economics is included. Education for the traditional professions of the law, medicine, and engineering, as well as the newer ones brought forward by this industrial age, is provided in the State-supported colleges and universities. By school and university extension courses adults busily employed are given the opportunity for education at all levels, from the three R's to the professions.

SUMMARY · With all its faults, no other major function of government has been better administered than that of education. None illustrates better the wisdom of the Federal system, with its division of responsibility among the national, State, and local units. Individual and local initiative have

[17]Federal Security Agency, op. cit. p. 43.
[18]*Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

been preserved at not too high a price. Religious sects and other special groups are left free to continue in the field of educational experimentation. Reliance of the schools on the public treasury has not subjected them to the regimentation of state policy. One of the best tests is that teachers habitually do not think of themselves as state employees, which they legally are. It is significant, too, that the leadership in teacher-training and educational methods has been held by the privately endowed universities.

## *LIBRARIES*

BEGINNINGS · The provision of library facilities is another government function which had its origins in private enterprise. Book collections until the nineteenth century were available chiefly to scholars and those members of the privileged classes who indulged such an interest. Benjamin Franklin and his associates in 1731 founded the first of the "subscription libraries," so-called because they were open to members who had paid dues for their support. This venture was an innovation, in that it was designed for the particular benefit of tradesmen and mechanics. Franklin, writing of this library and others like it, said, "These libraries have improved the general conversation of the Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their principles."[19]

By the middle of the nineteenth century, subscription libraries called "mercantile," intended primarily for the use of merchants' clerks, and various other types known as "associations," "societies," or "institutes," existed in many localities. A few received substantial financial support and built large book collections, such as the Boston Athenaeum (1807), the Providence Athenaeum (1753), the Astor Library (1849) and Lenox Library (1870) in New York City, and the Newberry Library (1887) and John Crear Library in Chicago. Between 1901 and 1917 Andrew Carnegie and the corporation founded by him gave more than forty-three million dollars for library buildings in all parts of the country.

PUBLIC LIBRARIES · The terms *social* and *public* were interchangeably used for these privately owned libraries, because they were generally available to persons who could make use of them. *Public*, however, is more correctly applied to those which are tax-supported, and this is the sense in which it is now ordinarily used. The first of this type seem to have been the town libraries of Salisbury, Connecticut, and of Peterborough, New Hampshire, founded in 1803 and 1833 respectively. To New York goes the credit for the first State law authorizing the levy of a tax for free libraries. While the power was given to the school districts, the libraries were for the benefit of both children and adults. By 1853 there were 8070 such

[19]C. B. Joeckel, *The Government of the American Library* (1935), p. 3.

libraries, totaling 1,338,848 volumes. Other States soon followed New York's example. The Massachusetts law of 1848, authorizing Boston to establish a public library, was the first State statute giving such permission to a municipality. Soon thereafter State legislation for tax-supported libraries grew apace. In time all the more stable units of government, namely, towns, villages, cities, and counties, here and there were given authorization to levy taxes for library purposes.[20]

DISTRIBUTION · In 1938–1939 there were 6880 public libraries in the United States out of the total of more than 11,000. The 5798 which reported had a total of 104,728,725 volumes and annual expenditures of $50,485,609. The great majority of these are municipal institutions, among which those of Cleveland, Boston, Chicago, Los Angeles, and New York are notable for their size, the variety of their collections, and the services which they furnish the public. Every State has a library at the capital; some have both law and general libraries. The Congressional Library at Washington, with its collection of 7,000,000 volumes, is the nation's largest and world's third largest.[21]

GOVERNMENT · The earlier public libraries were usually under the direction of the executive branch of the government. This type of control, however, subjected them to the same ills to which municipal services in general were subjected by the political machines which ordinarily controlled the cities. By 1930 the libraries in two thirds of the cities of thirty thousand population or over were administered by boards, with the immediate direction in the hands of a head librarian of their choice.[22] These boards are chosen in various ways. In a few cities they are self-perpetuating, the vacancies being filled by the board itself. In some they are chosen by mixed authorities, such as the judge of the district court, the school board, and the city council; in others, by the board of education; in still others they are appointed by the chief executive, mayor, city manager, or city commission. The board system has proved the best adapted to meet the problems of library administration. These boards usually have the power to appoint the library personnel, subject to such delegation as may be made to the head librarian, and to make general rules for the use of the library and its buildings and grounds. They receive bequests and in some instances have the right to purchase land and erect buildings. The power to levy taxes is given, as a rule, to the municipal council or county commissioners or reserved to the people of the district.

[20]C. B. Joeckel, op. cit. pp. 9, 10, 18.

[21]Federal Security Agency, *Public Library Statistics, 1938–1939*, pp. 3, 4.

[22]C. B. Joeckel, op. cit. p. 173. For a discussion of the library as a problem in public administration cf. A. Miles and L. Martin, *Public Administration and the Library* (1941), chap. vii et passim.

## *RECREATION*

The provision of facilities for recreation is one of the latest of government's contributions to the "greatest happiness for the greatest number."[23] The assumption of this function was due in large part to the urbanization of the country and the more widespread recognition of the value of recreation. The rural home, with its large family and open spaces, was in little need of government aid in this respect; but the urban family, living in close quarters and with its members scattered in various employments, is severely handicapped. Commercial recreation, afforded, for instance, by amusement parks, dance halls, and poolrooms, was inadequate in amount and often low in quality. Government entered the field because of its ability to furnish ample land through its power of eminent domain, to provide funds, and to secure expert and scientific guidance. Government development of recreation proceeded along three principal lines: parks, playgrounds proper, and neighborhood centers. All the self-governing units of government from the town to the nation participate to some degree in the function; but it is performed chiefly by the municipalities.

DEVELOPMENT · The opening of a play garden in Boston in 1885 seems to have been the first municipal venture of the kind.[24] New York followed four years later, and by 1900 the movement had spread to a number of other large cities. Chicago, however, in 1905, was the first to establish a full-fledged system of play centers, including field houses, assembly halls, gymnasiums and shower rooms, and branches of the public library. In 1934 it possessed 137 parks with playgrounds, and 85 field houses equipped for recreation. At the present time a large percentage of the country's municipalities, as well as some counties and townships, support recreation centers. The 12,348 park and recreational projects of the Federal Works Program planned up to 1937, at an estimated cost of over half a billion dollars, were undertaken on behalf of the various local governments. The States generally are active in the establishment of parks, which often serve the multiple purposes of recreation, forestry, and the conservation of wild game.

SERVICES · The kinds of recreational facilities and services furnished have greatly expanded in recent years.[25] The ordinary playground provides facilities for the usual group games. The better equipped have pools and ponds for swimming and water sports, ski and toboggan slides, bridlepaths, and nature-study trails. The field houses offer facilities for dancing, gymnastics, arts and crafts, musical productions, and theatricals. The stadia afford facilities for the mental exercise of watching exhibition baseball and football games and for the more aesthetic pleasure of pageants.

[23]For an excellent study of recreation as a function of government cf. George Hjelte, *The Administration of Public Recreation* (1940).

[24]G. D. Butler, *Introduction to Community Recreation*, pp. 60 ff.

[25]George Hjelte, op. cit. pp. 417 ff.

ADMINISTRATION · The power to tax for purposes of recreation is regularly conceded as a legitimate exercise of the police power, but in about half the States special enabling legislation has been passed.[26] The home-rule principle affords a substantial basis for municipal legislation. In about one third of the larger cities the administration of recreation is given to an office set up for that special purpose; in the others it is more frequently placed in the department of parks or rests with the school authorities. The first-mentioned plan is preferable, because it centers responsibility and is more likely to result in expert supervision. The recreation board or commission normally has the usual policy-making and rule-making powers and general financial control. The executive officer, ordinarily called the superintendent of recreation, carries out the board's policies and is in direct charge of the staff. Under him, in the larger cities, are several supervisors in charge of specialized divisions. The expenditures for municipal recreation in the United States in 1937 exceeded twenty-five million dollars.

## *PUBLIC HEALTH*

Modern public-health service has been conceived in broad terms. It has been defined as "the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts."[27] The essentials of a public-health program include the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease. The development of social machinery which will ensure for every individual in the community a standard of living adequate for the maintenance of health is an ultimate objective.

THE ROLE OF GOVERNMENT · From this definition it is evident that no agency other than government would be competent to administer a public-health program; for its essential characteristic is action for the entire community. Public-health administration, except as it concerns foreign and interstate commerce, is one of the reserved powers of the States and falls under the heading of their police power. Owing to the advance of science great agglomerations of population now may exist without peril from the dread diseases which in the Middle Ages periodically swept away large portions of the population. Public-health administration avails itself of the findings of the scientific laboratories with respect to the causes and cure of disease, and, with the strong arm of the state, enforces rules of living which protect the entire community. The estimated average length of life in 1790 was thirty-five years; in 1900, forty-nine years; and in 1942, 64.82 years. Public-health programs have played a large part in the

[26] A. Miles and L. Martin, op. cit. chap. vi.; G. D. Butler, op. cit. pp. 419, 434, et passim.
[27] Quoted in W. G. Smillie, *Public Health Administration in the United States* (Rev. Ed., 1940), p. 2

achievement of adding almost thirty years in a century and a half to the average life span.[28]

PROGRAM OF A PUBLIC-HEALTH DEPARTMENT · It is said that public health in the course of its evolution has passed through two periods and into a third. In the first the main idea was to eliminate waste and filth, which it was thought caused maladies by creating noxious odors and gases. The removal of nuisances and the enforcement of cleanliness were the main elements in the program. The second period, beginning about 1880, was dominated by the idea of quarantine and the isolation of disease. The third and present stage, beginning early in this century, stresses prevention and health promotion as well as disease control.[29]

The program of a modern public-health department, therefore, is said ideally to comprise five separate parts. First is sanitation, the provision of a safe and adequate water and food supply, the disposal of human waste, proper housing and city-planning regulations, the cleaning of streets and the abatement of smoke nuisances, and the control of the intermediate sources of disease transmission. Second, the control of communicable diseases. Third, public-health education. Fourth, individual health protection and promotion through visiting nurses, the establishment of medical clinics, and the giving of examinations to school children by physicians, dentists, and nurses. Fifth, the maintenance of research in disease prevention.[30]

STATE PUBLIC-HEALTH ADMINISTRATION · The colonial legislatures passed laws which today would be classed in the field of public health, chiefly for the abatement of nuisances, the removal of waste, and quarantine; but it was not until the establishment of the Boston Board of Health in 1799, of which Paul Revere was the first chairman, that any such permanent public agency came into existence. In 1869 the first of the State departments of health was established in Massachusetts. Before the close of the century thirty-eight other States had them; and today all have a State board, department, or advisory council, or a chief health officer.[31] Alabama is unique in that a private body, the State Medical Association, forms the State board of health and exercises its power through a Board of Censors, made up of ten physicians chosen from the College of Counselors of the association. This body has the power to make rules and regulations; but its administrative duties are small, the county health units performing all such duties to the exclusion of cities and villages.

THE MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH · The organization of a modern State department of public health and the functions it

[28]Metropolitan Life Insurance Co., *Statistical Bulletin* (April, 1944), Vol. 25, p. 6.

[29]J. A. Tobey, *The National Government and Public Health* (1926), pp. 15–16.

[30]W. G. Smillie, op. cit. pp. 3–9.

[31]United States Public Health Service, Public Health Bulletin No. 184, *Health Departments of a States and Provinces of the United States and Canada* (1929), and No. 222, *History of County Health Organizations in the United States, 1908–1933* (1936).

performs are well illustrated in the present Massachusetts department.[32] At its head is the Commissioner of Public Health, appointed by the governor, who is aided by a Public Health Council of six members appointed in the same way. The departmental functions are performed through nine "divisions," those of Administration, Adult Hygiene, Biologic Laboratories, Child Hygiene, Communicable Diseases, Genito-infectious Diseases, Food and Drugs, Sanitary Engineering, and Tuberculosis. The department has power to make rules and regulations respecting sanitation, water pollution, sewage disposal, milk supplies, food adulteration, and communicable diseases; but quarantine and nuisance orders fall to the town boards of health. The State is divided into eight health districts, in each of which is a chief health officer appointed by the commissioner and directly responsible to him.

Only a few of the duties of the department can be mentioned. It collects and publishes statistics of illness and disease; it distributes health literature; and its research staff annually publishes pamphlets and studies in the fields of bacteriology and health. It enforces the food, drug, and milk laws, collecting evidence and instituting prosecutions, and inspects bakeries and the cold storage of butter, meat and fish, and other foods. It tests the various rivers or city water supplies for bacterial content, and inspects and makes recommendations for sewage disposal in the various cities and districts. Four tuberculosis sanatoria and a hospital for cancer patients are under its direction. Its nursing supervisors give advice and guidance to local nursing associations and send nurses into the homes. Clinics for crippled children are maintained which give surgical and therapeutic treatment.

PUBLIC-HEALTH ADMINISTRATION IN OTHER STATES · The functions of the State departments of health in a majority of the other States are comparable to those of Massachusetts. That of California is under the control of a board of seven members whose executive officer is the director of public health. The New York department has a Public Health Council of seven members, which is chiefly advisory in character but may make rules and regulations for the sanitary code.[33] Executive power is vested in a Commissioner of Health, appointed by the governor and senate. Twelve separate divisions, each under a director, carry on the administrative work and cover the usual functions of such departments, including tuberculosis control, social hygiene, the care of physically handicapped children, and the study of malignant diseases. About 1800 nurses were employed by the various health agencies of the State and its subdivisions, and in one year (1938) more than 2,245,771 visits were made by 60 per cent of the nurses.

LOCAL HEALTH ADMINISTRATION · In all but a few States the cities and villages have public-health agencies, but their importance and character

[32]Commonwealth of Massachusetts, *Annual Report of the Department of Health* (1939).

[33]State of New York, *Fifty-ninth Annual Report of the Department of Health* (1938), Vol. I, pp. 2–4.

vary according to the State and the extent of municipal home rule. Outside New England the county has been used increasingly as a unit of public-health administration. In 1933 there were 569 counties having such agencies, usually a county physician with whom might be associated inspectors, public-health nurses, and laboratory and sanitary-engineering technicians. As a rule, the supervisory power of the State board over the county and city agencies is slight. In eight States, however, including Massachusetts, Illinois, Pennsylvania, and Ohio, largely because of past municipal inefficiency, public-health administration has been given to special districts through which the State health department carries out its program.

## *FEDERAL PUBLIC-HEALTH ACTIVITIES*

The contributions of the Federal government to the cause of public health have been both indirect and direct. In the first category are its research activities and educational publications, its subsidies to the States for the support of their programs, and its work in standardization; in the second, the passage of regulatory laws concerning health, and the establishment of agencies to administer them.

THE UNITED STATES PUBLIC HEALTH SERVICE · The United States Public Health Service is the only Federal agency whose sole concern is with public health and medicine, although there are others which deal with them in part.[34] At its head is the Surgeon-General, who is directly responsible to the Administrator of the Federal Security Agency, to which the service was transferred in 1939 from the Department of the Treasury. The work of the service is carried out through four administrative units: Office of the Surgeon-General, National Institute of Health, Bureau of Medical Services, and Bureau of State Services, each of which has four or five major divisions. Eleven district offices, including one each for Alaska and Hawaii, have responsibilities for their respective areas.

FUNCTIONS OF THE PUBLIC HEALTH SERVICE · In general the functions of the United States Public Health Service are such as a national, not a local, body may competently perform. They fall under five headings: prevention of the spread of disease, hospitalization and the treatment of disease, medical research, health education, and co-operation with the States in the various fields of public health.[35]

The service attempts to prevent the bringing in of disease from foreign countries and its interstate spread, for which purpose officers are stationed

[34] *United States Code*, Title 42, chap. i. The present organization was established by an order approved by the Federal Security Administrator, December 30, 1944 (Public Law 410, 78th Cong., 3d Sess.)

[35] United States Public Health Service, *Annual Report, 1944*, passim; United States Public Health Service, Public Health Reports, Supplement No. 152, *The Work of the United States Public Health Service* (1940).

at all important foreign and American ports. Vessels leaving foreign ports for the United States must first obtain a bill of health from the consular or medical officers stationed there, and they must submit to inspection upon arrival. If a contagious disease exists on the vessel, the sufferer is detained, and proper measures are taken to disinfect vessel, passengers, and cargo. Air transport presents a particularly difficult problem because of its rapidity and its contacts with infected areas of Africa and Asia. The service also co-operates with State and local health officers in combating the interstate spread of disease. In emergencies it may establish quarantine lines across which persons or goods may not pass unless disinfected. It makes sanitary rules and regulations regarding the shipment of animals and foods in interstate commerce; enforces the laws of Congress forbidding the transportation of persons and animals with certain designated diseases; and gives medical inspection to arriving aliens.

GENERAL HEALTH WORK AND MEDICAL CARE · The service administers certain hospitals, including those of the long-established Marine Hospital chain. Hospitalization is extended not only to American merchant and some foreign seamen, but also to immigrants, to the personnel of the Coast and Geodetic Survey and of the Public Health Service itself, and to members of the Federal civil service in general under the Employees' Compensation Act. Hospitals are maintained for certain communicable diseases, such as trachoma and leprosy. Close working arrangements have long existed with the State and local health officials, particularly in the matters of standardized reports and the training of personnel. These are extended by the Public Service Health Act of 1944, which lays the foundation for a unified public-health program for the entire nation.

NATIONAL INSTITUTE OF HEALTH · This distinguished organization serves as the research arm of the Public Health Service.[36] At its head is a director, with an advisory board of thirteen members, the National Health Council, of whom three are detailed from the army, the navy, and the Bureau of Animal Industry, respectively, and ten are appointed by the Surgeon-General of the Public Health Service: five from persons skilled in laboratory work and five from the public-health profession. The staff is organized in eight units: the National Cancer Institute, Division of Infectious Diseases, Division of Physiology, Biologics Control Laboratory, Chemistry Laboratory, Industrial Hygiene Research Laboratory, Pathology Laboratory, and Zoology Laboratory. Heads of the units may be appointed from within or without the Public Health Service from persons who show "unusual aptitude in science," and individual scientists may be appointed to research fellowships. The results of the institute's research are made available to other services of the Federal government and to other medical and public-health authorities.

[36] *United States Code*, Title 42, sects. 21–31; United States Public Health Service, *Annual Report, 1944*, pp. 23–50.

OTHER FEDERAL HEALTH ACTIVITIES · Scattered among other Federal departments are various services relating to the public health. The Office of Indian Affairs has a medical division engaged in the prevention and treatment of disease among Indians. The Bureau of the Census annually publishes mortality and death statistics for the United States. The Bureau of Mines investigates mine accidents and conducts research in methods of rescue and prevention. The Food and Drug Administration is charged with the enforcement of five acts all designed to promote the purity and truthful labeling of foods and other products: the Food, Drug, and Cosmetics Act, the Tea Act, the Import Milk Act, the Filled Milk Act, and the Caustic Poison Act. In furtherance of its purposes it analyzes these products and inspects the factories where they are manufactured or processed. The Department of Labor studies hazards in labor, as well as methods for their prevention; while the Women's Bureau and the Children's Bureau carry on various activities pertaining to health.

SUMMARY · The health program in the United States is a combination of the facilities of government with those of private individuals and agencies. Private initiative, aided by private endowments, carries on scientific research and develops the techniques of medicine and surgery; while government formulates general public-health policies and uses its police power to enforce them. To its historic character of policeman, government has added those of physician, nutritionist, and nurse.

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CHAPTER XLI

# *Government and the Public Welfare: Public Assistance, Housing, and the Police Power*

Aid for the needy is a group function almost as ancient as that of defense. Care of the ill, the crippled, the very young, and the aged has generally been, in the first instance, a family obligation; but in all stages of social evolution, in case of default by the family, it has been supplemented by group aid. The term *poor relief* is used here to designate the aid which private individuals or government extends to those unable to supply themselves with a minimum of food, clothing, shelter, and medical services, Such inability rests immediately on insufficient income or its imprudent use. Insufficient income, in turn, may be due to one or several contingencies: death of the chief wage-earner, illness, failure in business, a low capacity to produce because of mental or physical defects, or unemployment.

THE ENGLISH BACKGROUND · The thirteen colonies inherited the English law and attitude on poor relief; and since both seemed to suit reasonably well American conditions, they were adopted by the new States of the West. A statute of Elizabeth in 1572 was the first to make a levy of taxes for poor relief, and created the parish office of "overseer of the poor." The law was elaborated in a statute of 1601. This defined the classes entitled to relief, including the aged, children, persons physically and mentally incapacitated, and adults without means of support; designated the church wardens and two or more "substantial householders" as "overseers of the poor"; and required that work be provided for the employables, that children be apprenticed to work, and that almshouses be constructed for the housing and care of the poor. It is to be noted that the parish, corresponding to the American township, was made the unit of administration and that the overseers were empowered to levy the taxes. Massachusetts, settled scarcely twenty years later, carried the idea into effect in its law of 1642 by requiring that "every township shall make competent puision [provision] for the mayntenance of their poore according as they shall fynd most convenyent & suitable for themselves by an order & generall agreement in a publike towne meeting."[1]

STANDARDS OF POOR RELIEF · The attitude toward poverty and dependence and the concepts of what constitutes adequate relief entertained in early America were far different from the attitude of present-day

[1]R. W. Kelso, *The Science of Public Welfare* (1928), p. 162; H. I. Clarke, *Social Legislation* (1940), chap. xvi.

America. To receive public aid was then a confession of personal failure; to apply for it, a last resort; to take the oath of a pauper, to brand oneself as an outcast. In the days of primitive agriculture and plentiful new land, when even the least able might find food by a small effort, the attitude was understandable. Relief was given to the extent only of preventing starvation and otherwise mitigating extreme physical discomfort. By no means was the pauper to be made so comfortable that he should as a regular thing prefer public aid to what he might provide by his own exertions. Today the social opprobrium for those receiving public relief is much less, because of the general recognition that numerous able and industrious persons may be out of work because of world or national conditions over which they have no control. The standards of relief look more to the question of social adequacy than to that of mere subsistence. While the individual may have no legal claim on government for aid, public opinion endorses a program which will save him and his children for future usefulness as members of society. Prevention and cure are attempted as utilitarian as well as humanitarian measures.

POOR RELIEF IN THE STATES · In pre-Revolutionary times such poor relief as existed was administered by the separate colonies, and the new Constitution left this function to the States.[2] They, in turn, delegated the power variously to the towns or townships, villages, cities, and counties. In New England the town was the chief unit for poor relief; in the South, the county; in the Middle States it was divided between the two. Aid for the needy took the forms of "indoor" relief, the support of indigents in almshouses or workhouses, and of "outdoor" relief, a sort of dole system by which the needy were given cash or grocery orders to supplement their incomes and permitted to live in their own homes.

By the middle of the last century this had grown into a badly administered and expensive system. Indiana afforded an example of the Middle Western system, which divided responsibility between the county and the localities. The township trustees were ex officio overseers of the poor, with authority to give outdoor relief in the proper amount or to send a family to the county almshouse. The county commissioners were empowered to supply medical service. Before the Civil War the States had begun to assume responsibility for the institutional care of the insane, feeble-minded, and deaf and dumb.

STATE ADMINISTRATIVE AGENCIES · As the relief burdens of the local governments grew to large proportions and the expense became oppressive, it became evident that some sort of central co-ordinating, advisory, and supervisory agency was necessary. Massachusetts in 1863 established the first Board of State Charities, with supervisory powers over the State institutions and the power to adjust disputes and accounts among the towns as to the "unsettled" poor. It was later given supervisory power over all

[2]R. W. Kelso, op. cit. p. 185.

almshouses. Today all States have one or more central welfare agencies, of which there are three types: (1) the single administrator appointed by the governor, with whom is usually associated an advisory board; (2) an administrative board, the larger part of whose work is discharged by an administrator whom it appoints; and (3) a full-time board of three or five members which performs the work of administration itself.[3]

The functions of these State agencies may be grouped into five classes. (1) The direct administration or supervision of State benevolent institutions; (2) the giving of public assistance, such as that for crippled children or the blind; (3) the development and supervision of local relief agencies, county, township, and city; (4) the supervision of private relief institutions; and (5) the conduct of research and educational programs.

THE INDIANA DEPARTMENT OF PUBLIC WELFARE · The Indiana Department of Public Welfare may well be taken as typical of the central State agencies in organization and functions. This body is made up of six members appointed by the governor and senate for overlapping terms. Its major functions are the co-ordination of the welfare services in the State; the supervision of State and local benevolent institutions; the administration of the State-Federal systems of assistance to the aged and the blind; and aid to dependent and crippled children. For the discharge of these functions it is organized into six major divisions: General Administration, Public Assistance, Children's, Services for Crippled Children, Medical Care, and Corrections. The work of the board is performed chiefly through an administrator.[4]

The Division of Corrections has the supervision of all the penal, reformatory, and correctional institutions of the State, which number about a dozen and a half, and the granting and supervision of paroles for their inmates. It has also the duty of classifying the inmates and patients of these institutions and transferring them as necessary from one institution to another. It inspects and classifies all county jails and the ninety-two county almshouses, and makes reports and recommendations to the respective county commissioners.

The two children's divisions administer the Federal subsidies applicable to portions of their work. Their oversight extends to all the child-welfare services in the State, both public and private. Their duties include the licensing and inspection of child-care agencies; the development and encouragement of child-welfare programs; the furnishing of medical and surgical care for crippled children; and the supervision of hospitals doing such work for the State. The Division of Public Assistance has immediate charge of assistance to the aged and the blind, and to dependent children in their own homes. In discharging these duties it works with the county agencies.

[3]M. Stevenson, *Public Welfare Administration* (1938), p. 71.

[4]State of Indiana, Department of Public Welfare, *Four Years of Public Welfare in Indiana* (1940), p. v.

COUNTY RELIEF ORGANIZATION IN INDIANA · Each of the ninety-two counties has a board of public welfare, whose chief administrative officer is the director. It has general charge and supervision of county relief activities and acts to some extent as the local representative of the State Department of Public Welfare. Specifically its duties include assistance to the aged and the blind, aid to dependent and crippled children, and foster-home and parole supervision. They are performed through the four divisions of general administration, public assistance, child welfare, and parole supervision.

LOCAL RELIEF ADMINISTRATION · Municipal welfare departments generally antedate those of the counties.[5] In the larger cities the head is usually a member of the mayor's cabinet. The form of these agencies may be a single director with or without an advisory board; an advisory board with the administrative work in charge of a director or chief administrator; or a board directly in charge of administration. The duties naturally vary much from city to city, but fall into about five or six relief groups. That of public assistance includes such matters as home relief, the care of veterans and of transients, and aid to the blind. Under social service come family case work, legal aid, psychiatric service tests, vocational rehabilitation, and the supervision of parolees. Child-welfare services include those of child-guidance clinics, foster-home supervision, the care of handicapped children, and child placement. Finally, these departments have the responsibility of operating a variety of institutions, such as sanatoria, hospitals, asylums, and workhouses, and the approval of admissions to these and to county and State institutions. During the depression they had the sponsorship of the Federal Works Progress Administration projects. In some cities they are given such outside duties as public-health administration; the licensing and regulation of motion pictures, dance halls, peddlers, and newsboys; and the care and operation of certain public works such as bathhouses, cemeteries, parks, and beaches.

CO-ORDINATION OF THE WELFARE AGENCIES · Common prudence dictates that the work of the various State officials and institutions dealing with the relief of the needy be co-ordinated to the end that the maximum of good be obtained for the money and effort expended. The creation of central State boards with fact-finding and supervisory authority, and the transfer of more and more responsibility from the villages and townships to the county, were steps in that direction. Generally lacking is satisfactory co-operation between the welfare institutions and others organically separate but with similar responsibilities: the institutions of education and public health and the juvenile and domestic-relations courts. While progress has been slow, it is not altogether lacking. In some large cities, for instance, private initiative has been responsible for the organization of councils of social agencies, which are in the nature of exchanges. They

[5] M. Stevenson, op. cit. pp. 326–332.

serve as focal points for co-ordination through conference and discussion, while some approach the matter more practically by maintaining a central index of case records of families and individuals, which are open to all agencies public and private.[6] The most far-reaching effort for co-ordination and standardization by legal means, however, has come through the entry of the Federal government into the field of aid for the needy.

## *FEDERAL WELFARE ACTIVITIES*

It was a long haul to transfer responsibility for poor relief from its original seat, the village, township, and city, to the national government at Washington. The old system had not only tradition but many other arguments to support it. It was said that the local officials best know the personalities of the needy, their economic problems, and the local standards of living, and that through them aid can be applied more economically and effectively, while the padding of the relief rolls with the unworthy can be avoided. Moreover, there was the fear that relief would be thrown into the arena of national politics and its administration be controlled by pressure groups. Considerations such as these led President Hoover in 1931 to propose that an appropriation of twenty-five million dollars by Congress be administered by the Red Cross. Whatever the soundness of the arguments as between national and local relief, the handicaps of the State and local governments in levying taxes and borrowing money and the ease with which Federal funds could be obtained decided the issue.

BEGINNINGS OF FEDERAL RELIEF · In July, 1932, Congress passed the Emergency Relief and Construction Act, which authorized the Reconstruction Finance Corporation to lend up to three hundred million dollars to the States and territories, to be used in furnishing direct and work relief to the needy and distressed. The loans bore a 3 per cent rate of interest, and could be made to the governors or directly to the cities and counties. An Emergency Relief Division of the RFC was in charge of the loans. In May, 1933, after the inauguration of F. D. Roosevelt, the Federal Emergency Relief Act was passed, which made five hundred million dollars available for grants to the States, one half of it on the condition of matching money with the States, the other half free from such restrictions.

However, long before this the Federal government had entered the field of relief in incidental ways. As many as twenty-one different bureaus, offices, and divisions were listed in 1929 as responsible for some form of welfare work.[7] The act of 1912 establishing the Children's Bureau in the Department of Labor marked the first out-and-out effort of this sort. This bureau was empowered to "investigate and report to said department upon all matters pertaining to the welfare of children and child life among all classes of our people." Problems of mortality, the birthrate, dangerous

[6] R. C. White, op. cit. pp. 125–129.

[7] J. Brown, *Public Relief* (1940), p. 38.

occupations, accidents, and the diseases of children were specified. In 1921 the Maternity and Infancy Welfare and Hygiene Act was passed, which provided for the subsidizing of State agencies giving aid to needy mothers and infants. Both acts were placed under the management of the Children's Bureau of the Department of Labor. A further Federal venture into the field of general welfare and relief was the establishment under the act of 1920 of the Women's Bureau, which was instructed "to formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment."[8] In 1917 a law of Congress had established a program, supported in part by the national treasury, for the rehabilitation of workers injured in industry and for the training of the physically handicapped for some sort of useful work.

FEDERAL EMERGENCY RELIEF · With the passage of the half-billion-dollar bill in the spring of 1933 the Federal government was launched on a program of relief whose ramifications and extent no man could then foresee. At that time eighteen million persons were receiving relief from government funds: nearly one family in six was dependent in whole or in part upon public or private aid.[9] In the years which followed, the Federal government established several agencies representing various methods of attack on the problem of dependency, the chief of which was the Federal Emergency Relief Administration (FERA). All of these were joint Federal-State programs, since State administration must largely be depended upon for the actual operations in the field. The FERA was empowered to spend its funds for both direct and work relief. One of the divisions of the FERA was that of "Relations with the States," for which the United States was divided into regions for the purposes of relief administration, each under a director. Others were the Division of Research and Statistics, which kept account of the families and persons on relief and the kinds of relief given; the Education Division, which administered an educational program by which unemployed teachers and artists were given aid; the Rural Rehabilitation Division; the Social Service Division, whose primary function was to determine the eligibility of persons for relief; and the Work Division, which was in charge of the provision or approval of work-relief projects.

OTHER RELIEF AGENCIES · Outside the FERA were several important relief organizations. The Civilian Conservation Corps (CCC) provided work for unmarried men between the ages of seventeen and twenty-five on national, State, and local lands, chiefly the parks and forests. Each member was paid thirty dollars a month, twenty-two dollars of which was sent to his family. About 325,000 on the average were enrolled in this organization from its inception in 1933 to 1939. The Federal Surplus Relief Corporation, incorporated in October, 1933, purchased "price-depressed" commodities to take them off the markets. These commodities were then

[8] 41 Stat. 987 (June 5, 1920).

[9] J. Brown, op. cit. p. 145.

processed and distributed to the destitute. During the fiscal year ending June 30, 1938, this amounted to 1,839,100,000 pounds of agricultural commodities at a cost of $47,430,000. The Civil Works Administration (CWA), created in November, 1933, to supplement the FERA in the employment of persons on work projects, was discontinued after about eight months of trial. In the latter part of the year 1935 the Works Progress Administration (WPA) succeeded to the functions of the FERA and the CWA. With slight exceptions, its work projects were sponsored and planned by the State and local governments. The Federal government became responsible for work relief, leaving direct relief to the States. The National Youth Administration (NYA), created in 1935, provided funds to be paid students for work performed while in college or high school, and conducted a work program for young people not in school.

THE FEDERAL SECURITY AGENCY · The President's Committee on Administrative Management, appointed to study the organization of the national administration, recommended in January, 1937, the creation of a Department of Public Welfare, with a secretary who should be a member of the cabinet. The bill passed in April, 1939, embodied many of the committee's recommendations, but failed to include the new welfare department. The President, however, secured the substance of the department without the name by using the discretion given him by the act to group a number of the welfare and relief agencies together into a new Federal Security Agency, with a head entitled "Director." All that would be needed to convert this into a new department and its head into a cabinet member would be a one-sentence act of Congress. The establishment of this body in 1939 was the first decisive commitment of the Federal government to a permanent organization for the administration of relief on a national scale. The Federal Security Agency has been given the administration of some of the older welfare laws and the principal new ones created since 1933. These will be briefly explained in the pages following. The agency was organized into five divisions, or bureaus: the Social Security Board, the Office of Education, the Public Health Service, the National Youth Administration, and the Civilian Conservation Corps. Three other agencies, which might well have been given to the new Federal Security Agency, were left in their old positions: the Children's Bureau, the Farm Security Administration, and the Federal Surplus Commodities Corporation. The Works Progress Administration was transferred to the newly created Federal Works Agency.

THE FEDERAL WORKS AGENCY · The second agency created by Presidential order and falling short of departmental and cabinet rank only in name was the Federal Works Agency. This was given four divisions: the Works Progress Administration, the United States Housing Authority, the Federal Emergency Administration of Public Works, and a division embracing three older ones: the Bureau of Public Roads, the Public Buildings

Branch of the Procurement Division, and the Branch of Building Management of the National Park Service.

THE SOCIAL SECURITY BOARD · This board, as a division of the Federal Security Agency, is in direct control of the administration of the extensive program of the Social Security Act.[10] Its work is distributed among five service and three operating bureaus: those of Accounts and Audits, Business Management, Research and Statistics, General Counsel, and Informational Service, and those of Public Assistance, Old-Age Insurance, and Unemployment Compensation. For purposes of administration the United States is divided into twelve districts, or regions, each in charge of a regional director. Within each region are local field offices, which total 327 for the entire country. The greater portion of the social-security program is one of joint Federal-State co-operation, Federal subsidies furnishing the cement which holds it together.

The board is the Federal agent for supervising and checking State compliance with the conditions imposed as the price of receiving the subsidies. It is vested with the power to withhold the grants until the conditions set forth in the act shall have been complied with. Its certification is necessary for payments to beneficiaries under the old-age program and for tax rebates to the States for their unemployment-compensation laws. Its powers of supervision and administration extend over five of the welfare and relief programs of the Federal government.

OLD-AGE INSURANCE · The Social Security Act sets up a national system of old-age insurance by virtue of which annuities are paid to persons after reaching the age of sixty-five.[11] The amount is based upon the earnings of the individual, but earnings at an annual rate in excess of three thousand dollars are not counted. Monthly benefit payments may not exceed eighty-five dollars or be less than ten dollars. A gigantic card catalogue of all wage-earners coming under the act is kept. Seven classes of workers are not included in the system, chief among which are agricultural workers, domestic servants, government employees, casual laborers, and employees of educational, religious, charitable, and scientific organizations.

The system is financed by a tax laid upon employees and their employers. Until 1942 this was to be at the rate of 1 per cent of the wages paid and received, after which it was to be gradually increased until it reached 3 per cent. The rate, however, remains at 1 per cent, owing to the unwillingness of Congress to impose a heavier tax burden on industry and workers. Annual appropriations are made by Congress equal to the amount needed for the payments. The pay-roll taxes are credited to a treasury fund known as the Old-Age Reserve Account, which in 1942–1943 amounted to $4,268,296,000 and was invested in interest-bearing

[10]Federal Security Agency, *Eighth Annual Report of the Social Security Board, 1943*, passim, *United States Government Manual, 1945* (1st. ed.), pp. 449–458.

[11]*United States Code*, Title 42, subchapter i.

bonds of the United States. At the end of the fiscal year the Social Security Board was carrying the old-age accounts of 36,500,000 persons. The pay-roll tax for the year amounted to $1,130,495, and at its close 800,000 persons were entitled to its benefits. Payments of about $12,774,000 a month went to 686,000 retired workers or their dependents. It was estimated that 600,000 persons of sixty-five years of age or over had remained in employment rather than retire and claim the benefits.[12]

PUBLIC ASSISTANCE · The Social Security Board is in charge also of the administration of Federal subsidies to the States for the purpose of direct assistance to three classes of persons: the aged, the blind, and dependent children. The aid for persons sixty-five years of age and older is supplementary to the old-age insurance scheme. It applies to those who reached the retiring age before appreciable wage accounts had been built up and to those not covered by the scheme. The board's certificate of approval of the State law and the manner of its administration is necessary before the subsidies are paid over, thus guaranteeing adherence to the Federal standard. The Federal contribution matches that of the State dollar for dollar except in the case of dependent children, where it is at the rate of one dollar for two.

In June, 1943, 2,169,947 persons were the recipients of old-age assistance at a cost of $652,891,000; 301,428 families received aid for 740,131 children at a cost of $161,926,000; and 53,714 blind persons received relief at a cost of $17,955,000. A curious fact is the disparity among the States in the percentage of the aged receiving aid. While for the nation as a whole it was 238 for every 1000 of the population, in one State it was 500, and in three it was fewer than 100. There was also a wide gap in the average monthly payments, which ranged from $9.15 to $37.60.[13]

UNEMPLOYMENT INSURANCE · The system of unemployment insurance sponsored by the Social Security Act is the outstanding example of the adaptation of an eighteenth-century-planned Constitution to a twentieth-century conception. On the face of it unemployment insurance rests not on Federal laws but on concurrent legislation of the legislatures of the respective States. No problem of doubtful jurisdiction is raised; for the matter of social insurance is clearly within the police powers of the States.

Of particular interest is how forty-eight separate legislative bodies were induced within a short period to pass virtually identical laws. The implement used was the potent Federal taxing power. A pay-roll tax is levied on all employers of eight or more persons, certain vocations being excepted. In the States which establish an unemployment-insurance system, according to the detailed standards laid down by the act of Congress, the employer is allowed a rebate of 90 per cent of the tax. The States retained their constitutional right to establish or not to establish an unemployment system; but in the latter alternative the proceeds of the tax would go into

[12]Federal Security Agency, op. cit. pp. 41, 42.

[13]Ibid. p. 45.

the Federal Treasury, to be used for the current expenses of government, leaving the workers of the State without coverage. Needless to say, all the States, as well as the territories of Alaska and Hawaii, acted with celerity.[14] When one employer contested the tax and its rebate as a device to coerce the States into such legislation, the Supreme Court rejected the plea.[15]

The tax is collected by the States and sent to the United States Treasury, where the proceeds are placed to the credit of each in an Unemployment Trust Fund and invested in United States bonds bearing interest at 3 per cent. In this way the proceeds become a part of the expendable annual revenue of the Federal government. By June 30, 1943, the State deposits totaled $4,002,961,000, which represented the accounts of 40,600,000 workers.[16]

UNEMPLOYMENT-INSURANCE COVERAGE · At the time of the 1940 census more than sixteen million persons, or nearly a third of the employed population, were outside the system. This number included farm workers, domestic servants, and the employees of religious, charitable, and certain other nonprofit organizations, and self-employed owners and operators. In addition there were more than five million civil servants, a large proportion of whom, however, are covered by retirement systems. The exceptions were made for various reasons: because they were in the higher income classes, because of difficulties of accounting, or because of the hardships which it was thought would be imposed on the nonprofit institutions. In the agricultural State of North Dakota only 27 per cent of all wages and salaries was covered by the unemployment-compensation law, while in industrial Michigan 83 per cent was covered.[17]

STATE VARIATIONS · The State systems must conform to the standards of the Federal act before they are certified by the Social Security Board as eligible to receive the Federal funds. Actually, however, they are allowed a considerable latitude beyond the Federal requirements. This accounts for differences in the industries and vocations covered; whether or not the workers shall contribute to the fund; the method of computing benefit amounts; the amount of weekly payments; the length of the waiting period before payments begin; and the maximum and minimum payments. The duration of the benefits, of course, is dependent upon the amount in the workers' account: in 1942 the potential duration periods ranged from 20 weeks in Utah to 8.5 weeks in Kansas.[18]

OPERATION OF THE ACT · For the year 1942–1943 a total of $176,100,000 in benefit payments was made to 1,200,000 workers, which, because of wartime employment, was less than half the amount for the preceding year. The unemployment benefits averaged $13.08 a week, and the beneficiaries

[14]Federal Security Agency, op. cit. pp. 1, 18, 99, 100.

[15]*Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

[16]Federal Security Agency, op. cit. p. 95. The total of the fund, counting Federal contributions, was $4,371,347,000.

[17]Ibid. pp. 13, 14, 54.

[18]Ibid. p. 54

were compensated for an average of 11.4 weeks. The smallness of the total amount, only about 15 per cent of the amount paid into the fund, was due to the high rate of employment arising from war conditions. In 1942, 40 per cent of those receiving unemployment pay exhausted their accounts.[19]

CRITICISMS · The most frequently voiced criticism of the act is its failure to cover certain needy classes, such as domestic servants and casual and farm laborers. The provision which gives employers a reduction in the tax rate in proportion to the steadiness of the employment in their factories has resulted in placing those in a given industry at a disadvantage in comparison with their competitors in other parts of the country. The Social Security Board itself favors the abolition of the State systems and the consolidation of the whole social-insurance scheme in Federal hands. Instead of the fifty-one State funds (including those of Alaska, Hawaii, and the District of Columbia) there would be one, and the workers of the poor States would be given benefits equal to those in the wealthier States.[20]

Differences of opinion exist also on the question of financing. The social-insurance funds are necessarily only book accounts, which, of course, morally constitute a first lien on the national resources. Since the funds from which the benefit payments are annually met must come from current taxes and borrowing, some argue that the whole complex system of special taxes and individual ratings should be scrapped in favor of benefit payments or pensions for unemployment and old age as they arise. This argument, however, ignores such considerations as the benefit of forced saving, the pride of the individual in building up his own fund, and the obligation of each industry to count the welfare of its workers as a part of the cost of production.

MATERNAL AND CHILD WELFARE · The Social Security Act adopted or amended old laws extending Federal aid for maternal-health and child-welfare services. Its administration, however, was left with the Children's Bureau of the Department of Labor, which is empowered to investigate and report upon all matters pertaining to the welfare of children and child life. The field work is done in co-operation with the States and is financed on the fifty-fifty plan. Subsidies to the States for the year 1942–1943 totaled more than twelve million dollars. Aid is given to prospective mothers and to children by public nursing services, prenatal clinics, and information on nutrition and child care.[21]

## *WORK RELIEF*

The problem of affording relief to the large number of unemployed, variously estimated as between ten and fifteen million persons, was one of the first problems which the F. D. Roosevelt administration had to meet

[19]Federal Security Agency, op. cit. p. 50. [20]Ibid.
[21]Department of Labor, *Annual Report, 1942–1943*, p. 25.

in 1933. After State and local stop-gap measures providing food and shelter to the needy, projects of "made work" were instituted in various localities. The advantages of work programs over government doles were supposed to consist (1) in maintaining the self-respect and morale of the workers; (2) in building things of utility to the community; and (3) in stimulating business in general by the spending of funds for wages and materials. The chief objections were the much greater expense entailed than would be required by a dole, and the habituation of the less ambitious workers to easy and often unproductive work at a fair wage.

EMERGENCY RELIEF · In May, 1933, Congress established the Federal Emergency Relief Administration (FERA) and appropriated five hundred million dollars to be spent both for direct and for work relief. In the autumn of the same year the Civil Works Administration was created for the purpose of undertaking an extensive program of "made work." This body took over the work programs of thousands of communities and added many more. Soon nearly four million persons were in its employ. In March, 1934, the Civil Works Administration was discontinued. The new plan placed the responsibility for the maintenance of the unemployed and the unemployables (the aged, the young, and the disabled) on the local communities. Supported by Federal subsidies, work projects of a variety designed to make use of the respective skills of the unemployed were to be initiated. After an interval in which several Federal agencies administered the funds appropriated for relief, the Works Progress Administration was set up in the summer of 1935.[22]

THE WORKS PROGRESS ADMINISTRATION · The purposes of the works program were to salvage unemployed labor and to encourage re-employment by private industry. All WPA projects were proposed by the various States and localities, which acted as their sponsors. These were then reviewed by the State WPA administration and, if approved, passed on to Washington. The projects carried out were of an amazing variety: from work with pick and shovel to productions in the fine arts of music, painting, sculpture, and the drama. The buildings constructed included college and university buildings, art museums, airfields, armories, recreation grounds, and electric-power plants. By the end of the year 1938–1939 over 7,000,000 persons had been employed on WPA projects; and during that year an average of 2,900,000 were so employed. The Federal expenditures for the year amounted to $2,155,000,000, and the State and local sponsors contributed an extra $493,000,000. In the same year 110,000 miles of paved highways were constructed or improved, 6400 new public buildings completed, and 17,000 existing structures enlarged or altered. Of the $7,676,-254,000 total expended by WPA to June 30, 1941, wages and salaries

[22]Executive Order 7034, May 6, 1935. For a comprehensive study of the program cf. A. W. Macmahon, J. D. Millett, and G. Ogden, *The Administration of Federal Work Relief* (1941).

absorbed about 76.2 per cent, the purchase of materials 13.5 per cent, and the rental of equipment most of the remainder.[23]

WORK RELIEF UNDER THE FEDERAL WORKS AGENCY · By executive order of July 1, 1939, both the Works Projects Administration and the Public Works Administration were placed under the newly created Federal Works Agency.[24] The programs and objectives remained the same; but because of the duplication the appropriations for the Public Works Administration were gradually decreased, and its life terminated as of June 30, 1943. The objectives and the program of the Works Projects Administration, however, remained practically the same. It was the evident intention to provide work for all persons unemployed or unemployable in private industry. In spite of the pick-up in employment due to the demand for war goods in Europe, there were 1,755,532 on the WPA rolls in June, 1940, and 1,410,930 a year later. In June, 1942, more than a year and a half after the attack on Pearl Harbor, WPA still enrolled 697,701, and had been given $1,225,648,000 of Federal and State and local funds to spend in that fiscal year. About two fifths of the expenditures were classed as war projects: the building and improvement of roads, streets, and water and sewer systems, and the construction of military barracks and airports. This, however, is not to be confused with the huge program of war production which is privately managed, the labor being performed by independent wage-earners.[25]

SUMMARY OF WPA · In the seven years 1935–1942 WPA spent $12,591,157,953 of Federal, State, and local funds on its projects and gave employment to 8,500,000 persons.[26] The year 1938–1939 saw the peak of WPA employment, with an average of 3,014,000 on the rolls. In four other years the average was well in excess of two million; in 1940–1941 it was 1,708,675, and in 1941–1942 it was 963,496. Among the results were the construction of 5700 school buildings and the enlargement and improvement of 33,000 others; the construction of 200 hospitals and the improvement of 2000 more; the construction or improvement of 8500 recreational buildings, 3000 athletic fields, and 8100 parks. More than 15,000 miles of drainage ditches were dug, and 664,000 miles of highways were constructed or improved.

THE NATIONAL YOUTH ADMINISTRATION · The National Youth Administration (NYA), established in 1935, was an expression of the need for special treatment for young persons on relief.[27] Needy students in high school, college, and university were given a small monthly allowance based on services rendered the institutions where they were in attendance. It was

[23]Federal Works Agency, *Third Annual Report, 1942*, p. 148.

[24]*United States Code*, Title 5, sect. 133. The Works Progress Administration was renamed Works Projects Administration.

[25]Federal Works Agency, *Report on Progress, 1942*, p. 37.

[26]Ibid. pp. 2, 3, 19, 71.

[27]P. O. Johnson and O. L. Harvey, *The National Youth Administration* (1938).

required, however, that the work be on special projects outside the usual activities of the school. The student benefited from both the wages and the training accruing from the project. A second feature of the program, for young people not in school, was a system of work projects, similar to the WPA plan, which, in addition to financial relief, would afford them training and education. At the end of the year 1938–1939 there were 280,000 young people enrolled in the school program, and 214,000 in the work projects. By executive order in 1939 the National Youth Administration was transferred to the Federal Works Agency, and in 1943 was discontinued.

THE CIVILIAN CONSERVATION CORPS · Another work scheme for the unemployed was the Civilian Conservation Corps, which was organized in the spring of 1935. Unmarried men between the ages of seventeen and twenty-five were eligible. They were housed together in barracks located near the work project. The types of work carried on included forest culture and protection, landscaping, erosion control, range development, the establishing of wild-game preserves, and the building of recreation facilities, roads in the national parks, and flood and irrigation works. In the year 1938–1939 the enrollees stood at 260,000 to 300,000 a month. In 1939 the CCC was transferred to the Federal Security Agency, and in 1943 it was disbanded.[28]

## *PUBLIC HOUSING*

After the First World War several European states, including Great Britain, Austria, Germany, and the Soviet Union, embarked on extensive programs of government-financed and government-owned housing for low-income groups. American entrance into the field had two primary objects. As stated in the act of September 1, 1937, they were "to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation."

Haste in getting the program under way in 1933 accounted for several projects of great expense and doubtful utility. However, in time more mature plans were adopted and placed under the administration of a succession of agencies: the Federal Housing Administration (FHA), the United States Housing Authority (USHA), the Federal Works Agency (FWA), and finally, in 1942, the National Housing Agency (NHA).

THE PLAN OF THE FEDERAL HOUSING ADMINISTRATION · The chief features of the present housing system were laid down in the act of June 27, 1934, which authorized the establishment of the Federal Housing Administration. The act was chiefly fiscal and standardizing in character, and dependent in part for its execution on the passage of State legislation.[29]

[28] *United States Government Manual, 1945* (1st ed.), p. 615.

[29] 48 Stat. 1246; 4 Fed. Reg. 2727; W. V. Reed and E. Ogg, *New Homes for Old* (1940).

Its chief features were the authorization of Federal loans to State-chartered companies, which in turn made loans for the construction of low-rent housing; Federal insurance of mortgages for low-cost housing made by banks and other lending agencies; and the establishment of national mortgage associations and a Federal Savings and Loan Insurance Corporation.

The law and its later amendments authorized the insurance of mortgages for three classes of homes: one-family to four-family houses up to a cost of $16,000; apartment housing up to $5,000,000 a project; and alterations and improvements of existing property, up to $2500 a structure. In the year 1938–1939 a total of $953,824,128 in such loans was insured, of which nearly two thirds was for small homes. Nearly half the borrowers whose mortgages were insured had incomes of between $1500 and $2500, and only 4 per cent had incomes below $1500, indicating that the benefits went to the middle and lower but not to the lowest income class.[30]

This phase of the government's housing program, therefore, was designed to stimulate and foster private enterprise rather than extend charity. By insuring mortgages meeting certain standards, up to 80 or 90 per cent of the value of the property, lower interest rates resulted because of the lessened risk to the lenders, ruinous second mortgages were ruled out, and the owners were given a period of from twenty to twenty-five years to complete their payments. Moreover, Federal standards for neighborhood planning, lot size and arrangement, and the materials and architectural plans considerably lessened the chances of house and neighborhood deterioration. In the years 1937, 1938, and 1939 the construction of small houses under this law numbered approximately 50,000, 100,000, and 125,000 respectively.

RELIEF HOUSING · The act of September 1, 1937, supplemented the foregoing by offering aid to those families with incomes insufficient to own their own homes or to pay a rent sufficient to cover decent living conditions.[31] The newly created United States Housing Authority might engage directly in the construction and operation of housing facilities or work through housing authorities established under State laws. To these it might make loans for low-rent housing and slum-clearance projects up to 90 per cent of their cost, and make annual contributions for a maximum of sixty years toward the upkeep of such projects constructed by State and local housing agencies, provided this was matched by State or local governments up to 20 per cent of those made by the Federal agency.

By June 30, 1941, 633 public housing authorities were in existence in the thirty-nine States where such were authorized.[32] At that time 587 projects had been approved and $777,369,637 set aside for their financing.

[30]For data on the operation of the Federal Housing Administration cf. its *Annual Reports* for the years 1941, 1942, and 1943.

[31]50 Stat. 889.

[32]Federal Works Agency, *Second Annual Report, 1941*, pp. 149, 335.

WAR HOUSING · The first emergency military appropriations of June, 1940, had not been made long before the housing problem became acute. The migration of workers to the war-production centers not only created acute shortages in dwellings but overcrowded the school, hospital, and public-utility facilities. The great public expenditures for public housing from 1933 to 1940 had produced only 60,000 homes, a negligible result when compared with the construction of 894,000 dwellings by private capital in the year 1925.[33]

A succession of Congressional acts directed the activities of the numerous Federal housing agencies to the construction of accommodations for war workers and the families of enlisted men. The Lanham Act, of October 14, 1940, and its amendments provided the basis for this program. This restricted the program to housing for (1) enlisted men in the naval or military services of the United States, (2) employees of the United States in the Navy and War Departments assigned to duty at naval or military reservations, posts, or bases; and (3) workers engaged in industries essential to the national defense. By January, 1942, approximately $600,000,000 had been appropriated for this purpose.[34]

NATIONAL HOUSING AGENCY · Early in 1942 the greater part of the housing activities, scattered among more than a dozen separate agencies, were placed under a National Housing Agency. Its work was performed by three principal divisions: the Federal Housing Administration, the Federal Public Housing Authority, and the Federal Home Loan Bank Administration.[35] Ten regional offices were given active charge of the work in the field. Whenever feasible, the management of the local housing projects was to be delegated to State and local housing authorities.

THE PLAN · At the outset the plans called for buildings of a permanent character, but owing to the urgency of the situation these had to give way to temporary structures to fill the immediate need. The law provided that the cost of the family units should not average above $3750, not counting land and other expenses; and that the rent should be "within the financial reach of persons engaged in national defense." The program extended to the construction of schools, hospitals, water-supply systems, sewage and garbage-disposal systems, and other necessary public works. The buildings were declared exempt from State and local taxation, but provision was made for annual payments in lieu of such taxes and special assessments. Any authority to exercise supervision or control of the schools so constructed was disclaimed. The need for providing public works was to be determined without discrimination on account of race, creed, or color.[36]

[33]Ibid. p. 26.

[34]Federal Works Agency, *Third Annual Report, 1942*, p. 19.

[35]*United States Manual, Winter, 1943–1944*, pp. 133–136.

[36]Federal Works Agency, *Third Annual Report, 1942*, p. 20; acts of Congress of October 14, 1940, and January 21, 1942.

## *THE POLICE POWER*

The preceding sections of this chapter describe the more important of the measures taken by government for the promotion of the general welfare. These measures are alike in that they consist of positive services offered which, for the greater part, the intended beneficiaries may accept or not as they please. There is another type of government welfare promotion known as the police power, which differs from the former in that it is negative in character and acts by compulsion. The police power is usually defined as the right of government to legislate in the interest of the public safety, order, and morals. The term *police power* is an invention of the American courts, but the conception, of course, is much older. Blackstone's definition was: "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations."[37] Police power is a social or group conception which restrains the freedom and common-law rights of individuals in the interest of the community.

It is a commonplace to say that the police power rests with the States, for only they have that breadth of legislation which the police power requires. While the great enlargement of Federal social legislation since the First World War seems to raise a question, the statement still is substantially correct, and must remain so until changed by constitutional amendment. Congress from the beginning has had the power to police interstate and foreign commerce, the mails, the Indian reservations, the public lands, and the territories and foreign possessions. As has frequently been pointed out, the area of the Federal police power has been enlarged by a broadened interpretation of the Federal commerce power, the granting of subsidies to the States, and the use or threatened use of taxation. This has resulted in the imposition of a second layer of police regulations as, for instance, in the fields of labor and of pure food and drugs.

The police power, both State and Federal, has been considered at other points in connection with the various functions of government. Only a few functions closely allied with the promotion of the general welfare will be taken up here.

## *THE POLICE POWER OF THE STATE*

PEACE AND SECURITY FROM CRIME · One segment of the police power is directed to the protection of the community against crime and open force and violence. This, in general, is the domain of the criminal law. Here are found the laws against riotous and unlawful assemblies, the carrying of

[37]W. Blackstone, *Commentaries on the Laws of England*, Bk. IV, pp. 162–172.

concealed weapons, and the maintenance of private military organizations. Persons held a menace to the public peace may be required to give bond to keep the peace and be of good behavior. Vagrancy is the charge often filed against persons arrested on suspicion in lieu of evidence of any specific crime. It is not to be confused with mere unemployment but refers to propertyless and unemployed persons "living a dissolute or vagrant life and exercising no lawful calling or business sufficient to gain an honest livelihood." Prosecution on the charge is often the alternative given the hapless hobo to moving on to the next community.[38]

SAFETY · The era of congested population and high-speed machinery is accountable for the great mass of safety legislation. Whereas the horse-and-buggy highway required only casual government regulation, the automobile has brought forth elaborate State and municipal laws and policing. Railroad regulations cover rates of speed, warning signboards and signals, automatic safety equipment, the elimination of grade crossings, and full-crew requirements; while those for ships and water navigation are equally elaborate. State and Federal regulations for air traffic are the latest addition to the transportation safety code. The dangers peculiarly inherent to mining account for laws governing the proper timbering of the mines to prevent collapse, the construction of ventilating shafts, and the operation of the machinery. The municipal building codes require that buildings be structurally sound and be provided with adequate exits to meet the fire hazards. The legislation for factories and workshops seeks to protect the workers by requiring the sheathing of rapidly moving machinery and the elimination of noxious gases.

HEALTH AND SANITATION · The general public-health programs were described above. The State police power supports them by various restrictive measures, one of the most important of which is the requirement of licenses for the practice of medicine, midwifery, pharmacy, and dentistry. Other laws regulate the disposal of waste, set standards of cleanliness for restaurants and hotels, or require the immunization against disease of all persons in an infected area. Numerous and important are those forbidding the sale of adulterated or impure foods or uninspected meats and milk. Drugs in general are subject to similar limitations, while certain ones may not be sold without the prescription of a physician.

ORDER AND COMFORT · The police power has much to say about matters pertaining to the public order and comfort. The ancient common law recognized the right of government to abate nuisances, which were defined as things which cause hurt, inconvenience, or damage. Only by degrees did government win the power to protect the community against persons who stood on their rights, such as the corporation which maintained a glue factory in a Chicago suburb, using dead animals gathered

[38]E. Freund, *The Police Power*, p. 98.

from the streets of the city.[39] Municipalities generally may zone the city for purposes of manufacturing; prohibit offensive establishments within the city or restrict them to certain areas; and require measures for the amelioration of the smoke nuisance. Much more slowly conceded has been the power to regulate against unsightliness. The greater part of the legislation against billboards and ugly buildings has been on the basis of safety and health. The protection of Sunday as a day of rest is based not on religion but on considerations of public order and comfort. The laws for the licensing of assemblies and the regulation of the distribution of literature on the streets are for the same alleged purpose.

MORALS · The famous "blue laws" of Connecticut were the earliest American attempt to regulate the community morals. The justification for such legislation is that vice impairs the strength of the community; produces disorder, crime, and economic losses; and is offensive to the community. The States generally forbid gambling and outlaw debts so incurred. Also general are the laws prohibiting obscene or indecent speech or publications. To draw the line between legitimate regulation and arbitrary censorship is difficult, and this difficulty gives the police and the mayor in some cities the opportunity for arbitrary and irresponsible censorship over theaters, books, and periodicals. Some States have boards of censorship for motion pictures. Ohio, for instance, requires that no films shall be exhibited unless of a "moral, educational or amusing and harmless character."[40]

INTOXICATING LIQUORS · The traffic in intoxicating liquors has been a prime subject of legislation, involving as it does questions of health, morals, crime, and economics. The States have experimented with many types of control. Questions of politics also have been involved; for the liquor interests have maintained powerful legislative lobbies, and the neighborhood saloon has often served as the headquarters of the local party machine. Some states use "high license," as a means to keep the number of saloons to a minimum; levy taxes, to make the price of liquor so high that few can afford it in large quantities; or require early closing hours for saloons, to shorten the drinking day. All have laws prohibiting the sale of intoxicating liquors to minors below specified ages. Many have tried local-option laws, giving villages, towns, wards, or counties home rule in deciding whether to prohibit all sales of liquor within their borders. Finally, more than a majority of the States at one time or another have tried the drastic remedy of prohibiting the manufacture and sale of intoxicating liquors. The difficulty with all these forms of control is in their enforcement. The forbidden goods are easily transported from one area to another and are readily manufactured under cover, as acknowledged by one court, which referred to fermentation as an "act of God."

[39] *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (1878).
[40] *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230 (1915).

After the repeal of national prohibition in 1933, many of the States enacted legislation delicately drawing the line between the lesser evil of liquor and the greater one of the saloon. Seventeen of them made the retail sale of hard liquors a State monopoly, leaving wines and beer to licensed dealers, while about three fourths of them set up State agencies known variously as "Liquor Board," "Liquor Control Commission," "Alcoholic Beverage Control Board," and the like.[41] These agencies usually exercise the power of issuing licenses formerly lodged in the municipal authorities, where it was one of the most prolific sources of political corruption, and make regulations for sales and closing hours.

ECONOMIC INTERESTS · The use of the police power to further the economic interests of the public is one of the striking developments of the era since 1900. The ancient common law regarded monopolies as contrary to the public interest and prohibited frauds, if not sharp dealings, in business transactions. The office of sealer of weights and measures, designed to give protection against short weighing, is an old one. The vocations of peddler, pawnbroker, and auctioneer, because of the ease of illicit transactions, have long been subject to State licensing and supervision. Later came the regulation of the sale of securities in the so-called "blue-sky laws." The exaction of excessive rates of interest, called usury, long ago called forth regulatory legislation in many European countries. Today all but a few of the States set maximum rates, varying from 6 to 12 per cent. The numerous laws for the protection of the rights of labor call for separate treatment.

## *THE FEDERAL POLICE POWER*

The Federal government, through its power to control interstate and foreign commerce and the mails and, by taxation, to impose burdens on manufacturers and their products, exercises a police power of considerable magnitude. Some of the laws are the expression of an independent national policy; others serve chiefly to bolster the State police powers; while many are a mixture of the two.

POLICING INTERSTATE AND FOREIGN COMMERCE · One type of law entirely prohibits the shipment in interstate or foreign commerce of certain deleterious or harmful objects, such as explosives, poisons, animals which may become pests, and habit-forming drugs, or requires a license for such shipment. Other prohibited interstate shipments are designed to enforce a national policy. They include prison-made goods, in order to protect labor and business against the competition of prison industries; strike-breakers, so as to support the labor unions; petroleum and its products produced in violation of State limitations, and migratory birds, protected by the treaty with Great Britain, as conservation measures; white-phosphorus matches,

[41]Council of State Governments, *Book of the States, 1943–1944*, pp. 308–309.

because of their danger; and pirated books of American copyright, as a protection to their authors or owners.

SUPPORT OF THE STATE POLICE POWER · Here belong the prohibitions upon certain articles in interstate and foreign commerce. These restrictions are designed to aid the States in the enforcement of their laws. They include all game taken in violation of the game laws of the States; stolen property if in excess of five thousand dollars, and all stolen motor vehicles; intoxicating liquors, as respects States prohibiting their sale; and certain fruits, unless accompanied by a certificate from the Secretary of Agriculture that they meet Federal or State standards. Other Federal laws forbid the shipment or movement in interstate commerce of kidnaped persons and fugitives from justice. The so-called Anti-Racketeering Act of 1934 prohibited the sending, through the channels of interstate commerce, of any demand for the ransom of a kidnaped person and of any communication threatening injury for the purpose of extortion.[42]

PURE FOOD AND DRUGS · The Pure Food and Drug Act of 1906 remains a landmark in the progress of Federal welfare legislation.[43] In a land of plenty, purchasers of prepared foods consumed incredible quantities of adulterated and deteriorated goods; while the needs of the sick were ministered to by adulterated and misbranded drugs and curative devices. False hopes for incurables were raised by blatant and conscienceless claims of manufacturers and venders. Except in a few States there was no recourse for those so injured except under the general fraud laws.

The act of 1906 and its amendments forbade the shipment in interstate commerce of any misbranded or adulterated food or drugs, and not only provided punishment for the act but authorized the seizure of such goods wherever found. Both *misbranding* and *adulteration* were broadly defined. Included in the former, for foods, were imitations of other products, misleading statements as to weight, ingredients, and quality, and failure to indicate habit-forming drugs; for drugs, in addition, false claims as to their curative effect. Foods are adulterated if mixed with substances which lower their quality or strength, or are injurious to health; if any valuable constituent has been abstracted; or if they contain any filthy, decomposed, or putrid substance. Drugs are adulterated if they differ in quality or strength from the standard list known as the United States Pharmacopoeia.

THE ACT OF 1938 · The Pure Food and Drug Law was rewritten and re-enacted in the bill of June 25, 1938.[44] More articles were brought under regulation, and the means of administration were strengthened. While only chewing gum was added to the list of foods, mechanical instruments and cosmetics were added to the category of curative articles. Cosmetics were defined as "articles intended to be rubbed, poured, sprinkled, or

[42] *United States Code*, Title 18.

[43] G. A. Weber, *Food, Drug, and Insecticide Administration* (1928); A. Kallet and F. J. Schlink, *100,000 Guinea Pigs* (1933).

[44] *United States Code*, Title 21, chap. 9.

sprayed on, introduced into, or otherwise applied to the human body or any part, for cleansing, beautifying, promoting attractiveness, or altering the appearance."

ADMINISTRATION · The administration of the law is entrusted to the Commissioner of Food and Drugs of the Federal Security Agency, who exercises an extensive power to issue rules and regulations. In the years 1941–1943 several millions of pounds of food were seized and destroyed. Of the 3483 court actions taken against offenders in the two years, the gamut was run of offenses from the sale of filthy flour, decomposed meat and fish, adulterated sugar and butter, and unlabeled horsemeat to many ingenious schemes of mislabeling and misbranding.[45]

Although the law was considerably strengthened by the 1938 revision, the pressure from certain drug and other interests left its provisions less stringent than they should be.

MEAT INSPECTION · The Meat Inspection Act of 1907 was a companion-piece to the Pure Food and Drug Act of the year before.[46] For some decades previous the sanitary conditions in some of the American meat-packing establishments had been notoriously bad, leading to temporary bans by some European countries on American importations. The law forbids the shipment of all meats in interstate or foreign commerce unless labeled "Inspected and passed." Inspectors are stationed at meat-packing establishments; and vessels carrying animals or meat for export may not be given a clearance without the inspector's certificate. No horsemeat may be shipped unless so labeled. Aided by the increased centralization of the meat-packing industry, the law is much more effectively enforced than those relating to foods in general.

REGULATION BY TAXATION · While the avowed purpose of taxation is to raise revenue, it may be used also to regulate, promote, discourage, or entirely prohibit certain conduct or the production or sale of commodities. Federal taxes with such regulatory purposes are those on intoxicating liquors, tobacco, and firearms, and the protective tariff. Protection of the dairy and farm interests is responsible for the tax of ten cents a pound on colored margarine; the tax of one cent a pound on all adulterated or renovated butter, and the requirement that such butter be plainly labeled and sold in not less than ten-pound lots; and the tax of one cent a pound on filled cheese. A law to regulate child labor, in 1919, under the guise of a tax on employers, was declared unconstitutional.[47] Many of the New Deal laws, including the Bituminous Coal Act of 1937, the National Industrial Relations Act (in part), the original and subsequent Agricultural Adjustments Acts, and the Social Security Act were made enforceable by means of tax penalties.

[45]Food and Drug Administration, *Annual Reports, 1941–1943.*

[46]34 Stat. 1260.

[47]*Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20 (1922).

NARCOTICS · The United States in 1912 became a party to an international agreement for the control of narcotics and other habit-forming drugs. Lacking jurisdiction over the matter except as narcotics and other drugs entered interstate and foreign commerce, resort was had to the taxing power. The Harrison Narcotic Act of 1914 was aimed more at identifying and regulating the persons handling a drug than at prohibiting by taxation.[48] The tax on the product is only one cent an ounce; and the annual tax for importers is only twenty-four dollars, for retailers three dollars, and for physicians and dentists one dollar. All dealers and dispensers, however, must register annually and dispense the drug by means of written forms. Safeguards against its unlawful use are found in the provisions requiring sale only from the original package in which it is taxed; making possession in an unstamped package or without a physician's prescription unlawful; and forbidding disposal by gift or otherwise without a written order of the government. In 1937 the restrictions of the law were extended to marijuana.[49] The administration of the law is in the hands of the Bureau of Narcotics of the Department of the Treasury, at the head of which is a commissioner aided by sixteen regional offices and a police unit.

INTOXICATING LIQUORS · The adoption in 1919 of the Eighteenth Amendment, prohibiting the manufacture, sale, and transportation of intoxicating liquors, was the first constitutional invasion of the police power of the States on a grand scale; and its repeal in 1933 was the first retreat of Federal power from a field once occupied.[50] High taxes as a means of control, however, had been a Federal policy from the beginning of the government. To those States which desired to retain their own prohibition laws the repealing amendment gave Federal protection by forbidding the transportation or importation of intoxicating liquors into any State or territory in violation of its laws. Supporting laws require permits from the Secretary of the Treasury for all manufacturers, importers, and wholesalers of intoxicating liquors; all sales in interstate and foreign commerce are forbidden; and all importations of liquor into prohibition States without the Federal license and State permits are made punishable by fines, imprisonment, and seizure and forfeiture of the liquor.

THE MAILS · The United States as proprietor of the postal system naturally may determine the extent and nature of the services to be rendered. Some of the regulations adopted, however, go beyond the purpose of giving effective service, constituting what amounts to national police regulations. Obscene, filthy, or indecent written or printed matter, lottery tickets, and letters and printed matter advocating treason, insurrection, or forcible resistance to any law of the United States are excluded from the mails. The mailing of ransom notes or other threatening letters is made

[48] 38 Stat. 785 (December 17, 1914).
[49] 50 Stat. 554 (August 2, 1937).
[50] *United States Constitution,* Amendment XXI, effective December 5, 1933.

punishable by heavy fines and long imprisonment.[51] The prohibited use of the mails to defraud has made an unhappy landing for thousands of criminals who glided unscathed through greater perils in the State courts.

SUBVERSIVE ACTIVITIES · Participation in rebellion against the United States or inciting others to do so has long been punishable, but the activities of foreign-inspired groups at the time of the Second World War led to additional restrictions. Heavy penalties are provided for those who advocate the forcible overthrow of the government of the United States, inciting others, printing or displaying seditious matter, or helping to organize groups or societies with that aim. Another statute requires all organizations subject to foreign control which engage in political activities, which carry on military drill, or whose purpose is the overthrow of the government to register with the Attorney-General of the United States and file detailed statements of their activities, organization, and resources.[52] The various Nazi societies unquestionably came within the scope of the law, and perhaps the Communist party until the dissolution of the Third International.

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[51] *United States Code*, Title 18, chap. 18, sects. 338a, 408c–1, 408d.

[52] Ibid. Title 18, sects. 9, 10, 14.

# VI

## GOVERNMENT AND THE ECONOMIC ORDER

*What is the proper relation between government and private enterprise in the United States is the nation's most highly controversial question. The line between the two, to use a military term, is in a highly fluid state. No sizable state of today has escaped the issue. The regimes of Mussolini, Stalin, and Hitler all were founded on revolutionary conceptions of the proper relation between government and business and commerce. Even though hard-pressed from without, China is deeply divided on the issue; while the demands of total war only made it more acute in the British, American, and French democracies. The chief features of F. D. Roosevelt's New Deal program stemmed from a new conception of the place of government in the economic order.*

*Economic Life.* The activities of people in making a living comprise the economic life of society. The usual classification of man's social relationships includes the categories of politics, culture, education, religion, and economics. No clear line, however, separates one from another. Indeed, one activity may at the same time have cultural and political as well as economic aspects. It is not difficult, however, to distinguish those activities which are primarily economic in character. Here belong the great food-producing and processing industries of agriculture, fruit-growing, stock-raising, meat-packing, flour-milling, and so on; the extraction of oil and gas from the earth; the mining of coal, iron, gold, silver, and copper; the construction of buildings, roads, dams, and bridges; and the manufacturing of the endless variety of products which sets off this age from all others of the past. Common to all industries are the problems of wages, dividends, production, management, and hours and conditions of labor.

The endeavor to secure a reasonable minimum of the material things which sustain and adorn life is one of the chief motivations of the struggle within nations and between them.

*Economic Determinism.* For more than three decades the theory of economic determinism has held a place of honor in the teaching of the social studies in the schools and universities. This theory holds, in brief, that economic factors chiefly account for the motivation and direction of human events. Many things, so the argument runs, which appear to be inspired by religion, patriotism, nationalism, or idealism are seen on closer scrutiny to be based on economic interests. Much history has been rewritten to conform to this pattern of thought. Thus, it is said, the Puritans came to America not for religious freedom but to acquire lands and carry on trade; the quarrel with Great Britain was fundamentally commercial, and had little to do with political principles; the Civil War was chiefly a contest between Northern trade and Southern slave and cotton interests; and the Spanish-American War was manipulated by the great sugar interests. American social and political institutions, it is asserted, largely owed their form and character to the factor of abundant free land, upon whose disappearance sharp and violent changes were due. Of great weight in determining our foreign policy since 1920 was the much expounded theory that American participation in the First World War had little to do with democracy or rival civilizations but was due chiefly to the unholy union between "Morgan's millions" and British capital. The investigations of a Senate committee several years ago, headed by Senator Nye, purported to demonstrate that the machinations of munitions manufacturers were a substantial factor in the encouragement of wars between nations.

*Other Factors.* No person is competent to state with confidence the relative potency of the economic and the various other forces, namely, those of nationalism, personal ambition, and moral, religious, and political idealism, in the ordering of human events. These are intangibles. Certainly it is difficult to minimize the influence of the motive of providing food, shelter, clothing, and surplus wealth. But the materialistic conception, standing alone, is too simple an explanation of the judgments and emotions of the human mind and the events which flow from them. While the world-wide depression, an economic phenomenon, had much to do with the coming to power of Hitler, Mussolini, Chamberlain, and F. D. Roosevelt, it only furnished the occasion for the release of other powerful forces. Though the doctrine of economic determinism is often the basis for liberal or radical politics, it may also serve the purpose

of the conservatives, as it did in the realm of foreign politics after 1933. The conservative-isolationist in England, France, and the United States quietly slipped into the historic chair of the communist, who traditionally had held that international war was basically economic in character and camouflaged behind a smoke screen of idealism and high principle.

*Dogmas of Government-Economics Relations.* The crowded condition of old Europe, with its depleted natural resources, ancient class distinctions, and accumulated wrongs, produced various economic cults, offering solutions of the government-economic relationship. The doctrine of laissez-faire, derived from the writings of Adam Smith, particularly his *Wealth of Nations*, and of the French Physiocrats, a group of French economists of the era preceding the French Revolution, holds that the maximum of production and well-being can best be attained by leaving private initiative free and confining government to a few simple functions. Socialism teaches that government, as the agent of all the people, should own and operate the chief instrumentalities of production and distribution, but leave consumers' goods to private ownership. Some socialists would have government monopolize all production, while others would have government operation only so far as might be found necessary or convenient. The doctrines of communism deal more with method and action than with a scheme of social organization. Socialism has no necessary implications of violence, whereas the central doctrine of communism is conflict and revolution, the rising of the proletariat to overthrow the capitalistic "exploiters." As in socialism, the system of private ownership of production goods would disappear. In the transition period the dictatorship of the proletariat, a strong state, would operate all productive and distributive enterprises. The final phase would begin when the state and all use of force had disappeared, and the economic agencies were operated by cooperative associations. The economic programs of Italian Fascism and German Nazism had a socialistic color, but the chief feature was a strong state controlling all phases of production. Private ownership of capital was retained, but the kinds and amounts of goods produced and labor relations were government-directed.

*Individual versus Government Enterprise.* The use of the terms cited above in discussing the government-economic relations in the United States usually tends to confuse the issues because of fixed antagonistic or favorable attitudes in the student's mind. "Economic individualism" or "private capitalism," and "economic collectivism" or "state enterprise," are more accurate and permit a consideration of gov-

ernment policies on their merits. American practice, for the greater part, has been shaped to meet situations as they arise, without too much doctrinaire influence. Throughout our entire national existence private capitalism has been dominant, but has operated side by side with government enterprise to make up the American mechanism. The most significant change in recent times has been the shift in proportion in favor of the latter.

*Fields of Government Control.* The relation of government to economic affairs will be considered in the chapters of this section as applied to the more essential fields. The first and broadest is that comprised under the topic of business. Here government has legislated in matters of trusts and combinations, trade practices, the quality of goods, and sales methods. Government policy with respect to agriculture and conservation comprises regulation of the disposal and use of land, marketing, the conservation of soil fertility, the limitation of output, and the provision of specialized education and scientific research. Transportation by land, water, and air is the subject of much legislation, including detailed regulation, subsidies, and government ownership and operation. Finally, labor relations present one of the most controversial fields and account for legislation of a wide range.

CHAPTER XLII

# *The American Economic System and Government Controls*

Before examining the relations between government and economics in the United States, one must understand the essentials in its system of production and distribution. Public controls must be fashioned to fit a country almost continental in extent, endowed with a great variety and richness of natural resources and facing the competition, real or potential, of Asia on the west and Europe on the east.[1]

EXTRACTIVE CHARACTER · The most potent factor of the American economy is our existence, particularly for the first century and a quarter, in dependence on unexploited or partially exploited natural resources. In general the American's economic efforts consisted primarily in drawing upon the wealth which nature had stored. He was able to ignore the two items of obsolescence and upkeep which are vital in the accounting of a manufacturer. The rich soil in large areas showed small diminution of output after a generation of tilling, so that fertilization was not in the annual cost; and even if the land showed a degree of exhaustion, the farmer could move on to other land. The original settlers found free materials to supply food, clothing, and shelter.

The emigrants who broke through the barriers of the Appalachians found rich bounties of nature which were to furnish them the means of an easy livelihood for a century. There were the white-pine forests of Michigan, Minnesota, Washington, and Oregon; the oak and walnut trees of Ohio and Indiana; the coal, gas, and oil deposits found here and there in great abundance from Pennsylvania to California; the fabulously rich silver mines of Colorado, Nevada, and Arizona; the gold of the California Mother Lode, the Pikes Peak region, and the Black Hills; the iron ore of the Mesaba Range of the upper Great Lakes; the copper deposits of Arizona; and, of more enduring value, the black soils of Illinois, Iowa, and the prairie States. These offered a living at a minimum of steady labor, meticulous accounting, or scientific business management.

Late in the last century the farmer became a part of an integrated national economy. He specialized in the growing of a few crops on a large scale, and became dependent on the city for ready-made clothing, processed foods, and expensive implements.

[1]E. W. Crecraft, *Government and Business* (1928), chap. i; A. N. Holcombe, *Government in a Planned Economy* (1935); H. D. Koontz, *Government Control of Business* (1941), chap. 1.

INDIVIDUAL INITIATIVE AND PLANNING · The second characteristic of the American economic system is the dominant part played by the individual in its planning, operation, upbuilding, and objectives. Individuals, not government officials, determined the routes for trade, migration, and commerce; the uses to which tracts of land should be put; the location of cities and villages; and the kinds of enterprises in which capital should be invested. Individuals discovered and exploited the deposits of minerals and precious metals; they also acquired the forests, and turned them to man's use with great wastefulness. With the aid of new inventions they built the great manufacturing industries which have dominated the American scene. Experimental laboratories of corporations and privately endowed universities furnished many of the data for pioneering in the field of manufacturing.

THE PROFIT MOTIVE · With initiative, ownership, and direction in private hands, the prospect of making a profit is naturally the guiding force. Individuals and lending institutions gauge their investments of capital on the likelihood of the success of the venture as manifested by the return of a profit. New goods are put on the market because it is thought there will be a demand for them which will yield a profit. In those regions where farming is diversified, the farmer's planting of the various vegetables, cereals, or fruits is guided by his estimate as to which will command the greatest profit. So profit is the lodestar which guides farmer, manufacturer, wholesaler, retailer, and mining operator in the judgments which they must make from day to day. The aggregate of such judgments made by individual producers or corporation managers direct the course of American economic life.

DISTRIBUTION THROUGH THE WAGE AND PROFIT SYSTEM · Nongovernmental agencies likewise determined the distribution of the goods produced under this economic system. The share of the laborer or the hired manager comes in the form of wages. Its adequacy is dependent upon the relation between the amount in dollars and the scale of prices of the goods which go to make up the standard of living. The share of the owner comes in the form of profits from the enterprise. Whether the return is sufficient to yield both wages and profits depends upon the demand for the goods at given levels of prices and upon the cost of production. The final goal in the production of goods and services is their enjoyment and use. The great inequalities in the distribution of the good things produced by the nation's industrial machine are a major cause of today's social unrest and the chief driving power in the program for more government intervention. High income taxes, government support of collective bargaining, subsidized housing, and the provision of free recreational, educational, and health services all contribute to the leveling down of incomes.

THE AREA OF EXCHANGE · A fifth factor which must be taken into consideration in any program of public control is the area of production and exchange. Unlike the four already considered, this has undergone almost

complete transformation since the Constitution was written. At that time the neighborhood was the most significant economic unit. True it is that there was a considerable commerce of a national and international character, but it played a minor part. Clothing and furniture were made at home or in the nearest town, often on special order. People of large means in the coastal regions did import expensive fabrics, furniture, and metalware, but this amounted to but a small percentage of such goods consumed. The Fathers left the control of economic affairs chiefly in the States, except for foreign and interstate commerce, as an area fully competent to supply the need of regulation.

Beginning in the 1830's, the expanding facilities of rapid and economical transportation progressively operated to break down the neighborhood system and create an integrated and interdependent national one. There is scarcely a neighborhood so isolated but that its economic well-being depends on men and agencies in far distant parts of the country. Raw materials are transported to distant manufacturing centers, and the finished goods are sent to every city and village of the land. Even meats have fallen into the integrated national system. Livestock is shipped from the farm or range to the few packing centers and returned processed for retail in the place of origin.[2]

## *THE STATES' JURISDICTION OVER ECONOMIC MATTERS*

The Constitution left each State largely the master of its own internal economy. The State's reserved powers, including the police power, may be employed to regulate business, trade, agriculture, mining, and industry in general. These powers are subject only to the limitations of the national Constitution and such as the State may impose on itself. Legislation in this field touches many phases of economics, such as trusts, banking and insurance, corporations, and the many aspects of agriculture and industry.

## *FEDERAL JURISDICTION*[3]

THE COMMERCE CLAUSE · The Federal powers over the economic order are only those given the Federal government by enumeration and implication. Its most extensive block of power comes from its jurisdiction over foreign and interstate commerce. What this has come to mean was explained in another connection, but a brief summary will show to what extent it covers the nation's economic life.

Congress may legislate with respect to all intercourse between the States: transportation and communication in all their forms, and their instru-

[2]A report of the National Resources Committee, *The Structure of the American Economy*, Pt. I, "Basic Characteristics" (June, 1929), presents a detailed study of American economic organization.

[3]For a fuller description of the question of the State and Federal jurisdictions cf. Chapter XXIII.

mentalities, including labor and management. Here plainly come the railroads, telegraph and telephone systems, radio, air lines, interstate highways, canals, rivers, and lakes. Congress may also remove hindrances to interstate commerce, a power which is interpreted to include the prohibition or regulation of trusts and monopolies, unfair trade practices, labor disturbances, and barriers erected by the States. Finally, its jurisdiction extends to all matters which directly *affect* interstate commerce, whose outer bounds no one now can well locate. Already the power has been exerted over all manufacturing whose products enter interstate commerce, and over the marketing in interstate commerce of the products of the farms.

THE TAXING POWER · The second source of Federal jurisdiction over the national economics is the power "to lay and collect taxes, duties, imposts, and excises." This was the basis of the first regulation of the kind, the protective tariff of 1791. A 10 per cent tax on State circulating notes was levied in 1866, to drive such currency out of existence. Much present-day Federal social and economic legislation rests on the same grounds: social security, punitive income and excess-profits taxes, and the regulation of some aspects of mining and agriculture.

THE SPENDING POWER · The absence of limits on Federal taxation and spending is the basis of what is now called the spending power. Subsidies are the means by which the States are induced or forced to legislate in accordance with plans laid down by Congress. Here again there are no perceptible bounds to the area which Congress may cover except those set by expediency and public opinion. So far the power has been used chiefly in the field of public welfare.

THE WAR POWER · The power to raise and equip armies and a navy gives the Federal government power in wartime over all phases of our economic life without any stable limit. Not only may all production and communication be regulated but all such facilities may be taken over and operated by the government. A like power extends to the consumption of goods to the end that they may be conserved for military purposes.

MISCELLANEOUS POWERS · Several other enumerated powers furnish the basis for considerable Federal economic legislation. That to coin money and regulate its value has potentialities for affecting the fortunes of every citizen for evil or good. In establishing uniform laws for bankruptcy, Congress may affect the economic situation of a considerable number of people. Not only is the power to grant copyrights and patents an important general stimulus to progress in the industrial arts but the advantages which many producing concerns possess are dependent upon the exclusive rights thus secured. The post offices and post roads from the beginning have facilitated that free and cheap interchange of information which has helped to account for the rapid industrial growth of the country. The parcel-post system, of course, amounts to a transportation utility of great commercial importance.

THE GOVERNMENT PROGRAM · Four different types of action respecting economic affairs are logically possible, and it happens that all have been employed by government in the United States in varying degrees. These are (1) the provision of the legal framework necessary for the operation of economic activities; (2) the establishment of regulations the violation of which is punishable; (3) the furnishing of positive aids to privately owned and operated concerns; and (4) the assumption of ownership and operation by government itself of the instrumentalities of commerce, business, and production.

1. *Furnishing the Legal Framework.* The least that the state can do is to identify the characters who play the game of economics and furnish a setting for them. Men living outside organized society in a "state of nature" would be hard put to it to make a living beyond mere subsistence. Government, at its meagerest, provides the conditions under which each person may strive for a livelihood to the extent of his abilities. It maintains peace and order, and its code of laws establishes the rights and the obligations of individuals. It defines and protects property rights, provides machinery for their transfer to others, and enforces the agreements and contracts which are the basis of co-operation in production. It identifies the characters competent to engage in the economic struggle, namely, individuals, partnerships, and corporations; defines the capacities of each; and furnishes tribunals to decide their controversies. Government which did not go beyond this program might correctly be designated as one of laissez faire. But no government of modern times has been confined to so narrow a field.

2. *Regulation.* The word *regulation* implies a society in which the private ownership of industry is the rule. It implies, further, that there are matters which need supervision or correction by an outside, or third, party. Government, as representing the entire community, is the logical agency to perform the task.

Government regulation may be evoked simply as a measure of good order, not because anyone is guilty of wrongdoing, as in the direction of traffic at a busy corner. It may be used to curb intentional bad behavior, such as the purveying of adulterated food or drugs; or to prevent unfair practices in the competitive struggle, for example, the spreading of false information or the use of another's trade name. The state, by means of regulations, may seek to even the competitive struggle by throwing its weight on the side of the weak, as in the case of the chain-store taxes. The regulatory power may be employed also on the paternalistic assumption that government possesses information and wisdom beyond that available to most individuals, for which reason individuals should be subjected to guidance. An example is the program of the Agriculture Adjustment Act, which, to a certain extent, substitutes government planning of production and marketing for that of the individual farmer.

3. *Aids to Business and Industry.* Government is not content to perform a correctional role with respect to economics, but stands by as a friend to extend a helping hand. It constructs facilities without which the individual would find some of his economic efforts impossible or severely handicapped. Harbors and rivers are deepened, and furnished with lights and markers, to make them navigable; flying fields and airways are laid out and maintained; weather charts and reports covering the United States and surrounding territories and waters are issued daily. Production and marketing are stimulated and guided by government-compiled statistics of the demands of the world's markets. The investigations of government scientific laboratories are made available to manufacturers. Public employment agencies attempt to bring about a better regional distribution of labor. Economy is promoted by the establishment of government standards as to weight, quality, type, or size for agricultural products, processed foods, and various lines of merchandise. Tariffs are undoubtedly aids to certain manufacturers, whether or not they contribute to the wealth of the country as a whole.

4. *Government as Entrepreneur.* Finally, government itself may enter the business field. Various motives have led to such ventures. Some of the European democracies have made certain industries government monopolies for the purpose of raising revenue. The hard-liquor monopolies of the States today are ordinarily based on both the police and the revenue motive. Government may consider itself forced to provide services or goods for which private capital is not available because of the risks involved. Examples are the Alaska Railroad, which supplies transportation to geographically isolated points in the interior; the postal service; and housing for low-income groups. Government may undertake a business in order to demonstrate costs of production to serve as a yardstick to be used in the regulation of privately owned utilities. Such ventures as those of the Panama Canal and the Tennessee Valley Authority involve not only long-time investments of great magnitude but questions of social, military, or foreign policy which could not wisely be administered by any other agency than government.

## *GOVERNMENT ADMINISTRATION OF ECONOMIC POLICIES*

How does government administer its various economic programs of extending aid, regulating, and owning and operating? How far has it advanced in developing types of control suited to the efficient execution of the program laid down by the legislatures? The question is one involving the whole problem of governmental administration, including personnel, finance, and responsible management. The general principles already have been considered; what is of interest here is their application to the various economic controls.

REGULATION AND AIDS · All government action in the economic field begins with an act of a legislative body declaring a policy. Formerly the policy was merely implied in the prohibitions and penalties laid down; lately it has usually been stated at length in a preamble, notably in the case of some of the major New Deal acts. Three chief types of regulatory administration now are employed.

PENALTIES AND PROSECUTION · The original type was a statute prohibiting acts under penalty, with enforcement by the regular prosecuting offices. Of this the Sherman Antitrust Act, in its earlier years, was a good example. This declared illegal "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade among the several States, or with foreign nations,"[4] and made every violation punishable by fines up to five thousand dollars or imprisonment up to one year, or both. The responsibility for enforcement was little different from that of the ordinary criminal law. The various United States district attorneys, under the direction of the Attorney-General, were directed to prosecute in the circuit courts such violations as came to their attention or to start proceedings to enjoin such violations.

Such machinery ordinarily is adequate for general criminal-law enforcement, but ill-fitted to the task of regulating economic and social affairs, where the penalty is only an incident. The staff of the prosecutor's office usually has neither the strength nor the specialization to undertake such a task. Enforcement tends to be fitful and sporadic.

INSPECTION AND PROSECUTION · A more advanced type of regulatory agency is the office equipped with a supervisory staff and inspection force. This enables it to give oversight to the concerns regulated, to warn of infractions of the law, and to bring prosecution where needed. Such offices are used in the States for the enforcement of regulations applying to workshops, bakeries, and mines. The Federal Bureau of Marine Inspection and Navigation and Bureau of Animal Industry belong in this category.

REGULATORY BOARDS AND COMMISSIONS · The commission or board of mixed powers represents the most elaborate and effective regulatory machinery yet devised. In addition to administrative powers it has the quasi-legislative function of making rules and regulations, and the quasi-judicial function of holding hearings and handing down decisions. Such agencies also usually have specialized staffs, including inspectors, legal counsel, and technicians. The examples are numerous: in the States, the public-utility, industrial, and welfare commissions; and in the Federal realm, the well-known Interstate Commerce Commission, Securities and Exchange Commission, and Federal Power Commission. Their success lies in their various capacities to co-operate with the concerns regulated, as well as to inspect, supervise, and prosecute (if necessary).

[4] 26 Stat. 209 (July 2, 1890).

THE FEDERAL TRADE COMMISSION · Congress in 1914 declared unlawful "unfair methods of competition in commerce."[5] The futility of so vague a law, if its administration were entrusted simply to a prosecutor's office, is clearly apparent. Congress, however, established a commission of five members for the purpose, whose powers and methods will serve as well as any to illustrate the commission system of regulation.

1. The commission need not wait until violations of the law become notorious but may anticipate them. It may require reports from business concerns, have access to their books, gather information concerning organization and management, and subpoena and examine witnesses.
2. It has the quasi-legislative power "to make rules and regulations for the purpose of carrying out the provisions" of the act.
3. Whenever it "shall have reason to believe" that a concern is using any unfair method of competition, it may serve notice and file a complaint, setting a day for a hearing. If, after listening to the testimony, the conclusion is reached that the acts complained of are "unfair," it issues an order to "cease and desist." The hearing stage represents the commission's quasi-judicial aspect. Should the order be ignored, the commission applies to the nearest Federal circuit court for enforcement.

ADMINISTERING AIDS · Because of the wide variety of the aids offered business and industry, no characteristic type of administration has been developed. The most usual is the single-headed office or bureau, which collects and publishes useful information. Field agents to disseminate and help in applying the information or results of scientific research are sometimes employed; for example, the county agricultural agents.

THE DEPARTMENT OF COMMERCE · The best example of a government agency whose primary function is the giving of positive aid to economic activities is the United States Department of Commerce.[6] Eleven of the divisions composing or affiliated with it may be so classified; eight represent government as owner or operator, and one, the Civil Aeronautics Authority, has the mixed functions of aiding, regulating, and owning and managing.

The aiding and promoting activities, if given in detail, would depict Uncle Sam as an assiduous man of the market place. They include the collection of world-wide statistics of trade and manufacturing for the benefit of the American manufacturer and businessman; the taking of censuses of population, agriculture, and other matters; the establishment of weights, measures, and standards for manufactured goods and agricultural products; the issuance of patents, copyrights, and trade-marks; the establishment and maintenance of aids to air navigation; and the publication of

[5]38 Stat. 717 (September 26, 1914); G. C. Henderson, *The Federal Trade Commission* (1925).
[6]Department of Commerce, *How It Serves You on Land and Sea and in the Air* (1941).

weather forecasts and warnings for the benefit of agriculture, commerce, and navigation.

THE BUREAU OF FOREIGN AND DOMESTIC COMMERCE · The Bureau of Foreign and Domestic Commerce is the most promotive section of the department. The law directs it "to foster, promote, and develop the various manufacturing industries of the United States, and markets for the same at home and abroad."[7] So it not only "keeps books" on the American national economy but makes comprehensive and intensive studies of those of all foreign countries. These include classified monthly and annual statistics of all goods and merchandise exported to other countries and brought into the United States. Officers of the foreign-commerce service in peacetime are stationed in all countries of the world. In the year 1940–1941 alone they sent 77,275 communications to the Department of Commerce. The bureau maintains friendly co-operation with the 2,800,000 business establishments of the country, giving individual aid in securing foreign orders, and for their benefit publishes the *Foreign Commerce Weekly*. In 1941 it performed its work with a personnel of only eight hundred and fifty-two persons and a budget of $2,213,000.[8]

## *GOVERNMENT OWNERSHIP AND OPERATION*

When government enters the field of economics as an entrepreneur, it faces the numerous problems of planning, design, investment, and management which constitute the everyday perplexities of the businessman. It is true that the financial problem is different; for its enterprises may run at a loss so long as the taxpayers are willing to make up the difference. But there are others peculiar to itself. Government management is ordinarily less flexible, because it must work by general rule; and political pressure is apt to hamper the effective use of labor, to force investments in unproductive fields, and to require inadequate rates and charges.

TYPES OF MANAGEMENT · The management of government enterprises may be vested in a regular administrative department, in an agency created for that purpose, or in a government-owned corporation. The first-named has customarily been employed by the States and municipalities except for street railways, where special transit boards are more often used. The business ventures of the two Dakotas, which included one or more banks, gasoline stations, grain elevators, coal mines, flour mills, creameries, and hail, fire, and tornado insurance, were managed by the routine or special State agencies.[9] Of the Federal businesses the postal

[7]32 Stat. 827.

[8]Department of Commerce, *Twenty-ninth Annual Report, 1941*, pp. 28, 38. For war purposes the Foreign Commerce Service was transferred in 1939 to the Department of State.

[9]W. M. Persons, *Government Experimentation in Business*, pp. 176–191. This volume gives an excellent summary of Federal, State, and local business enterprises down to 1934.

service, the Alaska Railroad, the Panama Canal, and the various reclamation, power, and flood-control dams (including the Bonneville and Boulder Dam projects, but excluding those of the Tennessee River) are managed by special agencies within the regular departments. By all odds the most significant innovation in the public management of economic enterprises is the employment of the corporation.

GOVERNMENT PROPRIETARY CORPORATIONS · As government entered more deeply into the field of economic enterprise it became plain that an instrumentality of administrative management better adapted to the purpose than the usual office, bureau, board, or commission was needed.[10] The success in private industry of the corporation commended it for experimental use. The first instance, the Panama Railroad, was inadvertent when it was taken over in 1904 from the private owners. The corporate form, however, was deliberately chosen for the Federal Land Banks in 1917, and has since been employed for all government banking and fiscal institutions. At the time of the First World War the Emergency Fleet Corporation, for the building and operation of ships, the Food Administration Grain Corporation, the War Finance Corporation, and two others of an emergency nature were organized. Since that time many others have been added for a wide variety of businesses. In 1943 there were in the neighborhood of fifty such Federal corporations, with a treasury investment of $14,804,281,000.[11]

ADVANTAGES · The general advantages claimed for the government proprietary corporation include those demonstrated in private business: the right to sue and be sued, perpetual succession, centralized organization, the ability to make speedy decisions, and general flexibility of management. More important still is its emancipation from some of the bonds restraining the traditional government department or commission.

In general its management is removed from the arena of politics. Its prestige as a corporation and its possession of a charter make it hard for Congress to tinker with its organization, interfere with its management, and make demands for jobs. Whereas the organization of an ordinary department is often prescribed in detail by the legislature, that of the government corporation is largely left to the judgment of the board of directors. Normally such corporations are excepted from the general civil-service laws and given power to establish, within limits, their own personnel policy. Freedom in matters of finance, while sometimes sharply criticized as undemocratic, greatly adds to the efficiency of management. While the ordinary government corporation depends on annual legislative

[10]For accounts of the various Federal business corporations, their organization and method, cf. J. H. McDiarmid, *Government Corporations and Federal Funds* (1938), and J. Thurston, *Government Proprietary Corporations* (1937).

[11]Secretary of the Treasury, *Annual Report, 1943*, pp. 696, 697. The largest item was $3,250,788,000 for the United States Maritime Commission.

appropriations, these normally are not itemized in detail; and whereas the ordinary government agency must turn all its receipts back into the treasury, the corporation may use them to meet its current expenses. It may have the power also to raise money by issuing bonds. The government corporations are freer, as a rule, from the auditing and checking controls of the Comptroller-General than the ordinary office, a fact which greatly expedites their work.

The government proprietary corporation is an attempt to combine efficient administration with democratic responsibility. The legislature lays down the major purposes which it is to serve, decides how much capital is to be invested, and makes the appropriations for current expenses. The problem is to give the corporation a freedom comparable to that enjoyed by private concerns in finance, personnel, and plant management and to free it from the more rigid procedures of bureaucracy, but at the same time to retain the checks proper for a public body.

## *THE TENNESSEE VALLEY AUTHORITY*

The Tennessee Valley development represents the largest investment ever made by the Federal government in any one project and presents its most formidable problem in business management.[12] The Tennessee Valley Authority's activities of construction and management cover such varied matters as dams and power equipment, flood control, soil conservation, agriculture and industry, housing and city planning, and the transfer of populations.

BACKGROUND · American dependence on Chilean nitrates, which in wartime might not be available, led Congress in 1916 to authorize the establishment of facilities for their production by the use of water power. President Wilson designated Muscle Shoals, on the Tennessee River, as the site of the first plant. Little progress was made on construction before the close of the war, but after some delays Wilson Dam and two nitrate plants were completed late in 1925. Opposition of private interests stalled any further development, and there were various proposals for the dis-

[12]Three studies of its administrative problems are J. S. Ransmeier, *The Tennessee Valley Authority* (1942); C. H. Pritchett, *The Tennessee Valley Authority* (1943); and H. Finer, *The T.V.A.: Lessons for International Application* (1944). The Panama Canal, exclusive of military and naval installations, and the Tennessee Valley project are not far apart in costs. The assets of the latter as of June 30, 1943, were reckoned at $654,333,000; but up to that time Congressional appropriations of $793,820,270 had been expended, representing $124,351,000 for the original Muscle Shoals project and $669,469,270 between 1934 and 1943. Cf. Secretary of the Treasury, *Annual Report, 1943*, p. 664. The net investment in the Panama Canal before the beginning of the new construction in 1940 amounted to $539,200,059, while the total expenditures were over $660,000,000. But these were offset by receipts of more than $500,000,000 turned into the treasury from tolls and other charges. Cf. Secretary of the Treasury, op. cit. pp. 524, 664; M. E. Dimock, *Government-operated Enterprises in the Panama Canal Zone*, p. 30; C. H. Pritchett, *The Tennessee Valley Authority*, p. 30.

posal of the property. F. D. Roosevelt, in the 1932 campaign, became an advocate of Muscle Shoals development; but his message to Congress in 1933 went far beyond the original conception in recommending a government corporation to enter the fields of "flood control, soil erosion, afforestation from agricultural use of marginal lands, and distribution and diversification of industry."[13] Senator George Norris of Nebraska, who had been largely responsible for the retention of Wilson Dam in government hands, framed and sponsored the bill which created the Tennessee Valley Authority and became law on May 18, 1933.[14]

THE PLAN · The Tennessee Valley project is much more than a river improvement project, being nothing less than a scheme of regional development for the entire watershed.[15] The Tennessee River rises in the mountains of Virginia, North Carolina, and Tennessee, flowing southwest into northern Alabama, thence roughly west to the northeast corner of Mississippi, and then nearly due north two hundred and seven miles to its junction with the Ohio. Of the twenty-eight dams those in the mountain streams are chiefly for the storage of water, to equalize the river's flow in wet and dry seasons. The nine dams of the main river create a succession of pools which make a navigable channel for the six hundred and seven miles from the mouth to Knoxville, in the mountains. Locks at the dams provide a total lift of eight hundred and fifteen feet. All are equipped with electric generating plants.

The immediate objects of the project are navigation, flood control, and the production of cheap electric current for the use of the region. The over-all objective is the improvement of the entire region by the encouragement of better agriculture and land use, the establishment of industries, and various plans of social rehabilitation.

ADMINISTRATION · The act of 1933 created the Tennessee Valley Authority as a Federal corporation.[16] Corporation boards usually are fairly large, seldom meet, and confine themselves to the making of general policy and the appointment of officers. That of the Tennessee Valley Authority, however, was given only three members, who, during its first years, performed both the usual board duties and those of direct management. In May, 1936, the Authority created a general manager to whom all the working divisions report.

By 1940 three operating units had been established, those of Power, Water Control in the River Channel, and Water Control on the Land. The first-named has the duties usual to the management of an electric utility; the second, those concerned with the design and construction of the dams and other river installations; the third, with conservation, forestry, agriculture, and chemical manufacturing. Other departments,

[13]C. H. Pritchett, op. cit. p. 29. [14]48 Stat. 58.
[15]Tennessee Valley Authority, *Annual Report, 1943.*
[16]J. McDiarmid, op. cit. chap. vi.

headed by a regional planning council, deal with health and safety, regional studies, and reservoir management.

PERSONNEL MANAGEMENT · The act of 1933 exempted the Authority from the regular civil-service laws, but required that all appointments and promotions should be made on the basis of merit and efficiency. A personnel system, under a director, was established, including a complete job classification scheme with corresponding salary grades, and a system of retirement allowances. Recruitment is chiefly on the basis of papers submitted with the applications and of personal interview rather than written examinations. Names on the registers are not ranked on a mathematical basis, as in the regular Federal service. Particular emphasis is placed on employee-training. Like private corporations, the Authority bargains collectively with its employees. In August, 1940, it signed an agreement with the Tennessee Valley Trades and Labor Council, representing fifteen unions of its employees, which seems to have been the first instance of the kind in the United States involving public employees.[17]

The personnel system, on the whole, has been well administered. But after the construction period has passed and the work settles down to a routine, there seems to be no valid reason why it should not be placed under the jurisdiction of the Civil Service Commission.

FINANCE · The Tennessee Valley Authority is dependent for its support on the annual appropriations made by Congress. From 1934 to 1941 these ran from $25,000,000 to $66,500,000, after which they were greatly increased to provide facilities needed by the war effort. Income in the same period from sales of power ran from $826,000 in 1934 to $4,933,300 in 1939 and $24,308,000 in 1942. These were made principally to cities, co-operative associations, and industries. Almost from its inception the Tennessee Valley Authority has sought to free itself from the hampering restrictions of the Comptroller-General. It will be remembered that his office was invested not only with the power of audit but with that of passing on the legality of all Federal expenditures. The Authority contended that its methods, designed for the ordinary government department, were unfitted to the operations of a business corporation such as itself, involving many purchases and sales, contracts, competitive bidding, and the compromise of claims. The Comptroller-General, however, had the power to cut off its funds by refusing to countersign warrants for payments from the treasury. Congress in 1941 resolved the conflict in favor of the Authority by forbidding the Comptroller-General to disallow credit in those cases where the Authority certifies that the funds are necessary to carry out the provisions of the act.[18]

THE YARDSTICK THEORY · One of the reasons early advanced for the building of government power plants was to demonstrate the real cost of production of electric current, so that it might be used by the public-

[17]C. H. Pritchett, op. cit. pp. 300–303. [18]Ibid. pp. 68, 262.

utility commissions to protect the public against exorbitant rates by private companies. Many difficulties, however, stand in the way in this instance. In order to determine costs, naturally the total expenditures for the project must be allocated among its various uses: navigation, flood control, and power production. The cost of any one may be made small or large according to what portion of the investment is allocated to it. In 1940 the Authority allocated the costs of the first seven dams as follows: 24 per cent to flood control, 36 per cent to navigation, and 40 per cent to power. This indicated a low cost of production for electric current and a very high cost for navigation.[19] The complexity of the use factors renders any allocation purely arbitrary, and consequently any alleged yardstick of power costs of little more than argumentative value. It might with some reason be contended that the value of the project as an instrument of regional reconstruction should be counted in as a fourth factor.

CONCLUSIONS · The Tennessee Valley Project affords an encouraging example of reasonably efficient government management for a business enterprise on a large scale. Particularly it demonstrates the value of the independent corporation as an instrument of government. The objective of flood control has been attained. Power has been furnished at a low price to thousands of homes and small users; but whether this has been attained by shifting the costs to the taxpayers of the entire nation is not yet proved or disproved. Navigation, the legal peg on which the whole enterprise hangs, is less promising. In its circuitous course the river passes through a largely rural region with no large cities and follows no trade route of present importance or great future promise.[20] The power development has been of the greatest value for the wartime emergency; but the greater portion of the supplies going into and out of the region are transported by rail. The two extremes of opinion, those of the collectivists and the individualists, have confused the issue by undue claims or unfair criticisms.

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[19]Ibid. p. 91.

[20]Freight traffic on the river increased from 70,700,000 ton-miles in 1939 to 138,000,000 in 1942. Cf. Tennessee Valley Authority, *Annual Report, 1943*, p. 23. The river in 1943 was navigable up to Knoxville. The completion of the Kentucky Dam, at the mouth of the river, planned for 1945, will give a year-round channel of nine feet from the Ohio River to Knoxville.

## CHAPTER XLIII

# *Government and Business*

The word *business* refers ordinarily to the activities of the market place and factory: buying and selling, the making of investments, and the management of all sorts of economic enterprises. It is not applied to the work of the physician, dentist, artist, and teacher, who normally are as dependent upon their profession for a living as the businessman is upon the profits of his undertaking. The businessman participates in the productive process at every stage: the procurement and exchange of raw and partly finished materials; the planning and management of manufactures and their financing; and their transportation and disposal by wholesale and retail. Without him or his equivalent the products of agriculture, the mines, the forests, and the factories would not be brought into the markets and made available to the consumers. His variety is legion: contrast the old rags-and-paper man, his rickety wagon drawn by an emaciated horse, with the captain of industry enthroned in his walnut-paneled room! His activities therefore are an indispensable part of the system by which the nation is supplied with those things which go to make up a living.

ENTRANCE INTO BUSINESS · Traditionally, in the United States, every person has been free to enter the vocation or profession of his choice. For many years there were only moderate bars for even those callings which require special or scientific training. Since about 1900, government has steadily added restrictions, even including some trades, the chief grounds for which is the protection of the public welfare. Dentists, physicians, nurses, druggists, veterinarians, teachers, and lawyers are licensed in all the States upon the basis of examinations or educational qualifications. Lately the list of occupations requiring government permission has been lengthened by including some of the skilled trades, such as those of barbers, cosmeticians, and plumbers. The avowed reason, to provide a higher type of service to the public, is sometimes reinforced by the desire of some trades to lessen competition. Generally, except in wartime, government has not attempted to debar people from a given occupation for any other reason than the good of the service. An exception, however, was an Oklahoma law of 1931 which forbade anyone to engage in the manufacture, sale, or distribution of ice except on satisfactory proof that the existing facilities were inadequate. The United States Supreme Court declared the law invalid because it curtailed the common right to engage in a lawful private business.[1]

[1] *New State Ice Co.* v. *Liebman*, 285 U. S. 262 (1932).

The licensing of businesses and occupations for purposes of regulation but not of exclusion is very extensive. A study found nearly four thousand different classifications employed by the States and their subdivisions. These cover such diverse items as junk dealers, fortunetellers, chain stores, brokers, amusement houses, hunters and fishermen, motor vehicles, pawnbrokers, and dispensers of soft and hard drinks.[2] Licenses for operating transportation and other public utilities, because of their semimonopolistic nature, are issued on the basis of "public convenience and necessity." But except in this field and as required by considerations of health and safety, the American may choose his own business or other vocation. The owner of money or credit who wishes to embark on a business venture may do so at his own risk.

FAIR REPRESENTATION AND ANTIFRAUD LEGISLATION · While government leaves to the businessman or investor the decision as to what activity he will promote, it seeks to establish conditions under which he may make intelligent and informed decisions, and punishes deliberate misrepresentation. The gathering and publication of foreign and domestic trade statistics is an important service which no private organization could well duplicate; and the common-law rules against fraud as well as special legislation afford some protection.

Kansas was the first State to make the protection of investors in securities a special care. Its "blue sky" law requires the registration of all securities before they may be offered for sale, and the licensing of their purveyors. Laws setting up such restrictions now exist in all the States except Nevada. Some provide only for the registration of securities; a few have only fraud statutes; but most of them follow the Kansas type. Registration requires the filing of data showing the financial condition and assets of the company offering the securities: their earnings, their indebtedness, and other facts which will give the investor the material necessary to form a prudent judgment of the investment. The banking commissioner of Kansas stated that in a period of six years between fourteen and fifteen hundred companies had been investigated by his department, of which fewer than four hundred had been granted permits to sell; and he estimated that the people of the State in that time had been saved at least six million dollars by the protection of the statute.[3]

FEDERAL REGULATION OF SECURITIES SALES · Useful as were the State regulations, a national one was necessary to close the gaps. This was accomplished in the Federal Securities Act of May 27, 1933, and the Securities and Exchange Act of June 6, 1934, which extended the control to the conduct of the stock exchanges.[4]

[2]C. C. Rohlfing and others, *Business and Government* (1941), p. 427.

[3]Council of State Governments, *Book of the States*, Vol. V, p. 305; C. C. Rohlfing and others, op. cit. p. 427.

[4]48 Stat. 74, 881.

The first act charged the Federal Trade Commission with the administration of an elaborate code regulating the issuance and sale of securities. All securities must be registered with the commission, and registration must be accompanied by a registration statement, including a disclosure in great detail of the company's condition: its capitalization, the amount of securities outstanding, its indebtedness, the salaries and remuneration paid to directors and officers, the sums paid to promoters, the commissions to be paid to underwriters, a balance sheet and profit-and-loss statement, and the price at which the securities are to be offered to the public. The statement filed with the commission must be signed by the president of the company, its chief financial officer, the principal accounting officer, and the board of directors. Registration statements of new securities must remain on file at the offices of the commission twenty days before the securities may be offered to the public for sale.[5]

The act is made enforceable by the exclusion from interstate commerce and the mails of any securities or their prospectuses unless the securities are registered. All persons signing the registration statement are liable for damages if it contains any untrue statement or fails to state a required material fact; and they may be sued by any person buying the securities. Naturally the registration of a security does not guarantee that it is a good investment, since all economic enterprises are attended with risks, but merely furnishes information which indicates a bona fide and substantial basis.

FEDERAL REGULATION OF SECURITY EXCHANGES · By the second act the administration of the first was turned over to a newly created Securities and Exchange Commission, which was clothed with the further duty of regulating the securities exchanges. All such exchanges are required to register, which is done by filing a statement containing an agreement to comply with the requirements of the act, copies of their constitution and by-laws, and other data concerning their organization and membership. Twenty-two such exchanges had filed by June 30, 1937.[6] The act provides a set of regulations and authorizes the commission to issue others to carry out its policies. All securities handled by members of an exchange must be registered, and such accounts must be kept as the commission requires. There are regulations respecting borrowing "margins," "over-the-counter" sales, and the amount of indebtedness of members. Such deceptive practices as "pegging the market," "matched orders," "short sales," and "stop-loss" orders, or the circulating of false and misleading information in order to induce people to buy or sell securities, are forbidden.

CONCLUSIONS · These acts have not been in operation long enough to warrant many conclusions. While they cannot shield individuals from the results of their own bad judgment, and perhaps cannot save the coun-

[5]H. D. Koontz, *Government Control of Business* (1941), chap. xxii.
[6]Ibid. chap. xxiii; F. P. Hall, *Government and Business* (1939), p. 285.

try from another period of speculative frenzy, like the State acts they do protect the public from the grosser frauds and more reprehensible practices. Some observers point to the discouragement of legitimate enterprise by the large expenses required in the issuance and registration of securities, the heavy civil liability under which promoters are placed, and the slowness and unwieldiness of the procedure for business promotion. It was noted in the "recession" of 1937 that while the investing public was not quickly stampeded into a "bear" state of mind, the moderate sales led to a decline in market prices unique in the history of the exchanges.

## *UNFAIR TRADE PRACTICES*

The individualistic common law was not generously permeated with restrictions on trade practices.[7] Man was presumed to be not only a political but also an economic being, furnished with protective faculties that would reasonably well carry him through the snares and wiles of the market place. Its rule of *Caveat emptor*, "Let the buyer beware," was representative. Persons engaging in horse-trading were expected to abide by the results of the matching of wits. The law assumed the rough equality of individuals in the economic struggle, closing its eyes to the ever-recurring type of Goldsmith's Moses at the fair.

There were, of course, some alleviations. If fraud or willful misrepresentation was employed, the victim might have recourse to the law. The imitation of a competitor's goods was permissible, but the "palming off" of something else as his product, the appropriation of his trade secrets, or attacks on his reputation or integrity were unlawful. It already has been noted that the common law did not countenance monopolies.

THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS · The need for national action on trade practices had long been apparent when in 1914 these two acts were passed. The methods of the Federal Trade Commission were described in the preceding chapter to illustrate one type of governmental regulation; the applicability of the two laws to the monopoly problem will be considered below.

The heart of the regulation is in the simple statement "That unfair methods of competition are hereby declared unlawful." Congress in 1938 broadened the prohibition by including "deceptive acts or practices" and false or misleading advertising of foods, drugs, devices, and cosmetics; but otherwise the task of defining unfair trade practices was left to the commission. The long list of offensive practices does credit to the ingenuity, if not to the principles, of the firms involved. Included are the misbranding of goods offered for sale; commercial bribery; giving secret commissions to dealers; the disparagement of competitors and their products; the sell-

[7]For an excellent study of the general subject of unfair trade practices cf. J. P. Miller, *Unfair Competition* (1941).

ing of second-hand or rebuilt articles as new; simulating trade-marks and trade names; the offering of "leaders" at below cost on condition that the customer purchase other goods; and the sales of goods falsely advertised as "Government," "United States Army," "Army and Navy," or "United States specification."[8]

GRIST OF THE MILL · While the commission's war on unfair trade practices in a sample period is not a picture of the whole, it should be generally representative. An examination of one volume of its reports, covering eight months in 1941–1942, shows these results.[9] An even one thousand cases were disposed of, comprising 362 carried through and 638 "stipulations." A case carried through is one which goes through all the stages from complaint to a final order. Of this type, 315 resulted in "cease and desist" orders, and 47 were dismissed or otherwise closed. In a "stipulation" the concern prefers to abandon the practices complained of rather than go through to a formal hearing. With the consent of the commission a stipulation is signed, admitting the practices complained of and agreeing permanently to "cease and desist" from them. About one third of the stipulations were in the enforcement of the ban on false advertisements in newspapers, periodicals, by the radio, or otherwise as to food, drugs, devices, or cosmetics.

The practices ruled unfair comprise a colorful and ingenious, if unlovely, fabric. They include the sale of "mineral-well" crystals concocted from pokeberries, and potassium iodide and other commercial chemicals, with water from the city mains; of "Oriental" rugs made in Belgium or Italy; of rebuilt men's and women's hats offered as new; of "Wisconsin" beer made in Chicago; of "featherdown" quilts of chicken feathers; of Japanese toothbrushes and optical goods labeled "Made in the United States"; and of a "smudgeproof, tearproof, waterproof, and runproof" cosmetic. Next to those practices involving medicines and curative devices, merchandising by lot and the sale of slot machines and push boards seemed to produce the largest number of cases. Falsely claiming the endorsement of doctors, nurses, hospitals, scientific laboratories, and the Federal government and infringing on the trade names and goodwill of reputable firms accounted for many more.

In view of the fact that the commission was created primarily to curb big business, it is interesting that all but a negligible number of the complaints were made against small firms, many of them of a fly-by-night character. In the list of cases the student would recognize hardly half a dozen names. One famous automobile manufacturing company was brought to time for requiring its authorized dealers to use only "genuine" parts in making repairs; and a national association of lumber manufacturers, for its scheme of price maintenance. It would seem as if big busi-

[8]G. C. Henderson, *The Federal Trade Commission* (1925), chap. iv.
[9]Federal Trade Commission, *Decisions*, Vol. 34, November, 1941, to June 30, 1942.

nesses had been the chief beneficiaries, through the protection given them against the misuse of their trade names and goodwill. Many of the cases were chiefly of local importance, and could have been corrected by the States if the States had possessed efficient administrative machinery.

OTHER FAIR-PRACTICES ACTS · Whereas the purpose of the antitrust laws was to encourage concerns to undersell each other to the advantage of the consumer, it should be noted that the laws against unfair competition may result in protecting the businessman against too low prices. This was the effect of the "fair trade" laws which, beginning in 1936, spread in six years to thirty-five States. These explicitly permit the manufacturers of branded or trade-marked products to sell them on the condition that they shall not be retailed below a designated price. The obvious purpose was to protect the reputation of a manufacturer's goods, which might be injured by being offered at cut-rate prices, or to prevent their use as "leaders." In 1937 Congress gave its sanction to these State laws in the Miller-Tydings Act, which exempts such resale contracts from the penalties of the Sherman Act.

CHAIN-STORE REGULATION · The disappearance of the individually and locally owned neighborhood store was another indication of the trend toward corporate-controlled big business. Purchases in large quantities, superior merchandising equipment, and more efficient sales methods enable the chain store to undersell the independent dealer. Resentment of the vanquished, popular realization that an impersonal organization had taken the place of the neighborhood store, and the refusal of the newcomer to give credit were the bases of the popular belief that there was an element of unfairness in the change. The aid extended to the independent store in a number of States was a discriminatory tax. Indiana, for instance, levied an annual tax on persons or corporations, graduated according to the number of stores under their management, beginning with three dollars for one store and running to one hundred and fifty dollars each for twenty or more. This and similar regulatory taxes in other States have been upheld by the Supreme Court as resting upon a "reasonable policy."[10] The Robinson-Patman Act, of 1936, while directed against unfair price discriminations in general, was designed to supplement the State antichain-store legislation. Price concessions are limited strictly to the differences in the cost of manufacture and delivery occasioned by the differing quantities sold. Furthermore, manufacturers or wholesalers may not furnish facilities such as storage unless they are open on equal terms to all customers, or allow any discount or commission to a purchaser except for services rendered. Both the giver and the recipient of the discrimination in price are penalized.

[10] *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931). The Louisiana chain-store tax, based on the number of mercantile establishments included within the management, whether within the State or not, was sustained in the case of *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412 (1937).

## *CORPORATIONS*

A corporation is an association of persons endowed with the capacity to act as one person. John Marshall defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of the law." Corporations are created by an act of incorporation, for which in this country any State, the District of Columbia, and the United States are competent. Because of certain advantages not found in partnerships or associations they have become the chief unit of industrial promotion and management in the United States. In 1939 the total of corporations filing income-tax returns was 511,741, of which 469,617, with total assets of $306,801,000,000, were active.[11] The National Resources Committee estimated that in 1933 the two hundred largest industrial corporations controlled from 19 to 21 per cent of the national wealth, between 46 and 51 per cent of its industrial wealth, and approximately 60 per cent of the physical assets of all nonfinancial corporations. The total assets of the two hundred corporations alone were estimated at $95,617,000,000, and their portion of the total plant used in manufacturing at 40 per cent.[12]

USE IN BUSINESS · The corporation has proved well adapted to the promotion and control of economic enterprises. Like an individual, it may sue and be sued; it may purchase, use, and dispose of property; and it may pursue its existence separate from that of the persons who compose it. The members are responsible for its debts and acts only to the amount of their stock. It affords a convenient way for the gathering of capital to invest in an enterprise by the sale of stocks and the power to borrow. By the proper adaptation of its constitution and by-laws it may assume forms convenient and effective for the management of business enterprises. The death or withdrawal of one or more of its members does not interrupt its existence or raise the need for reorganization. For it continues its existence, as Blackstone says, "in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant."[13]

GOVERNMENT REGULATION · Since the corporation is an artificial creation of the law and has only such rights and privileges as the law gives it, its form and status must necessarily differ much from State to State. The corporation codes of the various States, that is, the sets of laws relating to corporations, are long and detailed and usually governed by several sections of their constitutions. Until the middle of the last century, corporation charters were in most States granted individually by an act of the legislature. This, however, led to great abuses, since those seeking incor-

[11]Bureau of the Census, *Statistical Abstract of the United States, 1942*, pp. 211, 233.

[12]National Resources Committee, *The Structure of the American Economy* (June, 1939), p. 105. For a new interpretation of the nature of the modern business corporation cf. A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (1933).

[13]W. Blackstone, *Commentaries on the Laws of England* (Chitty ed., 1832), Vol. I, p. 468.

poration sought through personal influence to secure special favors in the act of incorporation. The provision of the Ohio constitution of 1851 that "the General Assembly shall pass no special act conferring corporate powers" was representative of the movement to displace legislative action and authorize incorporation by general statute. Now the usual procedure is for the incorporators, usually at least three in number, to draw up articles of incorporation, to be filed with the secretary of state or a corporation commission. What these shall include is determined by the law of the State. Among the usual requirements are the designation of a corporate name and the place of the principal office of the corporation; the designation of the classes of stock and their number and par value, and of the amount of capital with which the corporation will begin business; and a few general provisions respecting the internal government of the corporation, such as those defining the rights of the various classes of shareholders and guaranteeing that every shareholder shall have one vote for each share of stock. If the articles comply with the laws of the State, the proper officer is under obligation to grant the charter.

MISCELLANEOUS REGULATIONS · Democratic jealousy of any person or thing grown too strong, as well as many positive abuses, led to a strong popular sentiment in favor of the strict regulation of corporations. A separate article dealing with corporations is now a feature of nearly every State constitution, that of Oklahoma covering nearly nineteen closely written pages. Regulations deal with the internal government of the corporation, its financial structure, or its relations with the public and other corporations. While the internal government of the corporation is usually left largely to the corporation itself, there are a few regulations which are common. These cover such matters as the adoption of a code of by-laws at the first meeting; the date of the annual meeting; formal notice of meetings; voting by the stockholders; the choice of certain officers, such as president, secretary, and treasurer; the proper keeping of accounts; the preparation of an annual profit-and-loss statement for the benefit of the shareholders; and the procedure in effecting a reorganization and in the issuance of stock.

Each State counts those corporations as "domestic" which it has created, and those as "foreign" which it has admitted from other States. A corporation has no existence outside the parent State except as others are pleased to give it recognition. Generally a foreign corporation may do business in a State by filing with the proper agency its articles of incorporation and a list of its stockholders and other miscellaneous data, and paying a license fee. But consent to this action is conditioned upon its compliance with the form and purpose of the laws of the State.

Corporations must follow the general business regulations laid down by the police power of government, and usually others applying only to themselves. These, for the greater part, are inspired by the fear of monopoly and of the potentialities of its overgrown power.

## *TRUSTS AND MONOPOLIES*

THE PROBLEM · A monopoly is said to exist in a given commodity when one individual or concern is able to fix its price. Historically monopolies have long been regarded as evil and detrimental to the public good (except in the field of public utilities), and the English common law held all agreements in restraint of trade and commerce invalid. Free competition by individuals in the economic field is the basic feature of the American system, by which is implied a struggle in which some prosper and others perish, with the consumer the beneficiary of low prices and better goods in greater variety. But when the combat extends to the point where only one of the combatants survives, leaving him to set the price as he will, then free competition has ended as to that one product. Government then may enter the scene in order to restore competition, by resuscitating the vanquished combatants, or to oppose its ideas of rates and services to those of the monopolizing concern. Monopoly is evil not only because it stalls the system of competition but because it deprives individuals of an opportunity to make their contributions to the system of production.

TRUSTS · The word *trust* carries the idea of a business concern of great size, possessed of the power to exert monopoly over one or more products.[14] Originally it referred to a legal type of organization in which the stock of corporations to be combined was exchanged for trust certificates in the new superorganization. The appearance of large business units created by the absorption of smaller ones was particularly marked in the 1880's. Combinations in the fields of sugar, steel, oil, and railway transportation, accompanied by sudden price changes and arbitrary shifts in service, greatly incensed public opinion. The demand for the curbing or even the destruction of these large units was such as no political party could ignore.

STATE LEGISLATION · The fear fostered by government itself respecting monopolies had come down from the time of Elizabeth. The Maryland constitution still carries the clause placed there in 1776 that "monopolies are odious, contrary to the spirit of free government and the principles of commerce, and ought not to be suffered," while substantially the same was found in the earliest constitutions of North Carolina, Florida, Tennessee, and Texas.[15] The crusade against private monopolies, however, did not get under way until after the Civil War, at which time large business units were beginning to appear. In 1884 there appeared a national Anti-monopoly party which made nominations for President and Vice-President of the United States. Kansas in 1887 passed a statute against monopolies in grain, and two years later made it general. Seven other States had followed by the early part of 1890, and within a decade twenty-nine had so

[14] J. W. Jenks and W. E. Clark, *The Trust Problem* (1929), pp. 22–44; H. D. Koontz, op. cit. chap. xix.

[15] *Constitution of the State of Maryland*, Declaration of Rights, Art. 41.

legislated. By 1929 all but half a dozen had antitrust provisions in either their constitutions or their laws or both. New Jersey, until the advent of Governor Woodrow Wilson, was known as the mother of trusts, because of its tolerant attitude toward corporations.

## *FEDERAL ANTITRUST REGULATIONS*

The States had thus prepared the way for national legislation against trusts and monopolies. Federal action, however, could be made to apply only to acts of monopoly directly affecting interstate commerce and concerns engaged in such commerce. Since the offending trusts were organized under State laws and subject to the State's police power, the States were fully competent to deal with monopolies existing within their respective borders; but their effectiveness was greatly weakened when it came to monopolies operating beyond State lines. To reinforce this weak spot the act of 1890 was passed.

THE SHERMAN ANTITRUST ACT · Senator John Sherman, of Ohio, in the course of the debate in Congress, stated that combinations "unlawful at common law now extend to all the States and interfere with our foreign and domestic commerce and with importation and sale of goods subject to duty under the laws of the United States, against which only the general government can secure relief. They not only affect our commerce with foreign nations, but trade and transportation among the several States."[16] The antitrust law which was enacted soon thereafter attacked the problem by declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Suitable punishments were provided for those engaging in such monopolistic practices, and persons injured by reason of monopolistic practices were authorized to sue in Federal courts to recover threefold damages. Furthermore, the courts were empowered to restrain threatened violations of the act by issuing injunctions, and the property involved in the violation might be forfeited to the government.

ENFORCEMENT · The enforcement of the act from the beginning has been fitful and hesitating, alternating inaction, vigorous prosecution, and light slaps on the wrist, and, like ancient equity, depending on the length of the Attorney-General's foot. In the first thirty-six years of the life of the statute three hundred and seventeen suits were filed against alleged trusts, which resulted in nine hundred thousand dollars in fines and a few injunctions, dissolutions, and prison sentences.[17] The causes of weak enforcement were chiefly three: inadequate enforcement machinery, political favoritism, and a genuine lack of conviction as to the soundness of the

[16] J. W. Jenks and W. E. Clark, op. cit. p. 224.
[17] Ibid. pp. 245, 246.

policy of the act. Even President Theodore Roosevelt, its most vigorous champion, felt moved to make a distinction between "good" and "bad" trusts. Special interests from time to time appealed in turn to the Attorney-General, the courts, and Congress to make exceptions in their cases.

"Good" Trusts and Combinations · In how many instances the various Presidents discountenanced the prosecution of trusts and combinations will never be known, but the exceptions made by Congress are matters of record. The Webb-Pomerene Act, of 1918, excepted combinations entered into for the purpose of engaging in the export trade where such action seemed necessary in order to meet foreign competition. A section of the Clayton Act declared that the antitrust laws should not be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for mutual help and not conducted for profit. The Capper-Volstead Act, of 1922, exempted agricultural associations for the purpose of processing and marketing their products, provided prices were not "unduly enhanced"; and the Miller-Tydings Act, of 1937, added contracts for the resale of trade-marked goods. The production, processing, and marketing agreements, sweepingly required by the National Labor Relations Act of 1933, were given a blanket exemption from the antitrust restrictions.

Industrial Mergers · Combinations in the manufacturing of some of the leading commodities were the first to be attacked. Suits against the whisky and sugar trusts were dismissed, on the ground that they were combinations engaged in manufacturing, a State matter, and not in interstate commerce. Before long, however, the law was held to apply to certain iron-pipe manufacturers and meat-packers, on the ground that, while not interstate commerce, their activities affected the flow of such commerce. In 1911 the Standard Oil Company of New Jersey was ordered dissolved, and compliance resulted in the rechartering of its constituent parts in the various States. Suits against the Steel Trust, which had merged one hundred and eighty independent concerns, and the International Harvester Company, which at the time produced 85 per cent of the harvesting machinery sold in the country, were lost for one reason or another.

Prohibited Practices · A mere merging of the competitive concerns in a natural competitive area may be an infringement of the act; and so may practices which independent concerns agree upon, or which a large concern uses with respect to its own business.[18] The price-maintenance scheme of a proprietary-medicine manufacturer who used distinctive marks and wrappings to identify his products and those who dealt in them was condemned,[19] as well as that of an owner of motion-picture films who bound theater-owners to charge a minimum admission price and not to use double features.[19] A manufacturer, however, may announce to his

[18] *Miles Medical Co.* v. *Park and Sons*, 220 U. S. 373 (1911).

[19] *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208 (1939).

customers that he will not sell again to those who cut prices, as the Court has found this only a valid exercise of his independent discretion.[20] Trade associations for the distribution of statistical facts, including amounts of sale and production in various areas, prices, stocks on hand, and costs of handling and transportation, have been held legal, because the purpose of the act was not "to inhibit the intelligent conduct of business operations."[21]

THE "RULE OF REASON" · Should the Sherman Act be enforced to its very letter, even when restrictive agreements seem to be for the public benefit, or should the test of reasonableness be applied? In 1911 the Supreme Court adopted the latter alternative. In 1937 the Court held that Appalachian Coals, Inc., which acted as the exclusive selling agency for one hundred and thirty-seven producers of bituminous coal, was not violating the act.[22] The distressed condition of the industry, which had a productive capacity of seven hundred million tons a year and a normal demand of only five hundred million, had brought about intolerable practices, resulting in unemployment and great losses to both management and labor. The Court said that the question was whether there was "an unreasonable restraint of trade or an attempt to monopolize." If such was not the case, the combination was not to be condemned. The whole matter was thrown into doubt, however, by a ruling of the revamped Supreme Court in 1940 to the effect that all price-fixing is a violation of the Sherman Act even though it does not raise, lower, or stabilize prices.[23]

APPLICATION TO LABOR · Organized labor, by boycotts, strikes, and walkouts, has the ready means to obstruct interstate commerce. Do the antitrust laws apply to combinations and agreements for that purpose? The question was answered in the affirmative in the Danbury-hatters case of 1908.[24] This union and its parent, the American Federation of Labor, had conducted a nationwide boycott campaign against a hat-manufacturing company of Danbury, Connecticut, which brought suit for triple damages. The Court ruled that this was a conspiracy to prevent interstate shipment of the hats and that the law applied. In 1925 the law was applied to workers in certain coal mines who had conspired to attack and destroy a nonunion mine and keep its production out of interstate shipments; two years later it was applied to an order of a national stonecutters' union requiring all members of the affiliated locals not to work on stone brought from an Indiana quarry whose workers did not belong to the national union. In 1911 Samuel Gompers, president of the American Federation of Labor, was held liable under the law for advertising in

[20] *United States* v. *Colgate and Co.*, 250 U. S. 300 (1919).
[21] *Maple Flooring Mfrs. Assn.* v. *United States*, 288 U. S. 563 (1925).
[22] *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344 (1933).
[23] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).
[24] *Loewe* v. *Lawlor*, 208 U. S. 274 (1908).

his official journal a boycott against a stove-manufacturing company which had employed nonunion labor.[25]

A declaration had been written into the Clayton Act of 1914 to the effect that nothing in the antitrust laws should be held to forbid the existence of labor organizations or to forbid them from carrying out their "legitimate objects"; nor should they be held to be "illegal combinations or conspiracies in restraint of trade." The wording obviously conceded the right of organization, but did not give immunity from unlawful acts, whether under the antitrust law or any other law. The prosecutions of President Roosevelt's crusading Assistant Attorney-General Thurman Arnold, however, were cut short by several new court decisions. Labor, by judicial decree, was given the exemption from the Sherman Act which Congress earlier had accorded the farmers and some businesses. In the case of *Apex Hosiery Co.* v. *Leader* the lower court had awarded the company $237,310 in damages against a labor union for the seizure of its plant, the wreckage of machinery, and stoppage of work for three months; these damages were then trebled to $711,932.55 under the terms of the Sherman Act.[26] Chief Justice Stone, for the Supreme Court, applying the "rule of reason," admitted that the acts complained of were a restraint of interstate commerce, but declared that they were not such as were prohibited by the Sherman Act. In another case Justice Frankfurter, writing for the majority, held that the picketing and a secondary boycott of a company engaged in interstate commerce lay outside the Sherman Act because they occurred in an "area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of the courts."

THE CLAYTON AND FEDERAL TRADE COMMISSION ACTS · The Clayton and Federal Trade Commission Acts were passed in order to close the loopholes in the antitrust acts, revealed in the course of the attempt to enforce them. It was now forbidden to sell or lease goods or fix prices on the condition that the purchaser should not use the goods of a competitor. Concerns engaged in interstate commerce might not buy the stock of another where the effect would be to lessen competition; but purchases purely for investment were allowable. Interlocking directorates, a device by which a number of otherwise independent concerns were able to secure unity in prices and in practices by having one or more men elected to membership on all the boards, were banned for all except small firms. Tying agreements, by which the purchaser of one product binds himself to purchase others from the same concern, were declared illegal.

[25] *Bucks Stove and Range Co.* v. *Gombers*, 221 U. S. 418 (1911). See also *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1921); *Bedford Cut Stone Co.* v. *Journeymen Stone-Cutters' Assn.*, 274 U. S. 37 (1927).

[26] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Hutcheson*, 61 S. Ct. Rep. 463, 465 (1941).

RESULTS OF THE ANTITRUST ACTS · Plainly the antitrust laws have not succeeded in their purpose of preventing monopolies. It is true that a few large concerns, including the Standard Oil Company of New Jersey and the Northern Securities Company, were dissolved, and the threat of the laws undoubtedly was a discouragement to the formation of others. The trust problem, however, presents a quandary which has stood in the way of wholehearted enforcement. It may be stated in the following terms. Present-day techniques make large-scale production the most economical for all parties concerned: the producer of raw materials, the manufacturer, and the consumer. Large-scale production calls for large-scale organization, management, and control; and these, in turn, lessen competition and generate monopolistic practices. With the decrease in the number of independent producing units the rapid fluctuation in prices characteristic of a rural economy no longer exists. Prices are set by big business for long periods: a month, a season, or a year. To break the big concerns into small units would be only to raise the cost of production and increase the cost of living. Manufacturers of the same goods are doubtless able to make agreements to suit their purposes, whether legally combined in one entity or not. Price is determined by considerations of the possible sales at each level, as well as competition within the trade and with products outside which might be used as substitutes. On all these the antitrust laws probably have only a negligible influence.

Another weakness is the uncertainty of the law, which draws no clear line but leaves big business to operate at its own risk. Some of this uncertainty is due to the Supreme Court, whose rulings have been somewhat like the Irishman's trolley car: "off agin, on agin, gone agin." Any one of three tracks may be chosen, according to the destination chosen by the Court's majority. Those of the "rule of reason" and "fidelity to the text" take to opposite points; while shunting to the sidetrack leads to a quiet spot, exempt from future collision with the law. Other uncertainties are due to the divergent economic views of the successive Presidents as reflected in their enforcement policies.

These defects, pronounced as they are, do not necessarily outweigh the merits of the law. Its repeal would leave the way open for gigantic monopolies, which could operate openly and without handicap. It remains as a bar against the more flagrant evils. A restatement of the law by Congress, and a closer adherence by the courts to their judicial function, would doubtless contribute to the accomplishment of its original objective.

## *COMPREHENSIVE CONTROL OF BUSINESS*

The National Industrial Recovery Act was in effect for little more than two years, between 1933 and 1935, and has been a matter of history for a decade; but there are strong reasons why the student of the American

government of today should understand its essentials. It went far beyond any other scheme for governmental control of economic life attempted in the United States; in fact, it was comparable in extent to the economic controls in contemporary Italy and Germany. This act and the attendant acts relating to agriculture and mining embraced the entire national economy of production, trade, and commerce. In doing so it ignored constitutional lines and freely occupied fields of State jurisdiction. Its policy was the direct opposite of that of the antitrust acts: competition now was viewed as leading to low profits and wages and to alternations between excessive and deficient production. Price, production, and trade-practices agreements not only lost their odium but became integral parts of the new scheme, subject to governmental approval. The operation of the antitrust acts in the government-controlled fields was suspended.

PURPOSES OF THE ACT · The National Industrial Recovery Act was passed as an emergency measure, on June 16, 1933, at the time of the world-wide business depression.[27] The declaration of policy in the preamble shows the sweeping nature of its objectives: "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; to induce and maintain united action of labor and management under adequate governmental sanctions and supervision; to eliminate unfair competitive practices; to promote the fullest possible utilization of the present productive capacity of industries; to avoid undue restriction of production (except as may be temporarily required); to increase the consumption of industrial and agricultural products by increasing purchasing power; to reduce and relieve unemployment; to improve standards of labor; and otherwise to rehabilitate industry; and to conserve natural resources."

The aim, in short, was a general co-ordination and regulation of all industry and business through the collaboration of management and capital, labor, the consuming public, and government. Production would be set at actual needs, and prices at a level to make possible adequate consumption by all classes; the income of labor would be increased by setting minimum wages, and more jobs would be provided by shortening the hours of labor. Incidentally, the unionization of labor and collective bargaining were to be fostered. The means used to accomplish the general purposes of the act were three: regulation of the amount of output and sales, price-setting, and price-filing.

THE NATIONAL RECOVERY ADMINISTRATION (NRA) · Congress turned over to the President the task of organizing an administration for the act. He was given blanket authority to create offices and fill them, set salaries, and prescribe duties; and was empowered to delegate to subordinate officers such of his powers under the act as he thought fitting. In this way was created the National Recovery Administration, whose form changed

[27] 48 Stat. 195 (1933).

from day to day but retained these essentials: the administrator, who was in direct charge of the entire machinery and immediately responsible to the President; two assistant administrators, one for labor and one for industry; and five divisional administrators, in charge, respectively, of the divisions of extractive industries, textile trades, metals, chemicals, and transportation and amusements. Under this organization was the network of local offices and representatives scattered throughout the country.

CONTROL BY CODES · The NRA exerted its power of management and regulation chiefly through codes of "fair competition," which were to have been set up for each industry.[28] The codes were a written agreement to govern all the incidents of the business. They were to be drawn up by management and labor, and, when approved by the President, to have the force of law. If, however, none was forthcoming from an industry, the President himself might prescribe a code of fair competition after suitable hearings. No code could be approved unless it was truly representative of the industry, including both labor and management; and in no case could a code be approved if its effect was to promote monopolies. Besides certain required labor regulations the code might set maximum rates of pay and "other conditions of employment approved or prescribed by the President." Finally, if the President found destructive wage-cutting or price-cutting in any industry, in defiance of the policy of the act, he might require the offender to take out a license as a condition to carrying on business.

MAKING THE CODES · The initiative for a code normally came from within the industry. The proposal was laid before the deputy administrator; and hearings were held at which all producers had the right to debate the proposals. Consultations were had with various divisions of the National Recovery Administration, such as those on Research and Planning, the Labor Advisory Board, or the Consumers' Advisory Board. The code as amended would then go before the divisional administrator; after his scrutiny, to the administrator; and finally to the President himself, whose judgment in matters of dispute was final. In the course of this procedure manufacturers, dealers, consumers, representatives of geographical sections, and labor leaders all had a chance to be heard. Over seven hundred codes were drawn up and approved, covering some phase of every industry in the country. Among the more conspicuous ones were those of cotton textiles, iron and steel, copper, milk, meat-packing, coal-mining, cleaning and dyeing, petroleum production, hosiery-manufacturing, jewelry, and book-publishing.

ENFORCEMENT · While much reliance was placed on public opinion, the chief instrument for enforcement was the Code Authority. Its typical

[28]For a brief general account of the national recovery program cf. A. A. Berle, Jr., and others, *America's Recovery Program* (1934).

constitution was five members chosen by the industry, voting according to each company's amount of annual sales, and three others to represent the administrator, but without votes.[29] For the larger industries there were Regional Code Authorities, which in turn had local agents where the amount of business warranted them. The Code Authority was expected, from time to time, to recommend modifications in the codes of the industry, and measures for correlation with the codes of related industries. As a means of securing popular support of the program, placards bearing a blue eagle were issued, to be placed in the windows of the firms complying with the act; and flagrant violations were punished by a withdrawal of the placard.

PRODUCTION CONTROL · One of the simple rules of economics in a free economy is that price is set by the interplay of demand and supply. In the depression after 1929 the demand for commodities in general was greatly decreased, not so much by a lessened need as by a lack of income to pay for the goods. The sudden decrease in effective demand left large stocks of manufactured goods on hand, causing a stoppage of production, widespread unemployment, and an ever-decreasing demand for goods. Unemployment thus increased in a geometrical ratio. The NRA planned to raise prices by creating an artificial scarcity, and, in order to take care of men thrown out of work, to shorten the work week so that more men would be used in doing a given amount of work; and, finally, to alleviate the cuts in income from shortened hours by increasing the hourly wage. The various codes were fashioned to bring about these results.

About one hundred and twenty of the codes adopted provided for some form of control over production, in only ninety-one of which was the control effective.[30] Various methods were used. Seven provided for direct production quotas; three, for limitations on inventories of stock on hand; one, for the voluntary sharing of business; thirty-two, for limitations on the installment of new capacity; and sixty-one, for limitations on plant hours.

THE CONTROL OF OUTPUT OR SALES · Limitation of output or sales was employed chiefly in the extractive industries, such as those of petroleum, copper, lumber, and timber. The aggregate volume was to be set at the point where the price obtainable yielded a reasonable profit; and this was allocated proportionately among the various producing units. In every industry difficulties were encountered which seem inherent in a system of artificial control. The inherent difficulties in production control were well illustrated in the case of the fishing industry.[31]

Output control for the large and highly centralized industries was more easily administered than for the scattered and smaller ones. Code

[29]M. F. Callaghan, *Government Rules Industry*, p. 44.

[30]C. A. Pearce, *NRA Trade Practice Programs*, pp. 93–102.

[31]National Recovery Administration, Division of Review, Evidence Study No. 13, *The Fishery Industry* (1936).

regulations for the copper-producers, for instance, were responsible for an increase in price of about 10 per cent. The petroleum and lumber industries, with their numerous sources, however, presented difficult problems. With respect to the latter the allocation of quotas to thirty thousand different mills was complicated by the large variety of their products; and when profits rose, several thousand new mills entered the industry and applied for quotas.

OTHER PRODUCTION CONTROLS · Other means for the control of production were the limitation of the hours of plant operation; the restriction of plant capacity or the amount of stocks which a manufacturer might have on hand; and the forced sharing of business among the various producers, a revival of the ancient "pool," which had been prohibited by the Sherman Act.

The first named was authorized in sixty-one of the codes, chiefly those applying to textiles, jewelry, sewing machines, rice-milling, and wallpaper. A careful student of such restrictions concluded that in few cases were they effective in curtailing total production, but that they often handicapped certain types of establishments. Thirty-two codes limited plant capacity by prohibiting the installation of new machinery or plant enlargement. Such restrictions seem to have had little beneficial result, and on the other hand they were applied with little consideration for public convenience.[32]

PRICE CONTROL · Price control, except for public-utility charges, heretofore had been regarded as outside the domain of government. In 1934, however, the United States Supreme Court, in the case of *Nebbia* v. *New York*,[33] had upheld a law setting maximum and minimum prices for milk, holding that there was "no closed category of businesses" affected with a public interest, and that the legislature was the "judge of the necessity for establishing price scales in the interest of consumer, producer, and the public." Five hundred and sixty of the first six hundred and seventy-seven codes contained some provision relating to minimum prices or costs.

The approach to price control was by three avenues: direct price control, the prohibition of prices below the cost of production, and price-filing. At least twelve codes authorized the establishment of prices without reference to the cost of production, chiefly in the distressed industries based on the extraction of natural resources, such as coal, lumber, and petroleum. The minimum prices set for coal brought about an advance above the 1929 level, but employment was down 20 per cent and production 37 per cent. Minimum prices for lumber brought five thousand additional mills into production, and price-setting was soon abandoned at the request of the industry. Much the same result ensued for oil, iron, and steel. Price codes were made for barbers, laundries, shoe-repairers, and cleaners and dyers, but only that of the last named went into effect.[34]

[32]C. A. Pearce, op. cit. p. 120; H. B. Drury, op. cit. pp. vii–ix.

[33]*Nebbia* v. *New York*, 291 U. S. 502 (1934). [34]A. R. Burns, *The Decline of Competition*, pp. 471 ff.

The sale of goods below the cost of production was forbidden in four hundred and twenty-one codes, the effect of this prohibition being to give the market to the producer with the lowest cost. This and consumer protests and widespread violations led in the summer of 1934 to code amendments by which the prohibition was shelved except for an "emergency."[35] The scheme of price-filing included in four hundred and forty-four codes required the listing of prices with the Code Authority, not to be changed without a notice of from ten to twenty days. Among the difficulties of administration were the manipulation of the classification of goods, differences in freight costs, and the disposal of damaged or outmoded goods and stocks. In only about one third of the industries included was the filing nearly complete. Consumers protested, and even the government favored itself in its purchases by permitting a "tolerance" of 15 per cent below the filed prices. The system was on the way out before the final demise of the NRA.

END OF COMPREHENSIVE CONTROL · This first experiment in central-government control of the entire American economy lasted a little more than two years. The executioner, however, was not its author but the Supreme Court. In setting up the NRA, Congress could not well have been ignorant of the fact that it was giving powers to the Federal government which constitutional law, as interpreted up to that time, had accorded to the States; but the severity of the economic dislocation overshadowed questions of legality. By a unanimous decision the Court ruled the act invalid, on the ground that it usurped the reserved powers of the States and handed over legislative powers of Congress to the executive.[36] In spite of many protests the decision was a blessed event, because it terminated a scheme which already had gone far toward disintegration.

THE FUTURE · The Court, of course, was not ruling on the desirability or value of comprehensive government control. On the basis of subsequent Supreme Court decisions the objection of usurpation of State powers would no longer stand, and that of the delegation of legislative powers could be side-stepped by a more careful draftsmanship. The way therefore lies open for the adoption of some such plan in the future should public opinion demand it. The experience gained by the first attempt may well be of great value in shaping future relations between government and industry in the United States.

## *PACKERS AND STOCKYARDS*

Farmers and stock-raisers had long been the victims of price manipulations by packers, commission men, and operators of stockyards in the great shipping and meat-packing centers. Prices might be forced up for a few

[35] A. R. Burns, op. cit. pp. 479 ff.

[36] *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495 (1935).

days, only to be forced sharply downward by collusive bidding, after shipments had been rushed in from the distant farms. Other grievances were the high charges for storage and for feed for the livestock. In 1920, as a result of a suit begun against the "Big Five" packers under the Sherman Act, a consent decree was entered into by which they were forbidden to own stockyards, terminal railways, or market newspapers; to operate retail meat markets; or to have any interest in the manufacturing or selling of food products unrelated to the meat-packing business.

THE PACKERS AND STOCKYARDS ACT OF 1921 · This law initiated a comprehensive scheme of regulation applying to all the larger stockyards.[37] No person may carry on the business of a dealer or a market agency unless registered with the Secretary of Agriculture. A dealer or agency is placed under bond, and his registration may be canceled for violations of the act or for financial irresponsibility. Stockyard operators are required, upon request, to furnish reasonable service without discrimination. All rates must be just, reasonable, and nondiscriminatory; must be posted with the secretary; and must not be changed except on ten days' notice. The secretary may suspend the operation of a new schedule for thirty days, and, after a hearing, make an order setting reasonable rates. Both packers and stockyard operators are forbidden to engage in unfair, discriminatory, or deceptive practices, a number of which are listed and parallel those forbidden by the Sherman Act and the Federal Trade Commission rulings.

ADMINISTRATION · The enforcement of the act is in the hands of a division of the Bureau of Animal Industry of the Department of Agriculture. Complaints may be made to the secretary, which are forwarded to the offender. If reparation is not made, an investigation is held, and damages may be awarded. The secretary may apply to the courts for the enforcement of his awards or orders. Considerable reliance for the enforcement is placed on co-operation with the State livestock commissioners or departments of agriculture. The act was upheld by the United States Supreme Court in the case of *Stafford* v. *Wallace* as a valid exercise of the power to regulate interstate commerce.[38]

## *PATENTS, COPYRIGHTS, AND TRADE-MARKS*

The drafters of the Constitution gave Congress the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." *Letters patent* is a legal phrase referring to the issuance of a document by a sovereign authority conferring a special privilege on a person or persons. Letters patent were used in England for a wide range

[37] 42 Stat. 159 (August 15, 1921).
[38] *Stafford* v. *Wallace*, 258 U. S. 495 (1922).

of royal grants, including title to lands; monopolies and trading privileges, such as those accorded the East India Company and the Virginia Company; and the conferring of titles of nobility. While monopolies in general were contrary to the common law, exceptions were made by statute in England and the colonies with respect to the works of authors and inventors. In American terminology the term *patent* is applied to the monopoly given inventors for their discoveries. The justification for the law is the incentive to production and the enrichment of society.

ADMINISTRATION · The administration of the act of 1790 was given to the heads of the three executive departments; but the work fell to the Secretary of State, Jefferson, who in that day of simple government organization examined the applications himself. In 1802 the office of Superintendent of Patents was created and placed in the State Department. A law of 1836 revised the patent laws and established the office of Commissioner of Patents. It was transferred in 1849 to the Department of the Interior and in 1925, by Presidential order, to the Department of Commerce.

WHAT MAY BE PATENTED · The law of 1790 required that the applicant should have "invented or discovered" a "useful art, manufacture, engine, machine, or device, or any improvement therein, not before known or used."[39] In 1793 the term "composition of matter" was substituted for "device," and in 1842 "ornamental design." In 1930 "botanical plants" was added. The law now reads: "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof" or "any distinct and new variety of plant."

GRANTING A PATENT · The applicant must file a petition, to include a description of the invention, a statement of how it was made, drawings (when feasible), the principle involved, and a designation of the part, improvement, or combination which is new. An examiner then makes an investigation and writes a recommendation, which, if negative, may be reviewed by a board of appeals chosen from the head examiners and assistant commissioners. If this board reaffirms the original decision, appeal may be taken to the United States Court of Customs and Patent Appeals.

The conditions positive and negative necessary for the granting of a patent are clearly specified. The thing must have utility, but need not necessarily be commercially successful. Inventions that are dangerous or injurious to the health or morals of the people may not be patented. Also excluded are things known or used in the United States before the time of the alleged invention or patented or described in a publication by some other person in a foreign country before the date of invention or more than two years before the date of application. New designs, new compositions and mixtures, new arts, as well as new machines and devices, are eligible.

[39]L. S. Lyon, M. W. Watkins, and V. Abramson, *Government and Economic Life* (1939), Vol. I, pp. 120, 121.

The patent gives the inventor or owner the exclusive right to manufacture, use, or sell the invention throughout the United States.[40] If the right is infringed, the remedy lies in a suit for damages; and threatened infringements may be enjoined. Patents, in general, are given for a period of seventeen years and are not subject to renewal.

RESULTS · One of the criticisms made against the patent system concerns its relation to industrial monopolies. Producers may be excluded, as it were, from fenced-off fields by the accumulation of patents in the hands of one powerful concern, some of which are purchased only to be suppressed. In the automobile industry it was found to be to the advantage of all to interchange patent rights without royalty.[41]

Other criticisms relate to the giving of patents on small details, which later may block major inventions; the delays due to the number of applications and the difficulty of determining the priority of claims; and the time and expense of patent suits, which often are used by powerful concerns for the purpose of squeezing out new inventors or forcing them to sell at low prices. Another criticism arises from the "Patent pending" device, which often is used as a means of extending the life of an invention well over its seventeen years.

Despite these weaknesses the results on the whole have been highly beneficial. The United States leads all other nations of the world in the number and importance of its inventions. These have served, along with the great natural resources, to build up its high-geared industrial system. The privilege of the exclusive right to an invention is not only a stimulant to further invention but an aid in the financing and organizing of the production of the new article. In the first decade of the law the number of patents issued averaged 27 a year; in the mid-century decade it had risen to 2130; and it stands now in the neighborhood of 50,000 annually.[42]

COPYRIGHTS · A copyright is a grant by government, to an author, of an exclusive right to the use of his production.[43] The present act extends the privilege to many things outside the original conception. Included are books, periodicals, maps, music, photographs, drawings, prints, dramatic compositions, lectures, and sermons, whether printed or in long hand. The "news" of a newspaper cannot be copyrighted unless written in a distinctive style or in the form of a commentary. Citizens of the United States, and aliens whose home government grants the same privilege to citizens of the United States, are entitled to the copyright privilege.

ADMINISTRATION · The administration of the copyright laws is in the hands of the Copyright Office, which is an adjunct of the Library of Con-

[40]F. P. Hall, *Government and Business* (1939), p. 337.

[41]Temporary National Economic Committee, *Investigation of Concentration of Economic Power*, Pts. 2 and 3, pp. 253–1159.

[42]Temporary National Economic Committee, op. cit. Pt. 3, pp. 843–845; F. P. Hall, op. cit. pp. 334–346.

[43]35 Stat. 1075.

gress. The procedure in obtaining a copyright is much simpler than that with patents. The deposit of two copies of the published work, with the proper fee, is sufficient. Lectures and the like, and musical or dramatic compositions, if not reproduced for sale, may be registered by the deposit of one copy; while motion pictures require only a title and description and a few prints. No search is made, as with patents, to ascertain whether the material is original, questions of originality and infringement being left to the courts. Infringers are liable not only for damages but also for the profits so obtained; and the willful pirating of a copyright for profit is a criminal offense.

RIGHTS OF THE COPYRIGHTER · Copyrights are given for a period of twenty-eight years and may be renewed for another period of that length, and they may be disposed of in the same ways as property in general. The copyright carries the exclusive right to print or otherwise duplicate the text or designs; to translate it into other languages; or to perform it in public. This holds for music, sermons and lectures, and dramatic compositions, but unauthorized musical productions not for profit are not forbidden. The legal problems respecting copyrights are comparatively simple. The exclusive right is not given to the idea but only to the form in which it is expressed; the former becomes a "free good," for whatever it may be worth.

RESULTS · The copyright laws have doubtless lent a great stimulus to writing. Their importance for the commercial world is marked in the fields of book and magazine publishing, photography, and to a smaller degree in theatricals and dramatics. An International Copyright Union, of more than half a century's existence, which gives protection to authors in all the member states, has not been adhered to by the United States; but American authors are protected abroad by treaties with individual states. Some manufacturers have urged that the registration of designs, as in fabrics, carpets, and other commercial articles, be changed from the Patent Office to the Copyright Office, because the slow machinery and technical character of the patent law fail to give adequate protection against pirating competitors.

TRADE-MARKS · Trade-marks are marks, drawings, or symbols used by manufacturing companies to identify their goods in the public mind. They are of great importance in commerce, because the prestige of a manufacturing concern is an important item in merchandising. The general power to legislate regarding trade-marks rests with the States, but Congress may act with respect to those used for goods in interstate and foreign commerce. Federal laws now set up the procedure for their registration and cancellation, and for settling contests between those claiming the same mark. Trade-marks which consist of immoral or scandalous matter, or which comprise the flag or coat of arms of the United States, the picture of any President of the United States whose widow survives, or any living individual without

his consent, may not be registered. Infringement of the trade-mark by reproducing or counterfeiting may be prosecuted in the Federal courts, and goods from foreign countries infringing trade-marks so registered are denied entry. The announcement of registration is in the *Official Gazette* of the United States Patent Office, and the mark, to be of protective value, must be accompanied by the sign "Reg. U. S. Pat. Off." International registration, effective in all countries which subscribe to the convention of 1910, is carried out by the United States Patent Office upon the payment of a special fee.

## *BANKRUPTCY ADMINISTRATION*

DEFINITION AND PURPOSES · Bankruptcy laws have, as their purpose, the relief of debtors who have found themselves so deeply involved that they cannot reasonably hope to fulfill their obligations. The immediate effect is to divide the assets of the debtor among his creditors proportionately to the amount owned each and to relieve him of any further legal obligation to pay the debt. Imprisonment for debt was current in England at the time when the Constitution was adopted, although a statute of 1542 had established partial bankruptcy relief. Bankruptcy laws are socially useful, because they give incentive to the debtor to start life anew; and they serve the creditors by preventing a further dissipation of resources belonging to them and by making an equitable division for all claimants. There is, of course, nothing in the law to prevent a bankrupt who later has become affluent from voluntarily fulfilling his moral obligations by paying the debts which he previously had incurred.

THE BANKRUPTCY POWER · While bankruptcy logically is a part of the general law of property, which belongs to the States, the Fathers, for good reasons, allocated it to Congress.[44] They feared the passage of "stay," or moratorium, laws in the States, which would relieve the debtors of their debts or postpone their collection; or variations in the laws, which would put a premium on incurring debts in one State and getting rid of them in another. Congress, accordingly, was specifically empowered "to establish . . . uniform laws on the subject of bankruptcy," which the courts have held take precedence over all State legislation. However, for the greater part of our history there was no such Federal law. The present one dates from 1898; but the three previous ones were in effect only for the years 1801–1803, 1841–1843, and 1867–1868.

PROCEDURE · Bankruptcy may be *voluntary*, in which case the debtor files a petition to be so adjudged, or *involuntary*, legal action being brought by the creditors.[45] The latter may occur if one or more "acts of bankruptcy" are committed, one of which is an attempt of the debtor to transfer

[44]H. D. Koontz, op. cit. pp. 845–848; *United States Constitution*, Art. I, sect. 8, clause 4.
[45]*United States Code*, Title 11.

his property to a favored creditor. Because the handling of bankruptcy cases is as much an administrative as a legal matter, a special officer of the court, the referee in bankruptcy, was created, who receives and passes on petitions and is in general charge of the property of the bankrupt. If the property is large, a receiver may be appointed, which accounts for the occasional spectacle of an entire railroad system being under the administration of a court.

Before a case is closed, the debtor may offer the creditors through the court a "composition," which is a scheme to make an immediate partial payment of, say, 10 per cent, with subsequent payments at spaced intervals of thirty or sixty days. The object is to prevent liquidation or a receivership, which might destroy the business as a going concern and probably result in all parties' receiving but a small percentage of the amounts owed. The approval of the court and of a majority of the creditors, provided they represent the major part of the debt claimed, is necessary.

When a person has been adjudged a bankrupt, and his property divided among his creditors, he is discharged of his debts unless he has committed fraudulent acts. This, however, does not relieve him of all obligations. Taxes, alimony, money due for the support of wife or child, the wages of employees earned within three months of the beginning of the proceedings in bankruptcy, and restitution of money received by fraud or embezzlement are still due.

RECENT CHANGES · The economic collapse of 1929 had greatly increased the number of bankruptcies, even involving concerns which long had been of high stability. The cases handled by the courts in 1930 numbered sixty thousand, as compared with fifteen thousand in 1921. In many cases panic prices pulled down concerns which, with a moderate stay, would soon have become solvent. To alleviate the situation, several amendments to the law of 1898 were made.[46]

Farmers, to whom involuntary bankruptcy had not previously applied, were the subjects of the amendment of March 3, 1933. The "composition" feature, noted above, was extended to them and all other concerns except corporations, to which was added another, called "extension." This permitted an extension of the contractual time for the payment of a debt, conditional upon the making of specified payments and, in certain contingencies, upon a supervision of the debtor's property by a creditors' committee. The administration of the new provision for farmers was placed in the hands of referees, appointed by the court, called "conciliation commissioners."

Another sorely beset group, the railroads, which had suffered from costly and ineffective receiverships, were beneficiaries of the amendment. Any person or group owning 5 per cent of the railroad's indebtedness might present a plan of reorganization, which, to become effective, must have

[46] 47 Stat. 1467.

the approval of the court, the Interstate Commerce Commission, and creditors holding at least two thirds of the railroad's indebtedness. Previously the approval of all the creditors had been necessary. In 1934 the provisions were extended to corporations in general; but the move was ordinarily regarded as unsound, in that it opened the way to a fraudulent escape from obligations not permitted under the general bankruptcy law. Another amendment gave the privileges of composition and extension to workers earning not more than three thousand dollars annually.

MUNICIPAL BANKRUPTCY · Relief, however, was not confined to private individuals and corporations. An act of May 24, 1934, extended the benefits to municipalities and all other political subdivisions of the State, more than twenty-seven hundred of which, early in 1935, were in default on the principal or interest of their bonded indebtedness.[47] Creditors owning not less than 51 per cent of the unit's debts, or 30 per cent in the case of a few classes of special districts, might present a plan of reorganization, which should become effective upon the approval of the court and of creditors holding from two thirds to three fourths of the debt of each class, as the case might be. Since private individuals cannot take over a government for operation or seize its properties, the plan was limited to the scaling down of the debts.

Seemingly no one previously had contemplated applying the Federal bankruptcy power to the States. The law amounted to a thinly veiled plan of partial repudiation, which both the Federal government and the State governments have it in their power to effect, each for itself. Debts incurred by government are as much the will of the people as any other of its acts; and government has the means of paying its debts by the increase of taxes, which are a first claim on the property and earnings of all people living within its borders. Nevertheless, the act was declared invalid only by the close vote of five to four, the Supreme Court ruling that the fiscal affairs of the local governments "are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution."[48]

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CHAPTER XLIV

# *Government and Labor*

DEFINITION OF LABOR · The word *labor* is used to describe bodily exertion, chiefly physical, in the accomplishment of some useful thing, and to designate the whole class of persons so employed. By the census of 1940 there were 52,789,499 persons in the labor force of the United States, of whom 45,166,083 were classed as employed, 2,529,606 of them on emergency public work. Females accounted for 12,845,259 of the total force. Farmers were listed at 8,233,624, but this number included only 471,904 farm women. Wage or salary workers numbered 33,965,259, of whom 9,774,806 were women.[1]

The problems arising from the employer-employee relation differ sharply from those attending the ordinary commercial relation. The employer contracts to pay a stated wage, and the employee to give stated services. The exchange is of a concrete thing, money or goods, for an intangible bodily service. The employer gives over an object which he possesses; the laborer, something which is a part of himself, involving the subordination of his will to another.

GOVERNMENT AS THE THIRD PARTY · The laborer-employee's main interests are easy to see. Upon the amount of his wage and the continuity of employment depends the kind of living which he can provide for himself and family. His health and his satisfaction in his work depend much on the number of hours which he is required to work daily, his fitness for the work, and the conditions surrounding it. He usually is desirous that his children shall not be compelled to enter arduous labor at a tender age, and insists that he or his family be compensated for injuries or death which may result from employment. The interests of the employer are just as clear. He desires labor services of a high effectiveness, at a cost which will allow him a substantial profit, and a minimum obligation to pay for services when not needed. Where does government enter the picture? Its interests are those of the general public, which includes both employers and employees. It desires efficient production, continuously maintained, yielding both good wages to labor and a profit to the employer, which are essential to industrial stability; and it seeks working conditions promotive of the general welfare.

The policies of government toward labor include all the four types found in its dealing with other economic matters. Government furnishes the legal framework which establishes the respective rights of employers

[1]Sixteenth Census of the United States, *Population*, Vol. III, *The Labor Force*, pp. 3–7.

and laborers and the condition under which industry may be carried on; it gives positive aids and services of many kinds; it regulates, under the general police power; and it may itself be an employer.

## *LEGAL RIGHTS AND OBLIGATIONS*

The rights and the duties of a laborer, like those of any other citizen, are determined by the law of the land. The position of the American laborer from the beginning was largely that established by the common law of England; his position today is a result of modifications in that law brought forth by the pressure of the American environment. The lowest state of the laborer was found under slavery, where he was merely property and his will was of no account. In serfdom or villeinage he was bound to the land and bought and sold with it. Custom accorded him certain rights, and in the later phases he could secure his freedom by purchase. Peonage is a condition in which the laborer is nominally free but in fact is subject to another because of indebtedness.

The common law, at the time of the settlement of America, referred to the labor relation as that of "master and servant," which was recognized as a relation of free contract. The master could hire whomever he wished and the laborer accept such employment as he wished; but neither party was entitled to break the contract. Such special contracts for labor as those for indentured service, apprenticeship, and contract for a term of years were recognized. With the numerous modifications of our labor law in the twentieth century, including the protection of wages from garnishment and assignment, and the right to organize and bargain collectively, the labor relation is now referred to generally as that of employer and employee.

THE EMPLOYER-EMPLOYEE CONTRACT · The typical commercial contract involves an agreement between two parties to exchange a named amount of money for a certain amount of goods. The contract between employer and employee involves the exchange of services for money or some other valuable good. The element of personal service sets it off from the former, and necessarily raises the questions of the healthfulness of the environment in which the work is done, the number of hours required, and the speed and quality of the work. Because of the human and social factors, government has intervened in many ways to limit the freedom of both employer and employee to make contracts.

Another respect in which the two are sharply differentiated is that the labor contract normally cannot be enforced. Failure of the laborer to fulfill his contract makes him liable to a suit for damages; but such a suit is futile, since he may be entirely without property, and since such as he has and his future wages are protected against seizure by law. The violation of commercial contracts may be remedied by an award of damages or "specific performance"; but in the case of labor the latter is not

available, because it would amount to involuntary servitude. The labor contract consequently is radically different from all other kinds of contracts, a fact of which the great volume of Federal and State legislation on the subject is full evidence.

INDIVIDUAL V. COLLECTIVE ACTION · The common law viewed the laborer as a free individual, competent to make his own decisions and pursue his own plans. In the early days of this doctrine it was a liberal one, since it signified his liberation from the dominance of the lord of the manor or the artisans' guild. In later days, when he came to realize the weakness of his bargaining position as compared with that of the employer of many laborers, he turned to his fellow workers for collective support and to government for legal backing. The doctrine of individual freedom and responsibility was of great utility under a rural economy; but when the employer of a few gave way to a personnel director hiring several thousand, there was a clear necessity for meeting the concentrated power of management and capital with the collective power of thousands of workers. Collective action for labor finds expression in organizational activities, the concerted stoppage of work, the exhortation and persuasion of fellow workers, refusal to purchase goods from or to patronize certain firms, the holding of mass meetings, and bargaining with the employer. The past few decades have been a transition period, in which the collectivist point of view with respect to labor relations has steadily gained in Congress, the State legislatures, and the courts over the individualistic point of view.

UNIONIZATION · The common law looked with a hostile eye on combinations among individuals for the purpose of carrying out selfish ends. Those of the rich and powerful might have the purpose of overthrowing the government; those of the poor, of creating disorder or despoiling the propertied class. The general rule was that a combination of two or more persons, by concerted means, to do that which was unlawful, or to injure the public or individuals, constituted a criminal conspiracy. The English courts ordinarily held that combinations of laborers to raise wages fell in this category. The early American courts followed this rule, but shortly before the middle of the last century began to recognize that the objects of raising wages and ameliorating conditions were lawful and just. Unions were lawful or not according to their purposes and the means used to realize these purposes.

STRIKES · A strike is a concerted stoppage of work in order to obtain desired terms from an employer. In no State is the strike in itself illegal. The purpose and the means employed determine the legality. As a rule, a strike to obtain an increase in wages, to improve working hours, to bring about better conditions as to health and convenience, and to secure union recognition are legal. Those whose purpose is to interfere with the management, through insistence, for example, on the removal of foremen or the reinstatement of discharged employees, or to favor the materials of a

given company or prevent the circulation in commerce of certain materials, are illegal.[2] Strikes for the enforcement of the closed shop may or may not be legal. By means of the strike the worker withholds his commodity, labor, much as the merchant withholds his goods, in order to get a better price or other valuable considerations. The "sit-down" strike, first used in Europe, was employed in the United States in the years following 1933. It is a concerted stoppage of work, with the laborers remaining at their machines or in the factory. Since this amounts to a trespass and the forcible seizure of the property, it is illegal.[3]

PICKETING AND BOYCOTTS · Picketing is the stationing of strikers outside a factory or place of business for the purpose of persuading nonstrikers to cease work, or to apprise the general public of the strike and give the strikers' side of the dispute. The pickets may carry banners and placards, or they may confine their activities to addressing the workers and customers as they enter, in order to convert them to their cause.

Down to the end of the World War the courts were seriously divided on the question of the legality of picketing; but both court decisions and statutes now generally recognize its legality. In 1921 the United States Supreme Court, in the case of *American Steel Foundries* v. *Tri-city Trades Council*,[4] held that it was legal to place one striker at each gate of the factory for the purpose of announcing the strike and peaceably persuading the employees to join them. "Mass picketing," the use of large numbers of strikers and their friends outside the plant for purposes of intimidation, is illegal, as is the use of force and intimidation no matter what the number of pickets.

The word *boycott* is used in several senses. The consumers' boycott is a refusal to purchase the boycotted commodities or to deal with a certain firm or person, and may be used either in labor disputes or otherwise. The workers' boycott is a concerted refusal to work on materials of a given employer, either because of a dispute with him or because of his dispute with another union. In the latter case the refusal to work is called "sympathetic." The courts recognize a distinction between "primary" and "secondary" boycotts, the former consisting in the cessation of dealings with the employer or firm with whom the dispute exists; the latter, in the attempt to persuade a third party to join in the boycott. The law on the legality of boycotts is inconsistent and uncertain. Primary boycotts have usually been held to be legal; secondary boycotts, illegal. Boycotts accompanied by force or the threat of force are illegal; but, as a rule, workers may attempt to persuade others from patronizing a dealer or a manufacturer with whom they have a dispute.

[2]The matter of the discharge of workers is now sometimes included in the collective bargaining contract, which alters the rule. Discharge too may be illegal under the National Labor Relations Act.

[3]*National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939).

[4]251 U. S. 184 (1921).

The "lockout" is the employer's counter to the boycott, an agreement among employers or an order by one employer not to hire certain persons, such as those who have joined a union or those who have gone out on strike. The "black list" is a record by employers of men whom they will refuse to employ, usually because of union affiliations or because of having participated in a strike. More than half the States make black-listing illegal.

COLLECTIVE BARGAINING · A person who walks up to a factory gate and sells his labor is engaged in individual bargaining. But if, instead, he joins with numerous others in an organization to which is delegated the power to dispose of their labor, he is a participant in collective bargaining. It is well to note that acts of the business corporation itself are collective in character, since its powers of management, investment, and bargaining are done in behalf of the numerous stockholders.

AGREEMENTS · The collective-bargaining agreement, of course, may deal with any legitimate matter of interest to the two parties. Those entered into between a union with thousands of members and an industry of vast proportions are lengthy and intricate. Wages and hours of labor come foremost, including the detailed questions of pay for holidays, an annual vacation, and bonuses for night shifts or hazardous work. Methods usually are specified for handling grievances and disputes. The most common procedure is for the employees of a department or division of the plant to elect one of their members as a steward to represent them in the initial handling of a grievance and to serve as a member of the plant committee. Joint employer-union committees for the adjustment of disputes, with final recourse to arbitration, are usually provided for. Other items are the guarantee of seniority rights in discharge and rehiring, and the "check-off," by which amounts due the union for dues, assessments, and fees are deducted by the employer from the wages and paid over to the union.

THE BARGAINING UNIT · The heart of the agreement is its definition of the bargaining unit for labor and its privileges. This may be expressed in one or more of the technical terms: closed shop, union shop, maintenance of membership, preferential hiring, union recognition. In the *closed shop* no one may work in the plant unless a member of the union, which implies the employer's obligation to discharge any employee who refuses to join the union or who is not a member in good standing. To hire new employees, the employer places an order with the union, which supplies the men. The *union shop* differs chiefly in that the employer has complete control over the hiring of new employees, who need not be union members at the time, although they must become members as a condition of continued employment. Under the *maintenance-of-membership* agreement all the employees who were members at the time the agreement was signed, or who later joined the union, must retain their membership for the duration of the agreement. The *preferential-shop* agreement requires only giving

to union members the preference in some aspect of employment, usually in layoff and rehiring. The weakest of the agreements, *union recognition*, means that the union is recognized as the bargaining agent for its own members, which leaves the way open for competition of rival unions within the plant.[5]

## *GENERAL REGULATIONS*

LIMITATIONS ON UNION ACTIVITIES · Labor unions, like all other special interests, generally resist government regulation as applied to themselves, but seek to have it imposed on others wherever it is to their advantage. Since 1935 a considerable number of States have adopted regulations with respect to picketing, violence, and dues. The Wisconsin Employment Peace Act requires the incorporation of all labor unions, regulates the amount of dues, and enumerates and forbids unfair practices of employees. A Texas law requires the licensing and registration of labor unions and prohibits dues which would create a fund in excess of their reasonable requirements. Alabama and Arkansas "antiviolence" laws regulate picketing. Idaho and South Dakota forbid representatives of labor unions to enter any agricultural premise to solicit members, collect dues, or promote a strike.[6] The United States Supreme Court declared invalid an Alabama law forbidding loitering or picketing at the scene of a labor dispute, on the ground that it abridged the freedom of speech, but upheld a Wisconsin law which prohibits the intimidation of an employee or his family, mass picketing, or threats to obstruct workers from entering or leaving a factory.[7]

HEALTH AND WELFARE · Since early in the century, government has generally assumed the obligation to act for the health and welfare of the wage-earners. The regulatory laws commonly require the sheathing of rapidly moving wheels and belts, ventilating fans to carry off noxious gases, and precautions in the handling of substances which cause occupational diseases. The State legislatures and Congress have combined to forbid the use of phosphorus in the manufacture of matches. Sweatshop regulations prohibit the commercial production of certain goods in the home, such as garments and foodstuffs. For mines, safeguards against gases, falling rock, and dust are required, as well as in the storage of explosives.

[5]Department of Labor, Bureau of Labor Statistics, *Handbook of Labor Statistics*, 1941, Vol. I, Bulletin No. 694, pp. 460–465. The closed-shop agreements represent a far swing from the individualistic doctrines of the common law, but are supported by the National Labor Relations Board and recognized as reasonable and valid by the courts. Cf. *Williams* v. *Quill*, 277 N. Y. 1 (1938).

[6]Department of Labor, Division of Labor Standards, *Digest of State and Federal Labor Legislation*, August 1, 1942, to August 1, 1943, Bulletin No. 63, pp. viii-ix.

[7]*Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Allen Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 62 Sup. Ct. Rep. 820 (1942)

Beginning with Massachusetts in 1906, the States ordinarily have established inspection systems for workshops and factories. In some an industrial commission, with rule-making powers, is in charge. These commissions generally are authorized to issue orders for alterations in buildings and for the installation of safeguards, disregard of which may lead to the enjoining of the factory as a nuisance.[8]

PRISON-MADE GOODS · The United States Department of Labor reported in 1932 that, in the one hundred and four State and Federal prisons studied, 82,276 of the 158,947 convicts were employed at productive labor. While this is conceded to have a large educational value, the competition of such forced labor with free individual enterprise is customarily regarded as unfair. In that year the total production of prison labor was valued at over $75,000,000, chiefly in coarse clothing, roads, and buildings. While a substantial portion was for the use of the State and local institutions and offices, $28,889,908 worth was sold in competition on the open market, 40 per cent outside the respective States.[9]

After the First World War the States began to adopt legislation regulating the disposal of such goods. Convict labor is forbidden in specified lines where it conflicts directly with free labor, or it is required to be spread about in small amounts in a diversity of lines. More common now is the provision that production shall be only for the use of the government operating the prison. Two Federal statutes further stiffened the attitude of State legislators toward prison-made goods. The Hawes-Cooper Act, of 1929, gives the States jurisdiction over such goods shipped in from outside, and the Ashurst-Sumners Act, of 1936, prohibits the shipment of prison-made goods into a State which forbids their sale in its markets, and requires that all such packages be plainly marked as "prison-made." Whether prisoners should be kept in idleness in order to appease manufacturers and laborers is a question which is open to debate.

HOURS-OF-LABOR LEGISLATION · An excessive number of hours of labor for the day or week has been found uneconomical with respect to efficiency of production as well as human health and strength. Fatigue has been shown to be an important factor in the occurrence of industrial accidents. Government long ago intervened to bring about the shortening of the work day and the work week. The first American legislation for this purpose took place in 1842, when both Massachusetts and Connecticut set a ten-hour day for children under twelve years of age in factories. In 1847 New Hampshire pioneered with a ten-hour law for women, followed by a similar one in Ohio in 1852.[10] These and other statutes were cautiously

[8]Don D. Leschoir and others, *History of Labor in the United States, 1896–1932*, p. 365.

[9]The War Production Board reported that the value of goods made in State prisons in 1943 amounted to $25,000,000, and the value of their farm products to $24,105,470. Bureau of Labor Statistics, *Monthly Labor Review*, Vol. 59, No. 1 (July, 1944), p. 137. Cf. also United States Department of Labor, Bureau of Labor Statistics, *Prison Labor in the United States*, Bulletin No. 698 (1940).

[10]J. R. Commons and J. P. Andrews, *Principles of Labor Legislation*, p. 101.

drawn, and it was not until 1879 that Massachusetts started the procession of States having enforceable hours-of-labor laws for women. On January 1, 1936, only five States were without them. They differ greatly, of course, as to the kind of industries to which they apply and the number of hours permitted per week.

GENERAL-HOURS LAWS · Limitation of hours for men came much more slowly, and then chiefly in the dangerous occupations. The earliest were for mining and for steam and electric railways. A Federal statute of 1907 set up limitations for certain classes of railroad workers on interstate railways, and the Adamson Act, of 1915, established the basic eight-hour day for all workers on interstate railways. State legislation rapidly spread to cover mines, street railways, bakeries, and finally workshops and factories. At the outset most of the laws set a ten- or eleven-hour maximum; but finally the eight-hour day and forty-four-hour or forty-hour week became the standard. As a rule, labor beyond the maximum is permitted upon the payment of wages at a rate of one and a half for overtime. Other laws respecting hours of labor include the provision of rest periods at stated intervals; the limiting of the hours of night work, applicable principally to women and children; and the provision for Saturday half-holidays, one day's rest in seven, and holidays on festal days. Annual vacations have been legally required only for public employees.

ATTITUDE OF THE COURTS · The courts long were reluctant to countenance the limitation of hours for men, because of its conflict with the freedom of contract. In 1898 the United States Supreme Court sustained a Utah law which limited the hours of men in smelters and mines to eight hours a day as a police measure for the protection of men in dangerous industries. The first general hours law to come before the Supreme Court was that of Oregon, in 1917, which limited the hours of work in mills and factories to ten hours a day. The Court held the law a reasonable exercise of the State's police power in behalf of the workers' health.[11]

ADMINISTRATION · All the States have special administrative agencies for the enforcement of hours-of-labor acts. These are boards, departments, or offices of "industrial relations," "labor," "labor and industry," or "labor and factory inspection." Some have a substantial rule-making power, to give flexibility to the laws. They may forbid work which is dangerous to the workers' health, safety, or welfare, and may vary the maximum of hours according to the industry.

FEDERAL EMPLOYEES · The Federal government was the first governmental unit to establish general limitations of hours. President Van Buren, in 1840, by executive order set the ten-hour day for workers in shipyards, and Congress in 1868 extended it to all mechanics and workers employed "by or in behalf of the government of the United States." Loopholes in the law were plugged by the act of 1892; and that of 1912 required

[11] *Holden* v. *Hardy*, 169 U. S. 366 (1898); *Bunting* v. *Oregon*, 243 U. S. 426 (1917).

the inclusion of the eight-hour provision in all contracts for materials or equipment for the Federal government. The Walsh-Healey Act, of 1936, requires every contractor furnishing supplies to the United States government to comply with a labor code, one part of which is the eight-hour day and the forty-hour week. In 1931 the forty-hour week was established for the Federal civil service, and by 1944 over half the States had this standard for their civil servants and for the employees of contractors engaged in State work.

## *GOVERNMENT AND UNEMPLOYMENT*

Unemployment was one of the most serious evils which the factory and wage system brought when it displaced the rural-agricultural economy. Paul Douglas estimated that somewhat more than 10 per cent of the workers in manufacturing, transportation, mining, and the building trades in the thirty years from 1897 to 1926 were unemployed.[12] At the peak of the depression in March, 1933, estimates of thirteen to fifteen million unemployed were made; and the number approximated ten million until 1940. Undoubtedly, in a dynamic society such as that of the United States, with ever-changing needs and new inventions and processes, necessitating readjustments in the location of industries and in the kinds of vocations required, there will always be a margin of unemployed. The introduction of a labor-saving machine may force a craft to seek an entirely new occupation. Business failures which close factories; the competition of a new region which forces the closing of old industries and their removal to other sections of the country, such as the transfer of the manufacture of cotton goods and that of shoes from New England to the South and St. Louis; or the exhaustion of a natural resource, such as that of silver at Virginia City, zinc at Joplin, and oil in various fields, may require a wholesale migration of labor.

EMPLOYMENT OFFICES · Agencies for bringing together the worker and the job have long been in use and originally were all privately owned and operated. Government's first part in the activity was regulation. The abuses in the earlier day were numerous and flagrant: exorbitant fees; the sending of workers to distant points to jobs either nonexistent or inadequate in number; and collusion with employers by which fees were split, or men quickly discharged in order to collect more fees. A law of the State of Washington prohibiting altogether private employment agencies which charged a fee for their services was declared unconstitutional in 1917; but the general power of the States to regulate has been upheld, and by 1944 was applied in all but six States.[13] The regulations take the

[12]Paul H. Douglas, *Real Wages in the United States, 1890–1926*, p. 459.

[13]*Adams* v. *Tanner*, 244 U. S. 590 (1917); United States Department of Labor, Division of Labor Standards, *Private Employment Agencies*, Bulletin No. 57 (1943).

form of a license fee of substantial size; the requirement of bond for good behavior; and the prohibition of many practices, including the sending out of applicants without a bona fide order, false information about the character of the job, the sending of women or children to employment which is morally hazardous, and the sending of applicants to places where a labor dispute exists without notifying them of this condition.

FEDERAL EMPLOYMENT SERVICE · Federal interest in employment service began in 1907 with a program for the placing of immigrants on farms; in 1915 an employment service to cover all occupations and industries was established; and in 1918, owing to the needs of wartime industries, the Federal Employment Service was greatly enlarged and placed in the Department of Labor. By the latter part of that year it had offices in every State and in Puerto Rico. Owing to widespread unemployment caused by the depression many more Federal employment offices were established in 1931, some of them duplicating well-run State agencies. Two years later a temporary agency, the National Re-employment Service, was established to aid in placing workers on work-relief projects.

Reorganization of the whole public employment service was carried out in the Wagner-Peyser Act, of 1933.[14] This called for Federal-State cooperation on the familiar subsidy basis. The annual appropriation is apportioned among the States on the basis of population. State employment systems complying with the Federal standards are subsidized up to 25 per cent of their cost. At the close of the fiscal year 1937–1938 there were 1606 Federal employment offices located in every State and the territories of Alaska and Puerto Rico, and there were affiliated Federal-State offices in forty-seven States and the two territories. In that year this nation-wide service aided in the placement of 2,900,056 workers in private industry and 937,291 in public works, while 12,014,183 had filed applications with it. Owing to the exigencies of the war the United States Employment Service was transferred in September, 1942, to the War Man-Power Commission.

## *REGULATION OF WAGES*

Government regulation of wages was slow to come in the United States. In a country of such great natural resources the necessity was not so great as in the older and more densely populated countries of Europe; while the American constitutional and legal traditions were generally opposed to such an invasion of the domain of free contract. The various State regulations, dating from early in the century, were concerned chiefly with the manner of the payment of wages. Some required payment in cash, rather than in kind from company stores, or specified weekly or biweekly payments instead of monthly ones.

[14] 43 Stat. 114 (June 6, 1933).

STATE MINIMUM-WAGE LAWS · The setting of rigid minimum wages raises some difficulties. Certain small industries exist only because they use the labor of women and children who eke out the family living; the cost of living varies from region to region and from urban to rural community; and physically handicapped persons often are employed at a lower rate than normal persons.

Massachusetts in 1912 enacted the first State minimum-wage statute; but it was not mandatory, and it depended for enforcement upon publicity and public opinion. By 1930 seventeen State minimum-wage statutes had been passed, of which three already had been repealed, five held unconstitutional, and one amended. No new minimum-wage rates were established between 1923 and 1933, but the latter year saw a new wave of seven State minimum-wage laws. The Oklahoma law of 1937 was the first to include men. In 1936 the United States Supreme Court declared the New York law unconstitutional, but in 1937 upheld that of Washington, thus finally clearing the way for such wage legislation.

AMOUNT OF THE WAGE · State laws set such standards as "a wage that will maintain the health and welfare" of the workers, or "a living wage." After unfavorable Supreme Court opinions the language employed tended to forbid wages that were "oppressive," or else required wages that were "fair," "reasonable," or "sufficient to meet the minimum cost of living necessary for health," or that represented "the reasonable value of the services rendered." Some of the statutes set a flat rate; that of Nevada, for instance, is three dollars a day or eighteen dollars a week. But because of variations of the needs in different industries and their general inflexibility this type is considered undesirable. The second and more usually applied type is the determination of rates by administrative boards following a standard set by the legislature. It is for the board to determine what is a "reasonable living wage." Court appeal is usually allowed, but only on questions of law.

FEDERAL MINIMUM-WAGE LEGISLATION · Congress, before the present law, had experimented with two pieces of wage legislation. The Adamson Act, passed in 1915 at the time of a threatened nation-wide railroad strike, provided for an eight-hour work day, but was in effect a wage law; for it required the old rate of pay for a shortened day, with time and a half for overtime. The Supreme Court side-stepped the question of constitutionality by ruling it an hours-of-labor law justified by the power to regulate interstate commerce. The second was the minimum-wage act for women and minors in the District of Columbia, which was held unconstitutional as an interference with the right of contract.[15]

THE FAIR LABOR STANDARDS ACT OF 1938 · The Fair Labor Standards Act of 1938 embodied the three objectives of minimum-wage regulation,

[15] *Wilson* v. *New*, 243 U. S. 332 (1917); *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923)

hours limitation, and the prohibition of child labor.[16] It applied to all persons and establishments, with stated exceptions, engaged in interstate commerce or in production which enters interstate commerce, estimated in June, 1940, to number 15,500,000 workers in 360,000 establishments. Since the great majority of this group were in wage brackets considerably above the minimum wage set, the act was intended for the benefit of those in a variety of minor industries and establishments, where the financial returns were small and the competition was keen, and where unionization had not been established or was weak. Even then a considerable number of classes were exempted in whole or in part from its provisions. These included executive, administrative, and professional employees; seamen; switchboard operators in small exchanges; farm hands and workers in the dairy, horticultural, and cotton-ginning industries; fishermen and those engaged in the processing and packing of fish; and the employees of air carriers, weekly and semiweekly newspapers with a circulation of less than three thousand, and retail stores and service establishments not in interstate commerce.

WAGES AND HOURS · The ultimate object of the law was a minimum wage of forty cents an hour for all workers covered by the act; but provision was made for a gradual advance to that point, and for some flexibility within the range of thirty and forty cents. Similarly, forty hours were set as the final standard for the work week, with forty-four for the first year of the act's operation, forty-two for the second, and forty thereafter. Longer hours were not prohibited, but the time-and-a-half pay for overtime was intended as a penalty to preserve the standard. Since many workers, however, prefer the longer week on the basis of higher pay, this part of the law has operated also as a minimum-wage regulation. Leeway is allowed for seasonal industries up to fourteen weeks a year, in which overtime pay does not begin until twelve hours a day or fifty-six hours a week have been reached. Exceptions are made also for collective-bargaining agreements and for certain industries, including dairy products, cotton-ginning and baling, cottonseed processing, and sugar-beet and sugar-cane processing. Seasonal privileges are extended also to the first processing of perishable fruits or vegetables, poultry, and livestock.

ADMINISTRATION · Enforcement of the act is given to the administrator of the Wage and Hour Division of the Department of Labor, whose task is much lightened by co-operative arrangements with the various State labor and industrial departments. The field work for the United States, Alaska, Hawaii, and Puerto Rico is under the management of fourteen regional directors.[17] Inspections of factories comprise a major part of the work. In 1940–1941 a total of 48,449 such inspections was made, of which

[16]52 Stat. 1060 (June 25, 1938).

[17]United States Department of Labor, Wage and Hour Division, *Annual Report, 1941*, pp. 35, 91–103.

31,493 showed violations of the law, payments of $10,916,527 in restitution for 354,271 employees being ordered. The cotton-textiles industry illustrates the effect of the act on wages. In August, 1938, before the act went into operation, 35 per cent of the workers were receiving less than thirty cents an hour; by September, 1940, this had fallen to slightly more than 1 per cent.

SETTING THE WAGE SCALE · The final wage order is issued by the administrator upon the advice of a tripartite industry committee, with equal numbers representing the public, the employers, and the employees. The committee is empowered to investigate the conditions in the industry, summon witnesses, and hold hearings, and must take into consideration the competitive conditions and wages in comparable work. Before the order is issued, the interested parties are given an opportunity to be heard; and an appeal may be taken to the courts on the question of its conformity to law. After 1945 a rate lower than forty cents an hour may be established for any particular industry if found necessary in order to maintain employment. Up to June 30, 1941, thirty-seven industry committees had been appointed, representing 4,500,000 workers.

Apprentices and learners may be exempted from the act, and physically and mentally handicapped persons may work at lower rates under special certificates issued by the administrator.

CHILD LABOR · One section of the statute practically re-enacts the Owens-Keating Act, of 1916, which forbade the transportation of goods in interstate commerce if produced in a factory not complying with a specified child-labor code. This act had been declared unconstitutional, in the case of *Hammer* v. *Dagenhart*, as an attempt to use the commerce power to control the States in the exercise of their police power.[18] Supreme Court decisions beginning in 1937, interpreting the commerce power, now afforded an ample base for the re-enactment of the law. The goods banned from interstate commerce are those made in factories where children under sixteen years of age are employed or, if in hazardous occupations, between the ages of sixteen and eighteen. Enforcement of this section of the act is by the Children's Bureau of the Department of Labor.

been held to apply to labor in interstate commerce. Several acts of wide application were passed during the F. D. Roosevelt administration, which, since they covered unionization and collective bargaining, and mixed questions of hours, wages, and conditions of employment, will be considered separately.

THE NATIONAL INDUSTRIAL RECOVERY ACT · The labor portions of the National Industrial Recovery Act, of June 16, 1933, were extensive.[19] The codes of fair competition which the President was authorized to establish for the various industries might contain provisions covering the hours of labor by the day or week, as well as a minimum-wage scale. One purpose was to decrease unemployment by shortening the hours of labor and so distributing the jobs among a greater number of people. The violation of the codes by the employers constituted "unfair competition," which was specifically forbidden by the statute. Two other provisions were designed for the promotion of the union labor movement. Each code was required to provide that the employees should have the right to organize and bargain collectively, through representatives of their own choosing, and be free from interference on the part of their employers in any such activities. Secondly, the so-called "yellow dog" contract was outlawed; that is, no person might be required, as a condition of employment, to join a company union or refrain from joining a labor organization of his own choice. Federal labor authorities were to order and conduct labor elections by secret ballot for the choice of representatives for the purpose of collective bargaining. The language of the act was general, authorizing the application of its principles to the whole field of labor, whether in interstate commerce or not. The purpose was not only to regulate interstate commerce as such but to remove those things which were "obstructions to the free flow of interstate and foreign commerce"; consequently the act covered anything within the entire range of the nation's economic life.

THE BITUMINOUS-COAL ACTS · When the invalidation of the National Industrial Recovery Act left the coal industry without a code of regulation, a new one, based on the taxing power, was passed. This was the Bituminous Coal Conservation Act, of 1935.[20] Coal producers were grouped into organizations of "code members" in each of the twenty-three districts into which the United States was divided; and compliance with the provisions of the code was enforced by the imposition of a 15 per cent excise tax on the sale of coal at the mines. The codes took over the provisions of the NIRA regarding collective bargaining and its incidents and authorized the setting of hours-of-labor and wage scales by the Code Authority in each district. This act was declared invalid as an attempted regulation, under the commerce clause, of a subject falling in the field of production and outside interstate commerce. A second act, which omitted the wage

[19] 48 Stat. 195 (June 16, 1933). [20] 49 Stat. 991 (August 30, 1935).

and hours-of-labor restrictions, but included those regarding unionization, was passed in 1937 and upheld by the Supreme Court.[21]

THE NATIONAL LABOR RELATIONS ACT · The primary object of the National Labor Relations Act is the fostering and protection of labor organizations and their activities, particularly collective bargaining, for which purpose it repeats substantially the pertinent features of the National Industrial Recovery Act.[22] Its regulations extend not only to interstate and to foreign commerce, as traditionally defined by the Supreme Court, but beyond these to all labor engaged in any industry which might "affect," "burden," or "obstruct" such commerce.

Five different kinds of "unfair labor practices" are defined and forbidden to the employer: (1) interference with the employees' right to self-organization and collective bargaining; (2) domination of or interference with the formation and conduct of labor organizations and the making of contributions to them; (3) discriminations in the hiring of employees or in the tenure or conditions of employment in any such way as to influence membership in a labor organization; (4) the discharge of any employee or any discrimination against him because he has filed charges or given testimony under the act; and (5) the refusal to bargain collectively with the representatives of his employees. No unfair labor practices of employees are listed or prohibited; and the act is not to be construed so as "to interfere with or impede or diminish in any way the right to strike."

THE NATIONAL LABOR RELATIONS BOARD · Administration of the law is entrusted to a board of three members appointed for terms of five years by the President and Senate. Their task is a difficult one. Representatives selected for collective bargaining by a majority of the employees in an "appropriate unit" are declared to be the exclusive bargaining agents for all. It is the board's function to certify the proper representatives, and for this purpose to conduct elections and count the ballots. What the "appropriate unit" is in a given case may be a difficult question. Should it be all the employees of one plant or of one corporation or of one department? Or should it be determined by crafts or trades? Decisions on this question are often made all the more difficult by the struggle between rival labor organizations in the same unit or between industrial and craft unions. The board is authorized to make rules and regulations necessary to carry out the provisions of the act, specifically, to prevent any employer from engaging in any unfair labor practice affecting commerce. Upon finding that an employer is engaged in such practices, it issues an order to "cease and desist," with such other requirements as are necessary to carry out the purposes of the act, including the reinstatement of employees with or without back pay.

[21] *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); 50 Stat. 72 (April 26, 1937); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940).

[22] 49 Stat. 449 (July 5, 1935)

ORGANIZATION OF THE ADMINISTRATION · For purposes of administration the United States is divided into nineteen regions, in each of which are located a director and his staff. These offices investigate charges of unfair labor practices, issue complaints, certify representatives of unions for collective-bargaining purposes, and conduct elections. Aiding the director are field examiners and the regional attorney and his staff. The board's office at Washington has divisions for clerical and fiscal work, case developments, the authorization of hearings, and legal matters. There are also a trial examining division, which assigns examiners to conduct hearings; an economics division, which prepares material for evidence in cases; and an information division, which gives publicity to the work of the board.

WORK OF THE BOARD · The tasks of the National Labor Relations Board are truly formidable.[23] Like the Interstate Commerce Commission, it has mixed legislative, judicial, and administrative powers. In conducting its hearings and investigations it may subpoena witnesses and have access to any copy of the records of the firm in question. It may order the discontinuance of the unlawful practices of employers, order a labor organization disbanded on the ground that it is company-dominated, and require the payment of unearned wages for workers who have been out on strike. Its mandates are enforceable in the courts, subject to the employer's right of appeal on questions of law. The courts, however, may not question the findings of the board as to facts nor hear objections newly raised.

In eight years of its existence (1936–1943) 58,318 cases were filed before the board. Of these, 32,306 arose from complaints against employers on the ground of unfair labor practices, and 26,012 from petitions for elections or pay-roll checks to determine the rightful factory bargaining unit. The cases filed in 1942–1943 totaled 9543, of which over 79 per cent were in manufacturing, chiefly the war industries, and involved 8,036,471 workers. A significant trend was shown in the decrease in the percentage of unfair labor practices from 45.3 of the previous year to 35.7, leaving inter-union struggles responsible for nearly two thirds of the total. In the same year 9777 cases, some of them holdovers from the year before, were given final disposal, of which 77.7 per cent were settled "out of court" and but 22.3 per cent by formal action. The magnitude of the board's electoral and tabulating task for the year is indicated by the 4153 elections and pay-roll checks conducted.[24]

EFFECT ON UNIONIZATION AND COLLECTIVE BARGAINING · The National Labor Relations Act undoubtedly has been an important factor in the phenomenal growth of labor unionism. The membership of the constituent unions of the American Federation of Labor had fallen from an earlier figure of 4,000,000 to 2,532,261 in the depression year of 1932.

[23] *The Decisions and Orders of the National Labor Relations Board* numbered fifty-three stout volumes.
[24] National Labor Relations Board, *Annual Report, 1943*, pp. 17–26, 84.

The increase to 3,000,000 in 1935 was doubtless due to many factors, including increased employment and the labor sections of the National Industrial Recovery Act.[25] In 1939, two years after the National Labor Relations Act had become effective, the combined membership of the American Federation of Labor and the Congress of Industrial Organizations unions had reached the grand total of 8,000,000; and for January, 1944, the Bureau of Labor Statistics estimated that 13,750,000 workers, or about 45 per cent of all those engaged in private industry, were employed under union agreements.[26] By 1940 there were more than 400 agreements calling for continuous collective bargaining; in 1944, closed-shop agreements covered 30 per cent and union-shop agreements 20 per cent of all workers under union contracts.[27]

The influence of the act in preventing industrial strife is not so easily appraised. The number of strikes in 1941 (4288) was exceeded only in 1937 and 1917; and the number of man-days lost (23,047,000), a better test, was the third largest on record, exceeded only in 1927 and 1937. The large 1937 figure may be attributed primarily to the concerted effort to take advantage of the support extended to the unionization and collective-bargaining movement by the National Labor Relations Act. But its influence in the high tide of 1941, when 46 per cent of the strikes and 68 per cent of the workers involved related directly to the war effort, must have been small. A combination of factors, including the more efficient handling of labor disputes by the Federal labor authorities, accounted for the sharp decline of four fifths in the number of the man-days lost in 1942 from the total lost in 1941.[28]

A satisfactory appraisal of the results of the act must await the passage of time. The period is still transitional, and the management of unions embracing more than thirteen million workers is a colossal one. The law has many uncertainties and, in its present form, still has not been given general approval. Much depends upon a better understanding of the problems on the part of the public and the emergence of better-qualified leaders for labor, for capital, and for management.

THE UNITED STATES DEPARTMENT OF LABOR · The Department of Labor as an independent agency dates from the act of March 4, 1913, which separated it from the old Department of Labor and Commerce.[29] The functions respecting labor were originally in the nature of services which interested persons might avail themselves of or not, as they pleased; the coercive functions mostly date from recent times. The department is

[25]Bureau of Labor Statistics, *Handbook of Labor Statistics*, 1941, Vol. I, Bulletin No. 694, pp. 328–329; *World Almanac*, 1933, p. 47.

[26]Bureau of Labor Statistics, Bulletin No. 776 (1944), *Extent of Collective-Bargaining Union Status*, p. 1.

[27]H. D. Koontz, *Government and Business*, p. 788.

[28]United States Department of Labor, Bulletin No. 741, *Strikes in 1942*, pp. 4, 5.

[29]37 Stat. 376.

headed by a secretary who sits in the President's cabinet, and its functions are divided among nine agencies variously known as "divisions," "bureaus," "offices," and "services." Three of these, those of the chief clerk, the librarian, and the director of personnel, are primarily overhead agencies. The others are in charge of special services or the enforcement of particular laws.

The Office of the Solicitor provides legal advice for the department and represents it in the prosecution of violations of the various labor laws. The Division of Labor Standards is engaged chiefly in promoting health and safety among the workers by carrying on studies, publishing reports, and assisting State and local officials engaged in similar work. The Women's Bureau formulates policies for promoting the welfare of wage-earning women and advancing their opportunities for employment. The Children's Bureau, besides investigating and reporting on matters of child life and welfare, administers the grants under the social-security program for maternal and child-health services and for aid to crippled children, and the child-labor provisions of the Fair Labor Standards Act.

BUREAU OF LABOR STATISTICS · The oldest division of the department, and perhaps its most valuable one, is the fact-finding Bureau of Labor Statistics. This makes monthly reports on employment and pay rolls, scales of wages, and labor turnover, and publishes two periodicals, the *Labor Information Bulletin* and *Monthly Labor Review*. Its numerous special studies are of great importance to labor organizations and employers of labor, and to committees of Congress and the State legislatures in planning their programs. These studies include much factual material, and such topics as industrial accidents, the cost of living of wage-earners, occupational diseases, labor laws and their administration, union scales of wages, and judicial decisions on labor laws.

## *GOVERNMENT AND LABOR DISPUTES*

THE GOVERNMENT AS A PARTY[30] · It is consistent with America's system of free enterprise that the freedom both of labor and of management to struggle for their respective advantages is recognized by law. The laborer, either singly or in association with his fellows, may withdraw from an employment, for bargaining or for any other purpose whatsoever; while management is the judge of what it shall produce, and, until the passage of the Wagner Act, could discharge an employee for any reason satisfactory to itself.

While this laissez-faire principle gave full opportunity for the two parties to obtain such advantages as they might, the general public was often the sufferer from the legalized contest. Workers in affected industries were thrown out of employment, and fuel, clothing, food, or other sup-

[30]T. R. Fisher, *Industrial Disputes and Federal Legislation* (1940).

plies were withheld from the consumers. The National Association of Manufacturers, in a study of the subject, reported that the cost of strikes in a ten-year period, 1916–1925, amounted to $12,982,048,000.[31] Of this amount the employers bore $496,048,000; the employees, $1,804,000,000; and the general public, $10,682,000,000. Government, which represents the general public, has the minimum duty of enforcing the legal rights of the two parties and of the public, including the maintenance of order and of free access to the courts. It may go further, in attempting to bring the two disputants to an agreement, even to the point of prohibiting strikes and lockouts.

TYPES OF GOVERNMENTAL INTERVENTION · Intervention by the government may take one of four forms: mediation (or conciliation), investigation, arbitration, or the prohibition of retaliatory or obstructive acts. Mediation, or conciliation, is the effort of an outside party to bring agreement through the proposal of a compromise and the use of his services in the process of bargaining. By means of an investigation, government may make an impartial survey of the situation and present the facts to the public in the hope that public opinion will force the parties to come together. Arbitration is more formal and rigid in its procedure. The parties agree upon an arbitrator, who, after an investigation of the facts, including a hearing for each party, lays down the terms of settlement. In this he is not bound to follow closely the legal rights of the two parties but rather their economic and social interests. In compulsory arbitration systems both parties are bound by the decision, and it is enforceable in the courts; but in voluntary arbitration, while there may be a strong moral obligation to accept, there is no legal one. In peacetime the principle of prohibition has been attempted in only one instance, to be described below.

FEDERAL MEDIATION AND CONCILIATION · Presidents, governors, and mayors often have intervened in labor disputes as mediators, in many cases with success; but this function is normally outside their legal duties and arises chiefly from the prestige of the office. Federal and State governments, aside from such impromptu sallies, have long maintained legal machinery for the same purpose, not as something binding upon the disputants but as a service which might be applied for and used.

Organized Federal mediation dates from the act establishing the Department of Labor in 1913. This act states that the Secretary of Labor shall have power "to act as mediator and to appoint commissioners of conciliation whenever in his judgment the interests of industrial peace may require that it be done." This power is now exercised by the department's United States Conciliation Service, headed by a director. Its conciliators are available upon the request of either party to a labor dispute, whether it arises in interstate commerce or not. In rare instances the initiative is taken by the government without request. In the year 1942–

[31]National Association of Manufacturers, *Convention Proceedings* (1926), p. 136.

1943 the Service participated in the settlement of 12,315 labor disputes involving more than 6,000,000 workers, which included strikes, threatened strikes, lockouts, and controversies over matters of employment.[32] How much credit should be given the Service for the settlements cannot be said, but it is known that the good offices of its skilled conciliators in some conspicuous cases were decisive. Besides the conciliation work it cooperated with the emergency war agencies, carried on investigations, and set up numerous cases for arbitration.

FEDERAL MEDIATION IN RAILWAY LABOR DISPUTES · Because of the intimate connection between an adequate and uninterrupted railway transportation service and the economic welfare of the country, the Federal government's first foray into the field of labor disputes was in the railway field. An act of 1888 provided for both voluntary and compulsory arbitration; the Erdman Act, of 1898, included both arbitration and mediation; and the Newlands Act, of 1913, set up a permanent full-time Board of Mediation and Conciliation. Under the latter two acts mediation was to be attempted first, to be followed in the event of its failure by arbitration. A special board was to be appointed for each case, made up of representatives of the railroads, the workers, and the public. These acts worked with fair satisfaction until the late summer of 1916, when the demand for the basic eight-hour day resulted in a deadlock. A strike which would have tied up the production and shipment of war materials for Europe, as well as the economic activities of the country as a whole, was averted by the passage of the Adamson Act at a special session of Congress. This act in effect granted the demands of the railroad brotherhoods.

In the period of Federal operation of the railroads during the World War, when the workers were government employees, disputes were settled by several boards, including a Railroad Wage Commission. The Transportation Act of 1920 established a Railroad Labor Board, made up of three members representing the railroads, labor, and the public. Although it heard many disputes and made settlements in a considerable number of cases, its decisions frequently were ignored, or one or both parties refused to submit to arbitration.

THE RAILWAY LABOR ACT OF 1926 · The old plan was thrown into the discard by the act of 1926, which introduced entirely new machinery, to include both mediation and arbitration.[33] As amended by another act in 1934 it has been singularly successful. The work centers in two boards. The first is the National Railroad Adjustment Board, of thirty-six members, half of whom are selected by the carriers and half by the organizations of national-railway employees. This board is organized into four divisions (three of ten members each, and a fourth of six members), to each of which is allotted jurisdiction over certain enumerated matters of

[32]Secretary of Labor, *Annual Report, 1943*, pp. 10, 11.
[33]44 Stat. 577.

railroad operation. The first, for instance, has charge of disputes involving train and yard service. Whenever a division becomes deadlocked, it may appoint a neutral referee to cast the deciding vote; but if no agreement can be reached in the choice of a referee, the choice is left to the National Mediation Board. Decisions reached by these divisions are enforceable in the Federal courts.

To the National Mediation Board, made up of three members appointed by the President and the Senate, go the larger disputes affecting the railroads as a whole. The board first attempts to make a settlement by means of conciliation, and may act either upon request or upon its own initiative. Should conciliation fail, it tries to bring about arbitration. There are elaborate provisions for the setting up of arbitration boards, the procedure in the submission of cases, the hearings, and the making of the award. The awards are filed in a Federal court, and, if not contested there on certain technical grounds, become final and binding on both parties. Should the parties not have been brought to arbitration, there is one last recourse: the President may appoint an emergency board to investigate and make a report upon the dispute. Although the conclusions and recommendations of the emergency board are not legally binding on the parties, the backing which they normally receive from public opinion usually leads to their acceptance.

STATE MEDIATION, CONCILIATION, AND ARBITRATION · State action to aid in the settlement of labor disputes, as might have been expected from the theory of the States' reserved powers over the subject, preceded that of the Federal government. By 1900 a majority of the States had legislated on the subject, and thirteen had permanent boards with powers relating to arbitration or conciliation. The work of the State agencies reached its heyday early in the century, and thereafter declined as Federal interest grew. It is significant today in hardly half a dozen of the States.[34]

The Colorado Industrial Disputes Law is perhaps the most noteworthy of the State schemes. It prohibits strikes and lockouts in industries "affected with a public interest," such as mining, until investigation and report have been made by the Colorado Industrial Commission, whose recommendations are not binding unless the parties have previously agreed upon such an arbitration. After the report has been made, the strike may proceed; but no picketing is allowed. The law has been the subject of bitter controversy and several times has been defied, but seems to have had fair success in preventing strikes and lockouts. Its principle,

[34]United States Department of Labor, Divison of Labor Standards, Bulletin No. 49 (1941), *Outline of State Agencies Administering Labor Laws*; E. E. Witte, *The Government and Labor Disputes*, chap. xi. "As of January 1, 1943, thirty-six States and two territories have legislation specifically relating to the adjustment of labor disputes. Three other States have provisions in their State constitutions relating to the adjustment of labor disputes, though no legislation has been enacted to carry these constitutional provisions into effect." (H. S. Kaltenborn, *Governmental Adjustment of Labor Disputes* (1943), p. 172.)

compulsory delay until a report can be made by an impartial board, adopted from the Canadian Labor Disputes Act, shows considerable promise.[35]

PROHIBITION OF STRIKES AND LOCKOUTS · The Kansas Court of Industrial Relations Act represents the only attempt ever made in the United States to substitute compulsory arbitration for strikes, lockouts, and the usual techniques of labor warfare.[36] In addition to the customary public utilities, the manufacture of food products, the manufacture of clothing, and the mining and production of coal were declared to be industries "affected with a public interest," in which no strikes, concerted cessations of work, or lockouts were permitted. In the event of a labor dispute it was required that the matter be taken before the Industrial Court, of three members, which, after a hearing, was empowered to "order such changes, if any, as are necessary to be made in and about the conduct of said industry . . . in the matter of working and living conditions, hours of labor, rules and practices, and a reasonable minimum wage or standard of wages." The act was opposed by both labor and management, true to their laissez faire instincts; and after the occasion for the act, the fuel shortage of a bitter winter, had been forgotten, the "party of the third part," the public, lost its enthusiasm. The act was given a slow death by three successive decisions of the United States Supreme Court.[37]

STATE ADMINISTRATION OF LABOR LAWS · In the early days of State labor legislation it was the practice to give over the administration to unrelated agencies created for each law. As the labor codes grew in length, and experience showed the wastefulness and ineffectiveness of this method, permanent boards or commissions with wide supervisory powers were substituted. By 1936 thirty States had given such agencies some measure of power to issue rules or codes having the force of law.[38]

WISCONSIN · The Industrial Commission of Wisconsin, composed of three men appointed by the governor and senate, is an example of this type.[39] It has powers of appointment, licensing, and the making of investigations and of awards in industrial-injury cases. Under its rule-making powers it drew up and promulgated several important codes: rules for safeguarding in factories, which dealt in detail with factory structures and machinery; general orders for mines; general safety codes for construction, steam boilers, and buildings; and sanitary codes for schools, public buildings, laundries, and railway and bus terminals. Other rules cover such diverse things as quarries, and the manufacture or handling of explosives, inflammable fluids, and dusts, fumes, and gases.

[35]H. S. Kaltenborn, op. cit. pp. 194–196.

[36]H. J. Allen, *The Party of the Third Part* (1921), chaps. i-ii; D. Gagliardo, *The Kansas Industrial Court* (1941).

[37]*Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 (1923); *Dorchy* v. *Kansas*, 264 U. S. 286 (1924); *Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U. S. 552 (1927).

[38]J. B. Andrews, *Labor Laws in Action* (1938), p. 34.

[39]H. S. Kaltenborn, op. cit. pp. 295–296.

The commission is also in charge of the administration of the State workmen's compensation law, and the laws forbidding or regulating the employment of children. It administers the hours of labor and minimum-wage laws; aids in the adjustment of controversies over wages owed; and establishes and conducts free employment agencies and licenses those privately owned and operated. In carrying out these many functions the commission is empowered to appoint unsalaried advisers, a staff of clerks, deputies, inspectors, and other assistants; to hold investigations and hearings; and to collect and publish information on matters relating to its work. A "little Wagner labor-relations act" is administered by a separate labor-relations board.

NEW YORK · New York is an example of a State with a labor administration less closely knit than Wisconsin's and yet co-ordinated.[40] The Department of Labor includes twelve major divisions, among which are those of Workmen's Compensation, Self-insurance, Inspection, Placement and Unemployment Insurance, Industrial Hygiene, Women in Industry and Minimum Wage, and Industrial Codes. While workmen's compensation is nominally entrusted to the department, it actually is administered by the Industrial Board, of five members, appointed by the governor. In about the same position are the Labor Relations Board, the State Board of Mediation, and the Board of Standards and Appeals, the duties of all of which are suggested by their titles.

INTERNATIONAL LABOR ORGANIZATIONS · The League of Nations early in its career established an International Labor Office, devoted to the study of labor problems and the encouragement of measures for the benefit of labor throughout the world. At Chicago, in 1924, an International Association of Governmental Labor Officials was organized, with the purposes of promoting co-operation among such officials and the passage of improved labor legislation. Membership so far extends only to American and Canadian officials.

EMPLOYERS' LIABILITY · Employers' liability laws redefine the relative rights and obligations of employer and employee with respect to the liability for injuries incurred in the course of employment. Since the field of employer-employee relations is one of the traditional fields of the general common law, the development of the law of labor relations has been chiefly in the hands of the various State legislatures and the decisions of their courts.

American labor law originally was the common law of England, which had grown out of the customs of an agricultural country. Rules which were fair and equitable in such an order of society might well lose such qualities when applied to an industrialized and urbanized community. Under the common law there were three defenses which an employer might make in claiming exemption from liability for an injury sustained in his shop: that

[40] Ibid. pp. 278–279.

the injury was due to the positive acts or the negligence of a "*fellow servant*," upon whom therefore the liability must rest; that the injured worker himself had been negligent, called the doctrine of *contributory negligence*; or that the employee had entered employment fully aware of its dangers, and so voluntarily assumed the ordinary hazards of the work, called the doctrine of *assumption of risk*. The injured laborer's remedy lay in a suit for damages against the employer, which often meant delay, large expense, and the disadvantage of having the highly paid attorneys of a large corporation as antagonists.

Early in the century the States began to pass statutes altering the time-honored common-law rules of liability. Usually the three defenses were specifically set aside and liability was imposed generally upon the employer for all injuries incurred in the course of employment. The reform was usually sustained by public opinion, on the ground of the relatively weak position of the laborer and the theory that injuries or deaths in the manufacturing of goods should be borne by the industry as one of the unfortunate items in the cost of production.

WORKMEN'S COMPENSATION · As has been explained, the employers' liability laws simply altered the relative rights and obligations of employers and employees. These rights might be asserted in the courts as before, although the situation of the injured had been altered for the better. Nevertheless, there still were the objections of delay, uneven ability to sue, and the natural inclination of judges trained in the common law to look with doubt upon the fitness of the new rules.

Beginning with Wisconsin in 1911, all but one of the States have established systems to facilitate the award of compensation for injuries; but in somewhat more than half of them the employer may elect whether or not to come under their provisions. Known as workmen's compensation laws, they are rightly regarded as twins of the employers' liability laws. The plans vary widely in details; but all agree on the three essentials: (1) the requirement that all employers of a specified minimum number of workers (usually three, six, or eight) contribute to a fund administered by the State, from which compensation shall be made, or, as the alternative, that they take out insurance with a private company, subject to the approval of the State; (2) a State commission or officer to administer the law; and (3) a simple, speedy, and inexpensive procedure for the determination of the compensation to be awarded.

ADMINISTRATION · A workmen's compensation commission, board, or officer is in general charge of enforcement, administers the fund (if any), awards compensation, and adjudicates disputes. The employee is required to report the injury immediately to the employer, who in turn must report it within a specified number of days to the State agency. Local examiners may make inquiries or hold hearings on the spot, but appeals may be taken from their decisions to the commission. If the concern is self-insured

and the insurance company fails to make an award of compensation, the matter goes to the commission for settlement.

In order to receive compensation, there must be an injury, and it must have been sustained in the course of employment, the determination of which is not always easy. At first, injury was taken to mean chiefly the exceptional, accidental, or violent, but later was broadened to cover the outcome of normal work, or such things as overstrain, weakened resistance, and the aggravation of existing disease. Occupational diseases, however, are compensable in only about half the States. An employee who is injured during the work period while off the premises or pursuing his own ends, or while on his way to or from work, is not entitled to compensation.

Eighteen of the States have employment compensation funds, but in only seven is contribution to them compulsory and self-insurance not permitted. In 1937 about $89,254,510 in premiums were paid into these funds. The cost of their administration has been reasonable. During the first twenty-five years of its existence the Ohio fund collected from employers only $1.057 for each dollar paid out in benefits, but this low cost was made possible by the payment of administrative expenses out of general appropriations. In California, where all expenses were accounted for, the cost was $1.15 for each dollar paid in benefits.[41]

RESULTS · At first, employers ordinarily opposed the adoption of compulsory workmen's compensation, but now give it wide acceptance. Criticisms are now directed chiefly to specific defects rather than the general idea. These include insufficient coverage, as farm laborers, domestic servants, and casual laborers, as a rule, are exempted; delays in making compensation awards; and the inadequacy of the payments as to the amount, the time for which they run, and the required medical attention. On the whole, however, the system has operated to the advantage both of labor and of the responsible employer.

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CHAPTER XLV

# *Government and Transportation and Communication: Highways, Inland Waters, and the High Seas*

The character of a nation's system of communication and transportation has a direct bearing on every phase of its social life. Easy, rapid, and cheap means add to the total wealth by facilitating the exchange of goods and services; tend to equalize the prosperity of the various regions; promote nationalism by breaking down local feelings and interests; soften the contrasts between rural and urban ways of life; and, by centralizing industrial production, foster the growth of large urban communities. There are corresponding effects on the political institutions. In a federation like the United States the need for action on a broad scale strengthens the national government at the expense of the State government, and the central State government, as a rule, at the expense of that of the local subdivisions.

THE AMERICAN COMMUNICATION SYSTEM · Land, water, and air furnish the media through and over which communication takes place in the United States. The combined highway routes total 3,270,000 miles, being made up of national, State, county, and (in about two thirds of the States) township or town highways and city streets. The railroad network comes next, with 229,174 miles of road (402,812 miles of tracks). Navigable rivers totaling 26,410 miles, of which a half are in the Mississippi river system; canals aggregating 4500 miles, more than one half of which are in disuse; and the coastal waters, river estuaries, and the Great Lakes furnish the routes of water communication and transport. The entire space above the safety limit is available for air navigation; 368,867 miles of certificated routes were actually in existence in 1942. More than 210,000 miles of oil and gasoline pipe lines and the telephone and radio networks (the last named with 1361 broadcasting stations) complete the picture.[1]

THE ROLE OF GOVERNMENT · Historically the transportation and communication business was the first to be operated or regulated by government. Remnants of roads here and there, from Britain to Mesopotamia, attest to the importance placed by the Roman rulers on roads in holding the vast empire together. "King's highways" were laid out throughout

[1]Interstate Commerce Commission, *Statistics of Railways in the United States*, p. 3 (1942); Civil Aeronautics Board, *Annual Report*, p. 3 (1942); Federal Communications Commission, *Fifth Annual Report*, p. 35 (1939); Report of the Commissioner of Corporations (1909), *Transportation by Water in the United States*, Vol. I, pp. 2–5.

England, while the roads and waterways of medieval Europe were under the control of feudal lords or the king.

Several factors account for the interest of government. Defense is one of the most important; the routes of the railways and highways of the European states were generally determined by military needs, and their merchant marines were subsidized for defense as well as commerce. The life-and-death power held by a transportation agency such as a railway over the fortunes not only of individuals and corporate businesses but of entire cities and regions makes some degree of government control inescapable. Even in a period of relative laissez faire, private capital could not build transportation lines without the loan of government's power of eminent domain; and water navigation could not develop far without the deepening of the rivers and harbors and the provision of lighthouses and other safeguards. Finally, in those instances where transportation facilities of vital importance to communities could not be operated at a profit by private capital, government had to enter the field as builder, owner, and operator.

GOVERNMENT POLICY · Government construction, ownership, and control of the highways have been the rule, leaving to individuals the furnishing of the vehicles of transportation. The same has been generally true of canals. Railroads in the United States have mostly been planned, built, owned, and operated by private capital, but in many instances with large subsidies from the national, State, or local governments. The internal navigable waters are owned and improved by government, and private ownership of the vessels has been considerably supplemented by government ownership. Bridges over streams are generally owned and maintained by the government. Air transport is private enterprise, but has received important government subsidy of one sort or another, while the air beacons, terminals, and fields are mostly government-owned. No field of transport or communication of commercial importance is without strict regulation, which extends to many matters involving rates, the amount and quality of the service, and financing. Government control has developed piecemeal, the Federal Transportation Act of 1940 being the first of a comprehensive character.

## *HIGHWAYS*

EVOLUTION OF AMERICAN HIGHWAYS · The rivers, creeks, lakes, and coastal waters were the first long-distance means of communication in the United States. At no point were the people of the original thirteen colonies far from a stream useful for the navigation of small boats. On land the old Indian trails were the first highways of traffic, from which evolved the early publicly controlled roads. These usually followed the high ground at some distance from a river. Thus in Ohio the Ohio River and the

Great Lakes were connected by three main Indian routes located roughly between the present cities of Cleveland and Marietta, Sandusky, Columbus and Portsmouth, and Toledo and Cincinnati. These were first traversed by the pioneers afoot; then with pack horses, sometimes in tandem, as a means of heavier transportation; finally, as the underbrush and some trees were cleared, wheeled vehicles, carts and wagons drawn by oxen or horses, appeared. Government soon interposed to lay out public highways. Beyond the timbered regions, in Illinois and west of the Mississippi, early travel was much easier. Wheeled vehicles could be used without the marking out of roads or their improvement. Francis Parkman has left a charming story of his trip in 1835, by means of horse and cart, across the plains to Fort Laramie, in Wyoming.[2] Brigham Young led his Mormon colonists to Utah in a horse-drawn buckboard. Travel in the old and the new South was even more difficult than in the Northwest Territory, because of the mountain chains which extended into northern Alabama, the greater rainfall, and the deeper rivers and more numerous swamps. The Ohio River, the Great Lakes, and the land routes across Ohio, Indiana, and Illinois consequently bore a disproportionate part of the east-and-west traffic. Beyond the Missouri River two great continental highways extended to the Pacific coast. The Santa Fe Trail was laid out by army engineers, southwest from Westport Landing (the present Kansas City), to Santa Fe, the political capital and chief trading center of the Spanish province occupying the north of Mexico. Pioneers laid out the Oregon Trail, which bore northwest from the Missouri River through Nebraska, Wyoming, and Idaho.

THE CUMBERLAND ROAD · The Allegheny Mountains, which stood as a barrier to the easy penetration of the Western country, were the chief cause of the early entrance of the Federal government into the field of transportation. President Jefferson in 1806 signed a bill for the survey of a route across the mountains, to begin at a point on the Potomac in Maryland. However, strict-construction theorists and the threats of foreign wars delayed the letting of the first contract until 1811. By 1817 the road had been carried through the mountains, following an old Indian route which had been used in succession by white pioneers afoot and by pack trains. In 1820 the great success of the enterprise led to an authorization for a survey to carry the road through to St. Louis, Missouri. Construction under Federal auspices was discontinued in 1838, when the road reached Vandalia on the prairies of Illinois and the railroads had begun to take up the burden of long-distance transportation. Thus was laid out through the heart of the nation the route which often has been referred to as "the Main Street of America."

A heavy stream of emigrants seeking homes in the West used this highway. Stagecoach lines (aided by mail contracts), giving swift and exten-

[2]Francis Parkman, *The Oregon Trail* (1931 ed.).

sive service, operated over its entire length. Congress, however, in 1837 surrendered its ownership and control of the road to the respective States in which it lay, and since that time has constructed no more roads on its exclusive authority except those on public lands and property. Federal authority to do so undoubtedly exists under the war and postal powers, but so far has been restricted to co-operation with the States through subsidy, the grant of lands and money, and the giving of technical assistance.

THE STATE HIGHWAY SYSTEMS · The planning and building of roads were thus left chiefly to the States, while the central governments in most States left the bulk of the work to the political subdivisions. In the States of the East, where heavy timber, mountains, and numerous and large rivers made travel more difficult, roads were laid out to follow the easiest natural routes. From Illinois to the Rocky Mountains the lines of the Federal system of surveys were usually followed, the laws permitting the opening of roads on all the "section" lines which separated the mile-square surveys; and so almost all roads ran due north and south or due east and west. In some places they might be opened on the half-mile lines bounding the quarter sections. In the mountainous and semiarid regions of the West, roads again were laid out on the principle of the line of least resistance, following rivers, the divides, and mountain passes.

THE NORTHWEST TERRITORY · Since the area of the Northwest Territory represents the first of the new territories beyond the mountains to receive Congressional legislation and to establish a compact system of local government units, its experience in developing a highway system will serve to illustrate that of all the newer States. A statute of the Northwest Territory of the year 1787 provided that roads might be opened upon the petition of citizens to the justices of the peace sitting in a court of quarter sessions. Every male citizen over sixteen years of age was required to work ten days each year on the roads, and for each day that he did not work or that he "wasted . . . in idleness or inattention to the duty assigned him" he should forfeit the sum of fifty cents.[3] In 1799 the time was reduced to two days, and the ages were set at twenty-one to fifty. The cost of bridges was to be paid by the county. The work of road-building and maintenance was in the hands of supervisors appointed by the court of quarter sessions.

THE OHIO HIGHWAY SYSTEM · Ohio began its statehood with a Federal subsidy, consisting of 3 per cent of the net proceeds of all Federal lands sold within its limits, to be applied to the "opening and making roads within the said state."[4] At first the administration of the funds was in the hands of State road commissioners, but soon was shared with the

[3]W. F. Gebhart, *Transportation and Industrial Development in the Middle West* (1909), p. 130.

[4]Ibid. pp. 139 ff. The account of Middle West development of highways in succeeding paragraphs follows this account.

counties. In 1806 the township trustees were authorized to levy a road tax, which might be paid by work on the roads. Later a land road tax was adopted, and levied according to whether the land was first-rate, second-rate, or third-rate. A law of 1824 recognized three classes of highways, State, county, and township, fixing the respective widths at sixty-six, sixty, and forty feet.

Private enterprise entered the field in 1809 with a law incorporating a turnpike company. The rates to be charged were defined in detail, and toll-free passage was given for certain occasions, including public worship, funerals, and elections. Two-horse vehicles were charged one "bit," with four cents for each additional horse, to pass a tollgate. By these various means and agencies a system of highways was developed. Generally they were not hard-surfaced, unless the corduroy roads, made of small tree trunks laid across the way and bound together by earth, and the few plank roads may be so considered. By 1848 the State had plunged into debt to the amount of $1,921,675.71 by investing in turnpike road stock. Meanwhile railroads and canals had begun to diminish the value of the highways for long-distance transportation. Another private enterprise was the ferry, needed because of the scarcity of bridges, which could be licensed only upon a petition signed by twelve householders of the township. Rates were fixed by the county commissioners and regulations made as to the hours of service. Private construction of roads to be paid for out of tolls, in spite of certain disadvantages, had proved a successful way of financing the road system. In 1866 there were still 2539 miles of such roads in Ohio; but by that time the laws had made easy their transfer to the public for free use, and they rapidly passed out of private hands.

The State government ceased after 1844 either to aid in the construction of roads or to subscribe to private turnpike companies. Thereafter local governments from time to time subscribed for turnpike stock or took over the building of roads with funds from assessments on the abutting landowners and, after 1885, from general taxation. The State did not again enter the field until the advent of the bicycle and the automobile on a large scale early in the next century. Beginning with New Jersey in 1891, the central State governments in rapid succession established highway departments and provided funds for general highway systems.

FEDERAL-STATE CO-OPERATION · The States, which for nearly fifty years largely had been out of the field of road construction and maintenance, re-entered it in the late 1880's, and the movement was greatly accelerated in the next decade by the coming of the automobile. An appropriation of five million dollars by Congress in 1916 was the beginning of the annual subsidies which have been largely responsible for the construction of the present great system of national highways. An act of 1921 provided that

the projects to be approved should be for the "completion of an adequate and connected system of highways, interstate in character."[5]

THE FEDERAL-AID HIGHWAY SYSTEM · The Federal-aid program is administered by the Public Roads Administration of the Federal Works Agency. Upon compliance with certain conditions the Federal government contributes 50 per cent of the estimated cost of a road project. The amount awarded each year naturally is dependent on the appropriation made by Congress. Projects for building must be submitted, and they must be approved as to routes, width of road, material used, and type of construction. The State must possess a suitable department, commission, or office of highways with which the Federal government may deal, and must have established a system of highways, comprising not over 7 per cent of its total mileage, which shall be eligible for Federal funds. The roads of this system are divided into the two classes of "primary," or interstate, highways and "secondary," or intercounty, highways; but not more than 60 per cent of the Federal funds may be spent upon the interstate highways. If it is found that a State has failed to keep its Federal-aid highways in repair, the Federal Works Administration, after due notice, may make the necessary repairs; and no further project for the State will be approved until reimbursement is made.

RESULTS · The results have exceeded the hopes of the most optimistic prophets. The network of 220,864 miles of Federal-aid highways provides connections between all the principal cities and localities of the country. In addition there are the 9818 miles of roads constructed on Indian reservations, in the forests, and on military and other Federal property.[6] During the eight years 1923–1930 over six billion dollars was expended on Federal-aid and State highways. Federal subsidies later were extended to the elimination of grade crossings and to roadside plantings. For the year ending June 30, 1942, the cost of Public Roads Administration projects was estimated at $412,639,373, which included funds for emergency war construction.[7]

STATE HIGHWAY ADMINISTRATION · Federal legislation has served as a standardizing agency for the States. All now have some sort of central agency; road-building designs are much alike; and uniform road-markers have been adopted. At the close of 1930 there were 324,496 miles of highways under central State control; by the end of 1936 this had increased to 533,144 miles. The movement is toward the absorption of county and township roads into the State system. North Carolina, West Virginia, Virginia, and Delaware by 1938 had taken over all county roads, and seventeen other states had taken over some of them. The chief reasons are the need for State-wide traffic planning, the greater economy of large-scale construction, and the greater ease of financing. In 1938 twenty-six

[5]42 Stat. 213.
[6]Public Roads Administration, *Work of the Public Roads Administration* (1942), p. 33.
[7]Ibid. p. 25; E. R. Johnson, op. cit. pp. 486–498.

States had both State and county road administration; six had State and township administration; and twelve had State, county, and township administration.[8]

A STATE HIGHWAY COMMISSION · Road administrative organization in the State of Oregon is typical. Oregon has a State highway commission of three members, appointed by the governor, one from each Congressional district, who receive payment for their necessary expenses only. The actual administration is in the hands of an engineer with a salary of seven thousand two hundred dollars a year. The commission is in charge of administrative policy: locating highways and adopting standards of construction, types of pavements, and kinds of materials. It may use the power of eminent domain to secure rights-of-way and road materials, including additional areas for park sites, recreational areas, and areas for the preservation of natural scenic beauties; may construct or license ferries; controls the construction of telephone and other lines along the highways; and is in general charge of equipment and of the repair shops located in convenient parts of the State. The State highway system consists of 4745 miles of primary and 2287 miles of secondary roads. Construction revenues are derived from motor-vehicle licenses and gasoline taxes.[9]

HIGHWAY TRAFFIC · Long-distance transportation had long been virtually a railroad monopoly, except for the traffic of rivers, canals, and the coastal waters. The hard-surfaced highway, the motor-driven vehicle, and abundant and cheap fuel ended that situation. Villages and small cities which formerly had been comparatively isolated now found this handicap removed. Highway transportation has certain advantages over that by railroad, particularly for short distances. The inconveniences of the fixed terminal point and way stations, and the expense of breaking the transport for small loads, do not appear in the same degree in the former case. In 1938 there were 22,600,000 passenger automobiles, 3,700,000 trucks, and 120,000 city and intercity busses in use in the United States. Freight lines with extensive equipment and covering long distances came into existence. It was chiefly the transportation of bulky freight for long distances, iron and steel products, the heavier farm products, and coal that was retained by the railroads. Some short lines were abandoned, and even the stronger systems were financially distressed by the new competition, which had been financed largely at public expense. Government regulation was inevitable.

STATE REGULATION · The "king's highway" of early England was regarded as something of a common. Along it moved the slow-going foot and horse-drawn traffic; on it lingered beggars, peddlers, strolling players, and huntsmen. The American conception was much the same. The

[8]Department of Agriculture, *Public Roads*, Vol. 19, No. 1 (March, 1938), pp. 2, 3.
[9]*Oregon Blue Book, 1939–1940*, pp. 24, 25.

fifty- to seventy-foot right-of-way was usually broken by only a single carriage track. Grass and weeds covered the remainder, which often was used as a herding ground by the poor for their cattle and horses, and as a camping ground for gypsies and for the emigrants in their covered wagons heading for the West. Then came the new conception, which regards the highways as a thoroughfare of traffic, no longer free to everyone but open only on the permission of government. State regulation is concerned with the protection of the State's property in the highways and with giving aid and protection to its users in matters of safety, health, efficiency, and convenience. Aesthetic and recreational considerations dictate those regulations which forbid billboards and other unsightly structures and the provision of observation points and picnic grounds.

PERMISSION TO USE THE HIGHWAYS · Many factors now make it unwise to leave the highways open to the use of all as they desire. Congestion of traffic, loss of life and property, and the destruction of the roadbed occur too frequently even with the present codes of regulations. State permission to use the highways is essential in some form for all motor vehicles. All but three States require drivers' licenses, which may be revoked or denied for violations of the highway regulations. Every State and some cities demand that motor vehicles be licensed before they may appear on the highway. A third type of permit is that required for commercial carriers of passengers and freight, with a prohibition upon those exceeding a certain measure in weight, length, or width.

COMMERCIAL TRANSPORTATION · Commercial carriers are now usually divided into three classes for purposes of regulation. A *common carrier* is one whose services for transportation are offered to the public for hire generally. A *contract carrier* offers transportation for hire by contract with individual firms or persons. Some manufacturing companies, instead of organizing their own transport services, make contracts with such carriers. A *private carrier* is one who transports his own goods by motor vehicle, as is done by farmers, manufacturers, packers and canneries, and the like. All States regulate highway common carriers; most of them, contract carriers; and a minority, private carriers.

CERTIFICATES OF CONVENIENCE AND NECESSITY · Persons desiring to operate on the highways as common carriers must first obtain from the proper agency, usually a public-utilities commission, a permit called "a certificate of convenience and necessity." As the name signifies, the application must give evidence that the proposed new service would add to the convenience of the public or is necessary to the proper conduct of the latter's business. In passing upon applications the commission takes into consideration such factors as financial responsibility, the condition and character of the equipment, the character of the service to be performed, the actual needs of the public, the effect of the proposed service on existing facilities, and the effect upon the roadbed and upon the traffic conditions

already existing. The schedules of rates and hours of service must be filed with the application.[10]

CONSTITUTIONAL AND LEGAL QUESTIONS · May the State make regulations which directly affect interstate motor traffic? Its claim to do so would appear much better than in the case of the railroads, for in the former case it is the proprietor of the right-of-way and in the latter it is not. In 1916 the United States Supreme Court, in the case of *Kane* v. *New Jersey*,[11] held that in the absence of Federal laws the State could "exact reasonable compensation" for the use of its highway properties from nonresidents as well as residents of the State. In 1927 it ruled that the State may make and enforce regulations reasonably calculated to promote care on the part of all persons using the roads, whether in intrastate or interstate traffic. In the same year it decided, furthermore, that the State may compel an interstate carrier to procure a certificate of "convenience and necessity" and pay the fees and taxes which go along with it.[12]

> The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to the regulation of the State to insure safety and convenience and the conservation of the highways. . . . Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for their use.

In a case two years earlier, however, it had decided that the State may not prohibit the use of its highways by interstate carriers.[13]

OTHER STATE REGULATIONS · Other State regulations include those relating to the kinds of vehicles which may be used, rates and service, and bonds and indemnity insurance. A Texas law had the effect of excluding the larger sizes of busses from its highways. It limited trucks to a width of 96 inches, a height of 12½ feet, a length of 35 feet, and a net weight of freight of 7000 pounds; but if a truck was used for short hauls to railway carriers, a length of 55 feet and a weight of 14,000 pounds of freight were permissible. The length of trailers, number and color of lights to be used at night, speed limits, and location of parking places are commonly regulated. It is customarily required that rates be fair and reasonable, and they are subject to test in the courts in this respect. The State commission, however, may set the rates on its own initiative to conform to this standard. Rates generally must be posted, and due notice must be given before changes are effective. States may regulate contract carriers, but may not compel them to act as common carriers. They may forbid the use of a certain route, even by interstate carriers, on the ground that it would tend to create congestion of traffic.

[10]E. R. Johnson, op. cit. pp. 520–523.
[11]242 U.S. 160 (1916).
[12]*Clark* v. *Poor*, 274 U.S. 554 (1927).
[13]*Buck* v. *Kuykendall*, 267 U.S. 307 (1925)

PORTS OF ENTRY · The establishment of a limited number of main arteries for interstate highway traffic has made it possible for a State to supervise the entrance and exit of persons and freight across its borders. Beginning with Kansas in 1933, about a dozen States within three years had established "ports of entry," where all or part of motor-driven traffic might be halted for inspection. The purpose was the enforcement of the various regulations respecting registration, the size and safety of cars and equipment, insurance, mileage and gasoline taxes, the entrance of intoxicating liquors, and the quarantine against infected fruit, vegetables, and livestock. Federal constitutional restrictions, however, prevent the levy of general State import and export taxes.[14] The State highway patrols supplement the frontier stations in enforcing the various regulations.

## *FEDERAL REGULATION OF HIGHWAY TRANSPORTATION*

Although the railroads long had been subjected to severe Federal regulations, highway transportation, subsidized by public funds in the provision of roadbeds, escaped until 1935. An act of that year declared it the policy of Congress to foster sound economic conditions among such carriers in the public interest; to promote "adequate, economical, and efficient service by motor carriers and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices"; and to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense."[15] Regulation of intrastate motor traffic by the States was not to be infringed. Administration of the regulations was placed in the Interstate Commerce Commission; but that body may refer to a joint board representing the respective States, when not more than three are involved, certain matters, such as complaints about fares and services, for investigation and recommendation. Members of the board are to be appointed by the respective State public-utility commissions or, if these fail to act, by the governor.

SCOPE OF THE REGULATIONS · In order to operate in interstate commerce, common carriers must obtain Federal certificates of "convenience and necessity," and contract carriers must procure permits. By 1937 nearly ninety thousand requests for the certificates and permits had been received.[16] Common carriers are required to file with the commission tariffs of their rates and charges, which must be "just and reasonable." Any person or State board or officer may file a complaint questioning the

[14]Department of Commerce, *Interstate Trade Barriers, 1942*, pp. 146–147; C. C. Rohlfing and others, *Business and Government*, pp. 328–329; Council of State Goverments, *Trade Barriers among the States*.

[15]49 Stat. 543 (August 9, 1935).

[16]F. P. Hall, *Government and Business* (1939), p. 124.

legality of the rates; and the commission, upon a hearing, then may set the maximum and minimum rates. The schedules must include those for long-distance travel, including "joint" rates with railroads, boats, or other motor-bus lines; and these are subject to revision by the commission. Contract carriers are required to file schedules of rates and services or copies of contracts containing minimum charges and other details as to services and practices; and common carriers must provide "safe and adequate service, equipment, and facilities" for the transportation of persons and property.

Various unfair practices forbidden to railways, such as rebates, or discriminations in the character of services given, are forbidden. Mergers of competing lines, through purchase, trust agreements, or interlocking directorates and the issuance of securities, are subject to regulation by the commission. Motor carriers must file surety bonds or policies of insurance, or give other evidences of financial ability to take care of claims which may arise against them. The commission is given a wide power to issue rules and regulations for carrying out the policies of the act, including the power to require uniform accounting and reports, uniform qualifications and maximum hours of service for employees, and the installation of equipment to promote safety of operation. The requirement for close co-operation with the States is particularly necessary because of their ownership of the highways, the local importance of congestion on the highways, and the existence of elaborate State highway administrative systems necessitated by the heavy amount of intrastate and local traffic.

## *TRANSPORTATION BY WATER*

GENERAL IMPORTANCE · Transportation by water may be said to be the oldest of the types used in the United States. By this means the continent was discovered, explorations were made, and colonization was carried out. Water highways were the most important factors in determining the location of early colonies and cities. Rivers flowing at frequent intervals from the Allegheny highlands to the coast were the routes of penetration for settlers and remained routes of travel and commerce. The St. Lawrence River and the Great Lakes, together with the Ohio River, furnished east-west routes for the explorers, traders, and colonizers. The Mississippi River provided a 3200-mile highway through the heart of the country from the Gulf almost to the northern border; and, combined with the Missouri, it provided a 3500-mile navigable route to Fort Peck, Montana, and the Northwest.

The United States possesses a greater mileage of navigable waters than any other country in the world. The Mississippi system, besides the parent stream, has such important navigable tributaries as the Ohio and the Missouri. The Ohio, in turn, has as tributaries the Monongahela and

the Allegheny; in the State of Ohio, the Muskingum, Scioto, and Miami; in Kentucky, the Kentucky and the Tennessee; and in Indiana, the Wabash. Among the affluents of the muddy Missouri are the Kaw and the Platte. Other navigable streams emptying into the Mississippi are the Arkansas and the Red in its lower reaches, and the Illinois and the Fox in the upper. The Atlantic coast has many streams, from Maine to Texas, navigable to the head of tidewater; whereas the West has only two of commercial importance, the Columbia in the Northwest and the Sacramento in California.

WATER-BORNE COMMERCE · The waters upon which the commerce of the United States moves fall into three classes, each of which has presented problems of government regulation peculiar to itself: inland waters, namely, rivers, lakes, and canals; coastal waters, or bays, inlets, and sea-level canals; and the high seas.

The water-borne commerce of the United States increased more than 50 per cent in the years from 1920 to 1940, the greater part of the increase being on inland and coastal waters. In the latter year it aggregated 607,900,000 tons, valued at $22,470,000,000. The commerce of the rivers, canals, and connecting waters amounted to 366,835,582 tons, of which 112,634,317 tons were on the Mississippi-Ohio river system, and 153,600,125 on the Great Lakes.[17]

JURISDICTION OVER NAVIGABLE WATERS · The Federal government, at various times and in various instances, has exercised all the four types of relations toward the business of water transportation, namely, as guarantor of legal rights, dispenser of aids and assistance, regulator, and owner and entrepreneur. To a greater extent than with any other form of commerce it has assumed a dominant and almost exclusive authority. The drafters of the Constitution expressly gave the Federal government power to regulate commerce between the States and with foreign nations, which, because of the nature of transportation at that time, was chiefly water-borne. They also gave the Federal courts jurisdiction over all admiralty and maritime cases. Together these have assured Federal regulation a place of dominance. The beds of the navigable rivers, canals, and lakes themselves are the property of the States or of private owners and are within the political jurisdiction of the States; but all such properties are held subject to use by the public for interstate or foreign commerce and to the regulations which Congress may impose for that purpose. In the case of the *Daniel Ball*, a small steamer plying between two Michigan points on a small stream, the Grand River, the United States Supreme Court ruled that the traffic was under Federal jurisdiction because of its connection with another navigable waterway, Lake Michigan, which is tributary to the sea.[18]

[17]Department of War, Board of Engineers for Rivers and Harbors, *Annual Report*, Pt. 2, pp. 2, 4, 146. The Ohio and its tributaries alone carried 265,699,854 tons.

[18]10 Wall. 557 (1871).

Federal jurisdiction, of course, extends only to navigable waters, but the definition of that term is such as government and the courts please to set. The existence of falls, rapids, sandbars, or shallow water does not remove a river from Federal jurisdiction, as exemplified by the Colorado River, which has long defied man's efforts to navigate it; and lately the courts have supported even Federal control of creeks tributary to navigable streams. Nevertheless, it has long been the rule that the State, in the absence of Federal action, may regulate incidental features of water traffic, such as harbors, pilotage, lights, and buoys.

FEDERAL REGULATION · Regulations of the business of water transportation are similar to those for interstate commerce on land. Rebates, combinations in restraint of trade, and discriminatory practices in general are forbidden. All agreements of one carrier with another, including those with respect to fares and pooled earnings, must be placed on file. These and other regulations are administered by the Maritime Commission.

## *FEDERAL AIDS TO WATER TRANSPORTATION*

THE DEPARTMENT OF COMMERCE · The Department of Commerce administers more of the aids to and regulations of commerce than any other single agency, but is far from being a monopoly. As now constituted, it has nine bureaus. The Weather Bureau is of general utility and might be classified almost anywhere, but its weather maps and hurricane and storm-warning service are of particular value to air and marine navigation. The Bureau of Standards, Census Bureau, Bureau of Foreign and Domestic Commerce, and Patent Office were described in connection with the problem of business regulation. The Inland Waterways Corporation operates the Federal Barge Lines on the Mississippi, Missouri, Illinois, and Warrior rivers and on Lake Pontchartrain. The Civil Aeronautics Administration, to be described at a later point, administers the Federal Airways System and the safety and licensing regulations, and otherwise promotes civil aviation.

THE BUREAU OF MARINE INSPECTION · The department's Bureau of Marine Inspection, as a wartime measure, was transferred on March 1, 1942, to the Department of the Navy. It is charged with various duties having reference to navigation. It enforces the laws respecting the registry, enrollment, and licensing of vessels, their port entrance and clearance, and many other parts of the navigation laws of the United States. It inspects boilers, hulls, engines, and life-saving equipment; checks vessels to establish their tonnage and see that lines indicating the maximum depth to which they may be loaded are marked; and publishes an annual report listing all ships of American registry, giving names, tonnage, and the home port. In every port of entry a shipping commissioner is maintained whose duties are concerned chiefly with the administration of the laws

regarding the recruitment and protection of seamen. These include the keeping of lists of eligible seamen, the superintendence of their hiring and discharge and the making of apprenticeships, and the witnessing of their contracts with the master of the vessel.

THE BUREAU OF LIGHTHOUSES · The Bureau of Lighthouses would seem to belong to the Department of Commerce, but in 1939 was transferred to the Coast Guard; and in 1942, as a war measure, the two together were transferred to the Department of the Navy. The bureau has charge of the lights, markers, and other signals for the guidance of vessels along all navigable waters, including the rivers and the Great Lakes. Administration is allocated to seventeen districts, each in charge of a superintendent. The equipment consists of lighthouses, ships, buoys, and nearly thirty thousand beacons. The work of the bureau is protected by a law of 1906 which forbids any person, corporation, or local government to erect any navigation guide without its consent.

THE CORPS OF ENGINEERS · The Corps of Engineers is an army unit in charge of the maintenance and construction work of rivers and harbors for purposes of navigation and flood control. Its budget for 1940–1941 was more than one billion dollars, which undoubtedly made it the largest construction concern in the United States.[19] The projects of that year, besides the routine maintenance work, included twenty-nine dams and reservoirs and one hundred and twenty-six flood-control projects, as well as current work on the Fort Peck and Grand Coulee dams, the Houston Ship Channel, and the Washington National Airport. It establishes harbor lines beyond which building and piers may not be built, makes specifications for bridges over all navigable streams, and approves the plans for all dams or structures affecting the navigability of waterways.

COAST AND GEODETIC SURVEY · The Bureau of Coast and Geodetic Survey, together with the Naval Observatory, does for the mariner and the airman what the highway map-maker does for the motorist. The former maps the coasts of the United States and the waters within twenty leagues, locating islands, shoals, and anchorages, and indicating the mileage between headlands, capes, and bays. Surveys are also made of the rise and fall of the tides and of the flow of currents, and data are compiled on the variation of the compass for all parts of the United States and its territories. The maps and charts are available to all navigators. The Hydrographic Office of the Department of the Navy exchanges information with similar offices in foreign countries, and prepares charts and sailing directions for the use of pilots, as well as manuals of instruction for navigators generally. The Naval Observatory broadcasts time signals and publishes three nautical almanacs for the use of marine and air navigators.

[19]Secretary of War, *Annual Report, 1940–1941*, p. 13.

## *RIVERS, HARBORS, AND CANALS*

Public sentiment has ordinarily been friendly toward the expenditure of money for river and harbor improvements, for which sentimentality sometimes is more responsible than cold reasoning. Rivers are alluring; they are the work of nature and permanent; and the pioneer days when they were the only means of travel have not been forgotten. Besides, their utilization offers a means of competition with the railroads, whose arbitrary acts in their earlier days aroused general resentment.

Federal appropriations for rivers and harbors were sporadic during the first half of our history and sometimes were made contingent upon contributions by the States or municipalities; but in 1870 Congress began making regular biennial appropriations. Because these were usually made without careful planning and the projects were distributed widely among the Congressional districts, they came to be known as "pork barrel" bills. The work now is on a better basis. All proposals and plans, whether originating in Congress or otherwise, are submitted for review to a Board of Engineers for Rivers and Harbors, consisting of seven members from the Corps of Army Engineers. They may recommend the commencement or the discontinuance of a project, based on its feasibility, estimated cost, and the amount of commerce which it might reasonably be expected to provide.[20]

IMPORTANT RIVER AND HARBOR IMPROVEMENTS[21] · The Mississippi, "the Father of Waters," with its tributaries, comprises the world's greatest navigable river system. The parent stream and its two great tributaries, the Ohio and the Missouri, alone have more than five thousand miles of navigable waters, to which must be added over a thousand miles of their smaller tributaries, which are navigable or may easily be made so. Great sums of money have been expended on the Mississippi for navigation and flood control. In 1878 Congress authorized the appointment of a Mississippi River Commission, composed of army engineers, three civilians, and various officers ex officio, to make plans for submission to the Secretary of War. A nine-foot channel is maintained from the Gulf to St. Louis and is rapidly being extended toward St. Paul and Minneapolis. The Mississippi and the Great Lakes have been connected by a nine-foot channel through the Illinois, Des Plaines, and Chicago rivers. The Missouri River has been partly improved as far as Sioux City, Iowa, and plans have been made to extend the navigable channel to Fort Peck, Montana.

[20] *United States Code*, Title 33, chap. 12, sect. 641.

[21] In 1934 President Roosevelt, as directed by Congress, appointed a committee, composed of the heads of the Departments of War, Agriculture, Labor, and the Interior, to prepare a comprehensive plan for the development of rivers in the United States. The report made recommendations covering all the navigable streams of the United States. Cf. House Document No. 395, 73d Cong., 2d Sess.

The Ohio and its main tributary, the Monongahela, constitute the most important river route, from the standpoint of mileage, in the United States. It taps the coal fields and iron-manufacturing centers of Pennsylvania, West Virginia, Kentucky, and Ohio, and affords an east-west highway for industry and consumers. In 1829 the construction of locks at the rapids at Louisville, Kentucky, was begun by private capital; in 1880 they were purchased by the United States and made toll-free. Improvements since that time, including more than thirty locks, give the river a nine-foot channel from Pittsburgh to Cairo, Illinois; and its upper tributaries, the Monongahela, Allegheny, and Kanawha, have been improved for considerable stretches. More than three hundred million dollars has been spent by the United States government on the Ohio River and its tributaries, excluding the Tennessee. In 1933 they carried a burden of 36,716,000 gross tons.[22]

The principal rivers of the Atlantic (including the Gulf) and Pacific seaboards have been improved for a considerable distance inland. These include the Merrimack, Hudson, Delaware, James, and Warrior rivers, and in the Pacific Northwest the great Columbia-Snake system. In 1934 the Secretary of War reported that two thousand river-improvement projects had been found practicable, and could be carried out at an estimated expense of eight billion dollars.[23]

River and Harbor Regulations · The Secretary of War is empowered, within certain limitations, "to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property."[24] In 1884 Congress abolished all tolls or operating charges for the use of all rivers, canals, or locks, except the Panama Canal. The creation of any obstruction to the navigable capacity of the waters of the United States is forbidden. No bridge across a navigable stream may be built without the express consent of Congress; and when such consent is given, the plans and specifications must be approved by the Chief of Engineers and the Secretary of War. Even after a bridge is completed, if the Secretary of War finds that it unreasonably obstructs navigation, he may, after a hearing, order it altered at the expense of the owner. The tolls for such bridges must be "reasonable and just," failing which the Secretary of War may prescribe a schedule. The engineers also lay out harbor lines beyond which no piers, wharves, or other structures may be built, and allot portions of the harbors as anchorages.

For regulating the operations of vessels, a code of rules more intricate than those for highways is prescribed. There are special rules for men-of-war, fishing boats, and passenger and cargo ships, both steam- and sail-

[22]E. R. Johnson, op. cit. p. 432.

[23]Ibid. p. 430; House Document No. 395, 73d Cong., 2d Sess., *Development of Rivers of the United States*, p. 834.

[24]28 Stat. 362 (1894).

propelled. These define what constitutes a right-of-way, specify the types of sound signals, and prescribe the color of lights to be shown on each area of the vessel. Separate codes apply to the Great Lakes and their tributaries, the Mississippi system, the Red River of the North, and rivers flowing into the Gulf of Mexico.

THE INLAND WATERWAYS CORPORATION · During the First World War the United States took over from their owners and operated the railways and inland-water carriers of the country. In 1920, when the properties were returned, the government-owned barges and boats were turned over to the Secretary of War for operation. In 1924 the Inland Waterways Corporation was created to operate such barges, on the Mississippi and its tributaries and on the Warrior River of Alabama, as might successfully be employed from the standpoints of the amount of business, depth of channel, and terminal facilities. The corporation was first capitalized at five million dollars, which was later raised to fifteen million and then reduced to twelve million. The object of the project was, by demonstrating the practicability of river transportation, to encourage private capital to enter the field, after which the government proposed to dispose of its equipment and withdraw from the enterprise.

The corporation, operating under the name of "Federal Barge Lines," gives service from New Orleans to Minneapolis, Chicago to St. Louis, and Kansas City to St. Louis; also from New Orleans to Mobile and Port Birmingham over the coastal canal, Lake Pontchartrain, and the Tombigbee and Warrior rivers. Its fleet in 1940 was composed of twenty-seven towboats and two hundred and seventy-seven barges, and plans had been made for their increase. In 1939 the corporation was transferred to the Department of Commerce, whose secretary acts as governor and director of the corporation.

In 1942 the Secretary of Commerce announced that the corporation was in a "sound financial condition." By that time it was paying its annual expenses without appropriations from Congress, but no account was taken of the twelve-million-dollar investment. Owing to this situation and to the requirement that the Mississippi River lines must be sold as a unit under a pledge to continue the service, no purchasers have appeared.[25]

CANALS · The Federal government played a smaller part in the field of canal construction. Its chief venture, that at Panama, was on a magnificent scale and attended with full success. The seaboard States had looked longingly toward the Ohio country, hoping to be connected with it by land or water routes. George Washington urged the difficult Potomac River route. New York, however, had the advantage in possessing the one "water level" break in the Alleghenies, the Mohawk Valley, stretching

[25]Department of Commerce, *Annual Report, 1942*, p. xx. The Secretary of Commerce announced that the Barge Lines had saved shippers thirty-three million dollars in the fifteen-year period 1924–1939. Cf. also M. E. Dimock, *Developing America's Waterways* (Chicago, 1935), pp. 10–13.

west from the Hudson. Spurred by its energetic governor, De Witt Clinton, the State in 1816 began the Erie Canal, connecting the waters of the Hudson with the Great Lakes, and completed it in 1825. Various shorter canals were built, after the War of 1812, by New York, Pennsylvania, and New Jersey. The Chesapeake and Ohio Canal was begun in 1828 by Virginia and Maryland, but reached Cumberland only in 1851, by which time the railroads had penetrated the mountain barrier. Pennsylvania by 1834 had completed a combined canal-portage railway route from its eastern waters to Pittsburgh, on the Ohio, at great expense and to small advantage, as the run was slow and unsatisfactory. Meanwhile the new States of the old Northwest had engaged extensively in the construction of canals. Ohio had three north-south routes connecting the Ohio River and Lake Erie, permitting the inexpensive shipment of farm produce to New York City by the connecting Erie Canal. The canals rapidly lost their importance after 1850, by which time the railroads had tapped the main regions not served by streams. By 1880, 4468 miles of canals had been built in the United States, at a cost of $214,041,802; of this total nearly 2000 miles already had been abandoned. The chief survivor today is the Erie Canal, which, after 1903, was deepened to give it a twelve-foot channel. Its average annual cost for operation and maintenance is in the neighborhood of $2,860,000, and its revenues are about $650,000.[26]

COASTAL WATERS · Plans have been drawn for the completion of links which would provide an intracoastal canal running from Massachusetts to Texas. The advantage would lie in furnishing a route at sea-level protected from ocean storms and tides. The Cape Cod Canal, constructed by the State of Massachusetts but now owned by the United States, is the first link. Long Island Sound, the Delaware and Raritan Canal across New Jersey, the Chesapeake and Delaware Canal, and natural inlets would carry the route to Norfolk. From there to Florida a water route of canals, inlets, and rivers already exists. To pierce the Florida peninsula and carry the canal through to Texas would be a more expensive task and of doubtful economic value, since the Gulf itself is a more or less protected waterway.[27]

Regulations of the coastal waters follow much the same lines as those of the inland waters. The coastal trade, including that with American colonial possessions, is confined by law to ships of American registry and construction. The pollution of the coastal waters by the discharge of oil from vessels is prohibited, and a special set of regulations has been made for the harbor of New York. Because of competition with the transcontinental railways, regulations are thrown around intercoastal shipments passing through the Panama Canal. Rates and charges, whether single or joint, must be posted with the United States Shipping Board, and rebates and discriminations are forbidden.

[26]H. D. Koontz, *Government Control of Business*, p. 882.
[27]E. R. Johnson, op. cit. pp. 442–443.

## *THE REGULATION OF OCEAN COMMERCE*

Congress has established a full code of laws regulating ocean traffic. This includes such matters as the registry of vessels, their sale or transfer, the liability of owners for losses, safety devices, the examination and licensing of pilots and engineers, the proper manning of vessels, and the provision of food and shelter for seamen and the methods for the payment of their wages. In doing so, Congress has acted under its power to regulate foreign and interstate commerce, and perhaps under an implied power to legislate on admiralty and maritime law.

THE MERCHANT MARINE: SUBSIDIZATION AND OWNERSHIP · During the years from Washington to Lincoln the American merchant marine steadily increased in size. Americans became expert builders of wooden sailing vessels, at a cost less than that of British ships. In the decade before the Civil War the advantage was being lost because of the introduction of steel vessels driven by steam power, for whose construction Britain was better equipped. The four years of the Civil War led to the loss of 40 per cent of the American tonnage, owing to capture or destruction by the enemy or because of transfer of registry to Great Britain. Meanwhile the Federal government had used various means to encourage the growth of our shipping. The first tariff gave a discount of 10 per cent in duties when the goods were brought in American vessels. Lighthouse and tonnage taxes imposed upon foreign vessels also gave something of an advantage to American shipping. To meet the competition with the new Cunard steamers, Congress offered a subsidy to our ships carrying the mails, but even this was not sufficient to meet the competition. Mail subsidies thereafter were given from time to time, but by 1890 the American merchant marine had declined to less than a million tons. Opportunities for the investment of capital to better advantage in domestic industry, higher and more expensive standards set for the treatment of seamen, and the greater experience of foreign rivals in shipbuilding and operation were among the factors that kept our tonnage down to a small figure until the outbreak of the First World War.

THE UNITED STATES SHIPPING BOARD · The outbreak of the First World War, during which much British, French, and Italian shipping was destroyed and the rest was devoted to the needs of those nations, was the occasion for the renewal of efforts on the part of the United States government to restore its merchant marine. The Shipping Act of 1916[28] aimed at "encouraging, developing, and creating a naval auxiliary and a naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries"; and "the regulation of carriers by water in the foreign and interstate commerce of the United States." The administration of the law was placed in the United States Shipping Board, subject to the general

[28] 39 Stat. 728 (September 6, 1916).

direction of the President of the United States. This board formed an Emergency Fleet Corporation, which proceeded to create a merchant fleet by purchase, leasing, and construction. After American entry into the war, construction was undertaken on a huge scale, and many vessels, some of them of wood, were hurriedly put together to help to meet immediate needs. In 1920 the gross tonnage of American merchant vessels was over seven million tons.

At the end of the war the government found itself with a large surplus of shipping on its hands. Some of the vessels were tied up and finally sold for scrap; others were sold to private operators for a small portion of the original cost; and still others were operated on regular lines to foreign countries by the Emergency Fleet Corporation. The government's policy, after establishing regular lines, was to sell them to private concerns for continued operation.

The act of 1920 reiterated the policy of the United States to build up a merchant marine sufficient to carry the greater part of its commerce and to serve as a naval or military auxiliary, but ultimately to be owned and operated by private citizens. A construction fund up to twenty-five million dollars was established, to be derived from the sale of Shipping Board vessels, and lent to private concerns on favorable terms for the construction of new vessels. Because of the oversupply of shipping, small use was made of the fund. Of the 1707 vessels owned by the Shipping Board in 1922, only 359 were in operation on seventy-eight trade routes.[29] These, as a whole, were operated at a substantial loss, and by 1928 many had become obsolescent.

Another act of that year set up a new revolving fund of two hundred and fifty million dollars, to be lent for building new ships and reconditioning old ones. Another important feature was the authorization of very liberal mail subsidies as a means of encouraging American shipping. How successful these new aids would have been had the shipping of the world not entered a sharp slump in 1929 is problematical. Vessels were operated at a loss, and many were idle. In June, 1933, acting upon Congressional authorization, President Roosevelt abolished the Shipping Board and transferred its duties to the Department of Commerce, which operates through the Shipping Board Bureau.

THE UNITED STATES MARITIME COMMISSION · In 1936 Congress again tried its hand at the problem. In establishing a new United States Maritime Commission it substantially reiterated its earlier declaration of policy, only modifying it to cover a merchant marine carrying all the domestic and "a substantial portion" of the foreign commerce.[30] The system of mail-subsidy contracts was abolished, and aid now was extended by the payment of a "construction differential" and of an "operating differen-

[29] E. R. Johnson, op. cit. p. 390.
[30] 49 Stat. 1987 (June 29, 1936).

tial." The former was computed as the difference between the costs of constructing the vessel in a foreign and in an American shipyard. Vessels might be built by the Maritime Commission by contract upon application and sold to the applicant, or by the individual by contract upon plans approved by the commission. In no case was the differential payment to exceed 33⅓ per cent of the cost. The "operating differential," another name for a subsidy, was the difference between the American and the foreign cost of operation.

These subsidies give the commission the power to confine the types of vessels to those which will best fit the commercial and military needs of the country, and to place them on the routes which will be of particular value to American commerce and industry and best meet foreign competition. It may purchase any vessel built with the aid of the subsidies, and during any emergency proclaimed by the President of the United States may requisition any vessel of American registry.

EMERGENCY SHIP CONSTRUCTION · The recall of the merchant ships of the various European states for war purposes at the outbreak of the Second World War immediately brought a crisis in American foreign trade. The idle vessels of the Maritime Commission were reconditioned and put in service or sold to the South American states and Great Britain, while the latter placed an order for the construction of sixty new ships. Foreign vessels lying in American ports were requisitioned. The Maritime Commission in 1941 greatly enlarged its building program, planning for the completion of twelve hundred steel vessels of thirteen million dead-weight tons by the end of 1943. Two thirds of the amount was completed in 1942 alone, and the expanded program called for nineteen million tons in 1943. The commission also instituted a training program for the fifty thousand additional officers and seamen needed for the new fleet.

By 1944 the United States had a merchant marine of new and speedy vessels far in excess of that of any other nation. It seemed likely at the end of the war to pose one of our major domestic and international problems. In September, 1939, the United States merchant fleet consisted of 939 ships, of 5,281,872 gross tonnage, with 48 of the larger ones laid up because of inability to match foreign competition. When it is remembered that several nations, notably Great Britain, Norway, Japan, and Italy, are highly dependent for their living on the income from shipping, the sharpness of the coming competition may be visualized. The United States may have to make the choice between a ship-subsidy race with its rivals and the tying up of a large portion of its merchant marine. Even with foreign competition greatly decreased by the war, the operating subsidy paid to private owners in 1940–1941 was $13,061,301.06.[31]

[31]United States Maritime Commission, *Economic Survey of the American Merchant Marine* (1937); ibid., reports to Congress, 1940–1941, 1941–1942, 1942–1943.

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CHAPTER XLVI

# *Government and Transportation and Communication: Railroads, Airways, and Wire and Radio Communication*

## *RAILROADS*

In 1828 the Baltimore and Ohio Railroad began to build its tracks, and in two years it had twenty-three miles in operation. Other companies soon entered the field. By 1850 the national mileage had reached 9000, and by 1860 it was 30,635. The close of the Civil War was the signal for the colonization of the trans-Mississippi area. Railroad-building at an unprecedented rate took place until all the principal regions had been tapped. In the decade 1880–1890, 70,000 miles were constructed, but thereafter the pace gradually diminished as it met the steadily growing pressure of the hard-surfaced road. The country's maximum mileage, 254,037, was reached in 1916, when some abandonment and tearing up of tracks began. In 1930 the railroad mileage had diminished to 249,052, and by 1942 to 229,174.[1] In its weaker sectors the "steam horse" had met its superior in the motor-driven car. The railroad's retreat is still more eloquently shown in the traffic figures. In 1920, passengers to the number of 1,269,913,000 were carried a total of 47,369,906,000 passenger miles, or an average of 444.6 per capita; whereas in 1930, 707,987,000 passengers were carried a total of 26,875,642,000 passenger miles, or 218.3 miles per capita.[2]

SOCIAL AND ECONOMIC IMPORTANCE · The railroads had been extended to the point where reasonably adequate service was available for almost all cities and towns. They were well adapted to take care of all types of transportation: bulky freight and small, light, and valuable goods; passengers individually and en masse. They had ended the isolation of communities connected only by mud roads and horse-drawn conveyances. The individual's social horizon, which usually had been bounded by his own county, now was extended to include the State or nation. The railroads' traffic rails were also bonds to tie the country together socially, economically, and politically. It was inevitable that government should play a large part in the affairs of an institution which was so inextricably intertwined with all the affairs of the community.

[1]Interstate Commerce Commission, *Statistics of Railways in the United States, 1942*, p. 3.

[2]President's Research Committee, *Recent Social Trends*, p. 169; Interstate Commerce Commission, *Annual Report, 1916*, pp. 42, 43.

PROBLEMS AND ABUSES · The railway systems are owned and operated by private corporations, all but a few of which are chartered by the States. Until the First World War the railroad corporations were the first choice for attacks by political orators upon "the enemy." They had a more potent control over the destinies of thousands of communities and millions of people, including farmers, small manufacturers, cattlemen, and oil-producers, than any other person or thing in the United States. They were larger and more wealthy than most of the people with whom they dealt, and their power and resources were everywhere evident. Many of the ills of which shippers complained were inadvertent, due to inefficiency and lack of planning; others were deliberate, the result of efforts to increase profits. A delay of a few days in receiving freight cars might well result in great losses to the farmer, because of the spoiling of his products or the decline in prices. The chief complaints lodged against the railroad managements were discriminations among various shippers of the same product, in rates or in services; unreasonably high rates and fares because of monopolistic agreements between carriers; charging more for short than for long hauls over the same route; discriminations in service among several towns; collusion with buyers at the terminals; failure to provide cars and service to co-operatives, while at the same time supplying chosen shippers and producers; and failure to provide adequate, sanitary, and comfortable accommodations for passengers. Not to be forgotten was the influence of the railroads in politics, so pronounced in many States that legislators and governors were classified as "railroad" or "nonrailroad" men.

GOVERNMENT AID · Private money financed the first railroads, but soon the States or their political subdivisions began to supply funds in the form of "loans," gifts, or donations. Several States entered the construction field, but usually ended soon by selling the property to private individuals at a fraction of the original cost. Many States purchased the bonds or stock of railroads, along with those of banks and of canal and turnpike companies. Large debts thus were incurred, Tennessee, for instance, running up a debt of $29,234,000 and Missouri one of $32,000,000 for railroads. A revulsion came in the 1850's, when some States repudiated their debts altogether, while others took the precaution to close the door to future indiscretions by adopting constitutional amendments forbidding such investments. This, however, did not always apply to the counties and municipalities. Their promised subscription often determined whether a road would be built and the route it would follow. It is estimated that the amount contributed by these units amounted to several hundred million dollars for the country as a whole.[3]

LAND SUBSIDIES · Federal aid was given chiefly to transcontinental lines. Because of the States'-rights feeling, public lands before the Civil War were turned over to the States as trustees, later to be deeded to the rail-

[3]R. E. Riegel, *The Story of the Western Railroads*, chaps. ii, iv.

roads. The theory supporting the land subsidies was that government would be reimbursed by the increase in the value of the land which it retained. One of the earlier grants was that in 1850 of four million acres of Illinois, Alabama, and Mississippi land to the Illinois Central for the Chicago-New Orleans route. For the Pacific railroads the grants were even more lavish. A vast domain of twenty million acres was given away for the building of a line from Omaha, through Ogden, Utah, to San Francisco. The grants made between 1850 and 1871 amounted to one hundred and fifty-five million acres, scarcely two thirds of which remained in railroad hands because of a failure to build the road contracted for or to finish it on time. Besides land grants, loans of money were made in some instances. Six Western railroads received over sixty-four million dollars, the greater part of which was finally repaid with interest.[4]

JURISDICTION OVER THE RAILROADS · The attempts of government from the beginning to regulate the railroads faced the obstacles inherent in the division of power between nation and States. At first the Supreme Court held that in the absence of Federal laws the States might legislate even on interstate traffic; but this was soon overruled. For fifty years or more the States legislated on railroad transactions which concerned the shipment of goods between points in the same State, but kept their hands off shipments which passed a State or international line. For instance, a "dry" state might prohibit the shipment of intoxicating liquors between points within its borders but not from outside, since this would amount to a regulation of interstate commerce.[5] The consequence was that authority existed nowhere for the regulation of the railroads as a unit.

The break with this illogical situation came when the Interstate Commerce Commission ventured to order a railroad to alter its rates between certain points in Texas on the ground that they interfered with interstate commerce, and was sustained by the United States Supreme Court. "This is not to say," the Court explained, "that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."[6] Taking its cue from this decision, Congress in 1920 explicitly conferred upon the Interstate Commerce Commission the power to determine intrastate rates to the extent that they interfere with the interstate business of the roads. The ultimate result was to spread Federal control over the affairs of the railroads in general.

STATE REGULATION · Because the railroads were their own corporations, the States from the beginning assumed a mild regulatory power over them.

[4]R. E. Riegel, op. cit. chap. iii.
[5]*Leisy* v. *Hardin*, 135 U.S. 100 (1900).
[6]*The Shreveport Case*, 234 U.S. 342 (1914).

The earlier charters included regulations for the use of the right of eminent domain, the tolls which might be levied (on the assumption that the roadbed would be used by persons in general for their various vehicles), and maximum charges, although some railways were unfettered in this respect. Even before the Civil War some of the States had their railway commissions, but few had significant regulatory powers until about 1870. Then, aroused by rate discriminations, the farmers of the Middle West demanded commissions with teeth in them; and so began the codes, for the curbing of the railroads, which ultimately found a place in every jurisdiction.

In most of the Middle Western and Southern States the railroad commissions now were empowered to set reasonable maximum charges, whereas those of the Northeast were more nearly advisory in character, depending on publicity and competition to right the wrongs. Regulation extended in many States to matters of services, discriminations, and accommodations for the public. By 1944 all the States except Delaware had agencies to enforce regulation of the intrastate operations of railroads, being variously known as "railway commissions," "public-utility commissions," "public-service commissions," and the like.[7] While in theory the State possesses a wide regulatory power, no rule is valid which obstructs or hinders a Federal rule reasonably adapted to the regulation of interstate commerce. Intrastate rates and charges may not be set at a level below Federal rates for the same service.

THE INTERSTATE COMMERCE COMMISSION · The Federal government began its program of railroad regulation in 1887, and the Interstate Commerce Commission, which was established at that time, remains in charge of the intricate regulatory rules accumulated over a period of more than half a century. Not only is it the oldest of the "independent" Federal commissions but it is also the most highly respected. Students seeking knowledge of the inherent possibilities and limitations of the public regulation of economic enterprises will find more instruction in the experience of this commission than in that of any other one agency in the American scheme of government.

The Interstate Commerce Commission is composed of eleven members, appointed by the President and the Senate for overlapping terms of seven years, not more than six of whom may be members of the same political party. Its range of powers is very wide, embracing the administration of the Federal regulations of the railroads applying to express and sleeping-car services, carriers by water, pipe lines carrying oil, and highway transportation. Its duties, in general, are more constructive and managerial than punitive. The objects are to see that the carriers are kept running; to eliminate bad practices; to maintain reasonable charges; to protect investors in railroad securities; and to foster planning for co-ordinated national transportation.

[7]Council of State Governments, *Book of the States, 1943–1944*, pp. 470–471.

ORGANIZATION · When the commission began its work in 1887, it was able for a time to perform its few simple duties after the manner of an ordinary committee. Now, with greatly extended jurisdiction and accumulated tasks, and with a working force of more than 2120, the duties of the commissioners are chiefly supervisory. The commission sits in five divisions, all but one of which are made up of three members. Each is in charge of a particular field.[8] Division 1, for instance, deals entirely with valuation matters, and Division 5 administers the Motor Carriers' Act of 1936. The full commission, of course, has a reviewing power over all divisions, and deals with questions of general policy. Further to relieve the pressure on the full commission, an act of 1930 authorized the assignment of any part of its work to a single commissioner or to a board of one or more subordinate officials, whose decisions and orders should have the same force as if made by the entire commission. Parties affected by such decisions have the right to ask for a rehearing, which may be held before a single member, a division, or the whole commission.

The commission is free to construct its own internal organization of subordinates. At the present time fifteen bureaus, organized on functional lines, exist, among which are those of Safety, Locomotive Inspection, Valuation, Air Mail, and Motor Carriers. Each is in charge of a director and is organized into divisions. The secretary of the commission acts as a general liaison officer, all matters from the subordinate units of the commission being cleared through him. He is in charge of the Bureau of Administration; maintains contacts with outside agencies, such as the Civil Service Commission and the Bureau of the Budget; and receives and dockets formal complaints and applications, much as does a clerk of a court.

METHODS OF WORK · The commission's procedure in handling its work varies necessarily with the function which is to be discharged. In its quasi-judicial field, for instance, the procedure bears a resemblance to that of the courts, but is somewhat simpler, speedier, and less technical. To this field belong the many complaints involving quality of service, which may be presented by any aggrieved person or firm, a unit of government, or the commission itself. After a formal written complaint has been filed, the matter goes through about half a dozen different stages before the commission issues an order, during all of which a trial examiner bears the burden of the work. Orders of the commission may be appealed to the courts on questions of law. Many complaints are handled by means of investigation, correspondence, and advice and mediation, without formal procedure. Many other functions of the commission call for distinctive procedures, such as the passing on applications of the railroads for "certificates of convenience and necessity," on the discontinuance of service, and on the issuance of securities.

[8] I. L. Sharfman, *The Interstate Commerce Commission* (1931–1937), Vol. IV, chap. xvi, sects. 3–5.

## *RAILROAD REGULATIONS*

The railroads are the most highly regulated of all industrial or commercial properties in the United States. According to the person's viewpoint and understanding, their situation may be likened to that of Prometheus, the Man-Mountain Gulliver in the land of the Lilliputians, the captured and caged wrongdoer, or merely the very sick patient ministered to by the physician. The regulations, whose scope can be indicated only briefly, cover every phase of the railroad properties and management.

SAFETY · One branch of the Interstate Commerce Commission's work is of a distinctively police character, namely, the enforcement of the safety laws. Congress has not only laid down concrete requirements but authorized the commission to make rules of its own. These cover such details as brakes controlled by the engineer, automatic couplers, grab irons, secure steps and running boards, and block signals. The requirement for safe boilers is enforced by the Bureau of Locomotive Inspection under a director appointed by the President of the United States.[9] An hours-of-service law forbids any person to work longer than sixteen hours in any twenty-four-hour period; and if one is on duty as long as that, he must not resume work without at least a ten-hour rest period. High explosives may not be transported in cars carrying passengers. The railroads are required to make monthly reports of all accidents resulting in injury to persons or equipment, and the commission is empowered to investigate and make a public report of all such accidents.

SERVICE · The Bureau of Service exercises control over railroad equipment and service, to further the speedy and economical movement of traffic. The part which it plays is managerial in character. Every carrier is required to furnish "safe and adequate" car service, and the commission may establish rules, regulations, and practices to that end, including the allocation of equipment among various customers in times of shortage. In emergencies its powers are even more sweeping. It may order equipment to be transferred from one system to another or from one part of the country to another; require the joint use of terminals and main-line tracks; and determine priorities in transporting goods.[10] Railway lines may not be abandoned or new ones constructed without a certificate from the commission that such change accords with public convenience and necessity, and the commission may order railways to acquire or construct new facilities.

RATE-MAKING · Rate regulation, or rate-making, is the commission's heaviest burden. The difficulty is that there are too many masters to serve. A reasonable return is needed on the value of the property in order to keep the roads running and to safeguard the investors; depressed in-

[9] 36 Stat. 914 (1911).

[10] I. L. Sharfman, op. cit. chap. i, pp. 237, 238.

dustries and regions demand rate concessions as subsidies; weak lines demand support at the expense of the stronger; the competition of highway and river transport, both subsidized at public expense, must be met; and consideration must be given to the transportation system as a whole, of which the railroads are only a part.

The commission's power over rates was built up only by degrees. The act of 1887 prohibited "unreasonable rates" and "unjust discriminations," but the commission was without effective power to prevent them.[11] By 1906 Congress had tightened the restrictions against deviation from published rates, punishing both shipper and carrier for violations, and requiring publicity for all rates and thirty days' notice of changes. The commission was also given the affirmative power to set reasonable rates, which must be obeyed by the carriers unless set aside by the courts. In 1910 it was authorized to bring about rate changes on its own initiative and to suspend proposed rates pending an investigation. Finally, the Transportation Act of 1920 empowered the commission to fix the minimum as well as the maximum interstate rates, and also intrastate rates if they should "unreasonably discriminate against, or place an undue burden upon, interstate or foreign commerce." Thus for the first time the law required that in making rates the efficiency of the national transportation system as a whole should be taken into account.

WHAT ARE THE RAILROADS WORTH? · While government has the undoubted power to set the rates charged by carriers for service, the courts long have held that the rates must be "reasonable" in order to meet the prohibition against the taking of private property without "due process of law." The Supreme Court, in the historic case of *Smythe* v. *Ames*, ruled that the carrier was entitled to "a fair return upon the value of that which it employs for the public convenience."[12] Hence arises the critical question What is the fair value of the property? To yield 6 per cent would require much higher passenger and freight rates if the valuation of the railroad were placed at, say, eighty million rather than fifty million dollars. The question is too intricate for examination here, but the difficulty of the problem thrown into the lap of the commission or of the Supreme Court is easily apprehended.

PHYSICAL VALUATION OF THE RAILROADS · Rate contests became an almost regular occurrence. State legislatures vied with the Interstate Commerce Commission in lowering rates. The railroads repeatedly complained that the publicly set rates failed to give a fair return on the value of their property. Farmers, businessmen, and politicians maintained that the railroads were asking for a return on fictitious values represented by "watered stock," which they confidently believed would be revealed by a physical appraisal of railroad properties.

[11] 24 Stat. 379 (1887).
[12] *Smythe* v. *Ames*, 169 U.S. 466 (1898).

Senator Robert M. La Follette, Sr., of Wisconsin, in 1913 introduced a bill which required the Interstate Commerce Commission to make such a valuation.[13] The act called for the appraisal of all physical properties, lands, rights-of-way, equipment, and terminals, and a separate report on "other values and elements of value, if any." The commission has consistently reported that no such factors as "good will" or "going value" exist. Separate appraisals were to be made of the original cost, the cost of reproduction new, and the cost of reproduction less depreciation.

The country was divided into five districts, each with approximately fifty thousand miles of railroad; and engineers, valuation attorneys, and accountants were placed in charge of respective fields. The task as set proved impossible of achievement. Records of the original cost were incomplete; costs of reproduction were constantly undergoing changes because of technical price changes and engineering advances; and because the magnitude of the undertaking required years to accomplish, appraisals no sooner were made than they became obsolete. A considerable portion of the project, particularly that of the original cost, had to be done by mere estimate rather than appraisal.[14]

The result of the twenty-year survey was announced in 1933. The original cost, exclusive of land, was placed at $22,860,365,394, and the present value of lands and rights at $3,032,799,826. It was further estimated that the cost of reproduction of the properties, excluding the lands, would be $23,953,546,235. In 1920 the commission found the value of the railway properties for rate-making purposes to be $18,900,000,000; but since that time large additions to the property have been made. The total cost of the project of physical valuation amounted to $300,000,000, or about 8 per cent of the value of the railroads, which places Senator La Follette's original estimate of $5,000,000 in a curious light.[15] While the survey has been of considerable value to the commission in its work of regulation, it can hardly be said to have been a net gain for the consumers and taxpayers.

RATE-MAKING UNDER THE ACT OF 1920 · The commission is authorized, as has been said, to prescribe rates which are "just and reasonable"; but if a fair return is the test of reasonableness, the commission never has been able to comply with the law.[16] Not since the sharp decline in railroad business after 1920, due to the combination of motor-highway competition and depression ills, have the railroads as a whole been able to earn 5 per cent on the conceded value of the investment; only in rare cases, individually and for a short time, have they done so. The commission and the railroad managements are generally agreed upon the principle of set-

[13]37 Stat. 701 (1913).
[14]C. C. Rohlfing and others, *Business and Government*, p. 315.
[15]Interstate Commerce Commission, *Fifty-seventh Annual Report* (1933), pp. 75, 76.
[16]41 Stat. 457 (1920); 43 Stat. 217 (1933).

ting the charges at the point of maximum returns if these are consistent with public convenience. Since the railroads are in sharp competition with formidable transportation rivals, their charges must be determined primarily by such competition, and the original investments must be largely forgotten. Neither the government nor the railroads won in the two-decade-long argument over the proper value of the railroad properties. Congress, in a hazy law of 1933, recognized that other considerations than capital value now are dominant in rate-making. In the determination of "just and reasonable" rates consideration is to be given also to "the effect of rates on the movement of traffic," "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service," and the "need of revenue sufficient to enable the carriers . . . to provide such service." This was a legal statement of the current practice of the commission.

FINANCING OF RAILROADS · Inasmuch as the railroad corporations were mostly created under State laws, the regulations respecting their finance came from the States and naturally differed greatly. Some railroad systems had been wrecked by high railroad officials who had entered the business for purposes of speculation rather than because of an interest in transportation; and weak State laws had contributed to this abuse. The act of 1920, requiring the consent of the commission before any new stocks or bonds might be issued, was adopted with the triple purpose of protecting the interests of the public in transportation, of safeguarding the investors against overcapitalization, and of protecting the railroads themselves against excessive costs of financing. A scheme for the issue of new securities must be presented in detail. Several considerations guide the commission in passing on requests for new funds: the benefit to the public; possible injury to present or future investors; the propriety of the type and kinds of securities; the threat of excessive capitalization; and the economy of financing, as determined by the price received for the securities, as well as the interest rate.

ORGANIZATION AND COMBINATION OF RAILROADS · The Sherman Anti-trust Act for many years was vigorously applied to the railroads to prevent or punish agreements of various kinds in restraint of interstate commerce. The principle involved was the desirability of maintaining competition as an automatic regulator of charges and services. A contrary policy was instituted with the Transportation Act of 1920. The pooling of traffic and earnings was to be permitted if the commission found, in any specific case, that it did not "unduly restrain competition" and was "in the interest of better service to the public, or economy of operation." Consolidations of railroad lines were to be encouraged. Specifically, the commission was ordered to make a study and submit a plan for the consolidation of the seven hundred or more independent lines into a limited number of systems. In 1929 such a report was made, recommending a grouping into twenty-

one regional systems, and conforming to the requirements of Congress that the scheme should (1) preserve competition, (2) maintain existing routes, and (3) equalize earning capacity by attaching weak nonpaying lines to strong ones. The scheme never advanced beyond the paper stage, although a few minor consolidations by lease or purchase, and quite outside the plan of the commission, were made.

Another gesture toward consolidation was made by the Emergency Transportation Act of 1933. This act created the office of Co-ordinator of Transportation, whose task it was to conduct studies and undertake reports for the purposes of eliminating duplications and waste and encouraging consolidations. Regional committees of railroad men, representing the East, South, and West, were appointed for conference and study. Several excellent reports were submitted to Congress before the lapse of the office in 1936, but no action was taken on any of them.

RAILROAD LABOR · The "commerce clause" gave Congress the opportunity to legislate for railroad labor long before its interpretation permitted general labor legislation. The numerous and detailed enactments bearing on hours, conditions, safety, welfare, and the settlement of labor disputes were summarized above in connection with a consideration of the general labor problem. Because of their intimate connection with railroad management and finance, those establishing a "little social-security" system were left for consideration at this point.

The immediate forerunners, however, are worthy of brief notice. The emergency act of 1933, whose purpose was to eliminate waste by encouraging co-ordination and mergers, contained a provision that the pay rolls must not be cut down by eliminating any employee in service as of May, 1933. The act was followed the next year by legislation setting up a railroad-labor retirement fund, to be raised by contributions from both employer and employees; but this was declared unconstitutional before it could go into effect.[17] After two acts of 1935, embodying a similar plan, but unsatisfactory to both labor and the railroads, had been enjoined by a court, a new measure was agreed to by the two parties and adopted by Congress.

SOCIAL SECURITY · The Railroad Retirement Act and the Carriers' Taxing Act, both of 1937, and the Railroad Unemployment Insurance Act of 1940 together established a system of social security for railroad labor.[18] The first took over the existing railroad pension systems and established a general annuity system based on the workers' years of service and earnings. An employee may retire at the age of sixty-five years, or at sixty if he has served thirty years; but retired employees who enter regular gainful employment are not entitled to the annuity. Death benefits are

[17] *Railroad Retirement Board* v. *Alton Railway Co.*, 295 U.S. 330 (1935).

[18] 50 Stat. 307; 54 Stat. 264, 785, 1100.

payable to the worker's widow or estate. Because of the relatively high scale of railroad wages, the annuities are much higher than the average under the general Social Security Act.

The Carriers' Taxing Act provides the financing. A pay-roll tax of 5½ per cent, to be increased to 7½ per cent by 1949, is levied, one half to be paid by the railroads and one half by the individual employees. The collections are made quarterly by the Bureau of Internal Revenue and deposited in the treasury. By June 30, 1943, a total of $871,499,980.81 had been paid into the fund, and the monthly annuity payments were in the neighborhood of $11,000,000.[19]

The Railroad Unemployment Insurance Act, of 1940, completes the social-insurance scheme. It provides benefits, for specified periods each year, based on the individual's salary scale and ranging from $1.75 to $4 a day. The financing is from a 6 per cent tax borne equally by the railroads and the employees, and is administered by the Railroad Retirement Board. The unemployment-insurance systems of those States covering railroad workers are outlawed and their appropriate reserve funds taken over. To June 30, 1943, $30,473,564.30 had been paid into the account, and benefits at the rate of somewhat less than five million dollars a year were being paid out.[20]

SUMMARY · Federal policy toward the more-than-a-century-old railroad industry has been marked by many contradictions. Munificent grants of land and money and other special privileges were given; at other times regulations for punitive purposes were adopted. Government has seemed to hold and act upon two antagonistic theories at the same time: that competition should be maintained among the various roads as to rates and services for the benefit of the public, and that the railroads are non-competitive semimonopolistic utilities, whose rates and charges should be uniform and fixed by agreement subject to the approval of the Interstate Commerce Commission. A manifestation of this contradiction occurred during the late summer of 1944, when the Department of Justice brought an antitrust suit against the Western railroads on the grounds of coercion and collusion, although the rates had been approved by the Interstate Commerce Commission.[21]

Allowing for many short-time variations, we may distinguish three periods of Federal railroad policy. The first, covering several decades, was characterized by enabling legislation, the granting of franchises, and gifts of land and money. The second, beginning with the act of 1887, was a period of regulation and, to some extent, of repression. The third, marked by the Transportation Act of 1920, was constructive in character, looking to aid for the weaker lines, adjustment to highway-motor competition,

[19]Secretary of the Treasury, *Annual Report, 1943*, pp. 494, 681.
[20]Ibid. pp. 514–516.
[21]*New York Times*, August 27, 1944, p. E5.

and the co-ordination of all transportation. The act of 1940 for the first time placed the regulation of railroad, water, and motor carriers all in one body, the Interstate Commerce Commission. The announced purpose was that of "developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of national defense."

RAILROADS AS PRIVATE PROPERTY · The railroads are private property, but private property of a peculiar character, which may be appreciated all the more clearly if they are compared with a more normal piece of property; for instance, a Texas ranch.

The rancher may operate as many thousand acres as his means will permit. He may augment his holdings by lease, by merger, by marrying the neighboring heiress, or by outright purchase; and he may collaborate with his neighbors or competitors by informal agreement, contract, producers' association, or a sort of interlocking directorate. He may substitute Hereford for Alderney cattle; shift entirely to sheep-raising; or stop production altogether and start a "dude" ranch. He may sell his livestock at whatever price he can obtain on the market; may borrow money, limited only by the banker's faith in his holdings and by his "face"; and spend it for any purpose whatsoever. He may maintain elaborate living quarters and stock pens, or the meagerest adobe and rail structures. He deals with the cow hands individually; pays them according to the custom of the community; and puts them on night and Sunday shifts without overtime pay. He contributes to no unemployment or old-age fund, and is answerable to no supervisory board or commission, but only to the regular courts.

In all analogous respects and more, it will be recalled, the disposition and use of the railroad property and the business conduct of its managers are restricted by law or dependent on the consent of government. Since private property in railroads is obviously little more than a shell, it may reasonably be asked, Why should not the final step be taken, that of government ownership?

GOVERNMENT OWNERSHIP · A veteran member of the Interstate Commerce Commission who was at the time Co-ordinator of Railroads stated in 1934 in a report, "Theoretically and logically public ownership and operation [of the railroads] meets the known ills of the present situation better than any other remedy."[22] Although, strangely enough, during the last decade and more of a trend toward collectivism the proposition has been little agitated, it might come to the forefront abruptly. Sharpened competition with highway and air transport, and the combined burdens of the $6\frac{3}{4}$ per cent pay-roll tax for social insurance, the Federal corporation tax, the State and local general property and excise taxes, and the relatively high wage scale, might well bring about a situation calling for a quick decision.

[22] 73d Cong., 2d Sess., Senate Document No. 119, *Public Ownership and Operation.*

The question is only one of the more difficult of those upon which sixty million voters must from time to time pass judgment. The issues are too involved for detailed consideration here; but the chief arguments on both sides will be stated in summary fashion.

ARGUMENTS FOR GOVERNMENT OWNERSHIP · The principal supporting arguments are the following:

1. Since the railroads are now halfway between private and public property, why not go the whole distance and eliminate time-consuming dealings with their owners? The Interstate Commerce Commission could be transformed into a corporate board and its energies, no longer dissipated in hearing complaints or making prosecutions under the Anti-trust Act, turned exclusively to the task of business management.

2. There would be an end to competition, and all lines could be integrated in one system, making possible a more economical use of tracks, terminals, and equipment, and the use of fewer employees.

3. By placing the treasury behind the enterprise, the question of credit would be solved; money could be borrowed at a lower rate, and be readily available for needed extensions of service.

4. Discriminations in favor of persons, industries, localities, and regions would be eliminated.

5. The strife between management and labor would be lessened or ended, since the employees now would become civil servants.

6. Finally, there is the collectivist argument, applicable to proposals for government ownership generally: that the railroads would be run for service and not for profit.

ARGUMENTS AGAINST GOVERNMENT OWNERSHIP · The chief arguments of those opposing government ownership run about as follows:

1. First and foremost among the objections to government ownership is the stock argument for private capital, that government is inherently incapable of running a large business enterprise efficiently and economically. The formalism and the control by rule or directive, characteristic of government offices and commonly referred to as "red tape," would kill initiative and condemn the management to mediocrity.

2. Ending intersystem competition would dull the urge for improvements and place all service on a dead level.

3. Since existing Federal enterprises have been operated at a loss, that policy could hardly be extended much farther; for the burden of sustaining them falls by taxation on the remaining privately owned industries, as well as on the people in general. The railroads, as one of the country's largest and most productive enterprises, which through taxation now help to sustain government-owned businesses operated on a deficit basis, should at least be self-sustaining. Apart from the ordinary operating costs, the chief items which the government would have to take over would be

the $25,000,000,000 capitalization, which, as an addition to the public debt, would call annually for more than one billion dollars in interest and principal; railroad "social security," which amounted in 1943 to $220,774,300; and taxes, amounting annually to $1,199,000,000.[23] Wages doubtless would continue to absorb about two thirds of the operating revenue.[24]

4. It is doubtful whether railroad labor, now better situated than any other class comparable in size, would be benefited. The problems of conditions and hours of work and wage adjustments would remain, with the difference that government, now the champion of labor, would become its employer. The right to strike would be diminished or abolished altogether.

5. If the railroads, like other government business enterprises, were kept tax-free, the State and local governments would lose a large, and in the sparsely settled West the principal, source of income.

6. The political argument has many ramifications. The 1,300,000 employees and their families would constitute a voting bloc which no candidate for President or Congress could well ignore. Rates for cities and regions, extensions of lines and service, and policies of management would be determined by political expediency rather than by sound economic considerations. The temptations for all sorts of discriminations and favors would remain, only with the parties changed.[25]

## *TELEGRAPH, TELEPHONE, AND RADIO COMMUNICATION*

In most of the countries of Europe, communication by electro-magnetic devices is a government-owned and government-operated monopoly, usually attached to the postal system. These instrumentalities in the United States characteristically were developed by private enterprise, but with various government aids. In 1837 S. F. B. Morse, who had perfected a practicable telegraph set, failing to get private aid, received from Congress a subvention to build a line from Washington to Baltimore. Soon private capital entered the field and the network grew rapidly. In 1861 the Western Union Telegraph Company extended its line to San Francisco ahead of the railroads. An act of Congress of 1866 extended to telegraph companies organized under State laws the right to erect lines through the public lands, along post and military roads, and under the navigable waters of the United States. In 1875 Alexander Graham Bell invented the telephone, and soon lines were pushed across the country and into every nook and corner. Early in the 1920's radio broadcasting got under way.

THE COMMUNICATIONS SYSTEM · The American communications system is complete for all ordinary purposes. The 102,247,033 miles of telegraph

[23]Secretary of the Treasury, *Annual Report, 1943*, p. 521.
[24]Interstate Commerce Commission, *Statistics of Railways in the United States, 1942*, p. 102.
[25]Ibid. p. 60.

and telephone wire, the 915 broadcasting stations and 50,000,000 receiving sets, to say nothing of the transportation systems, render it possible for a person anywhere to make contact with another in the most remote nook of the country.[26] More than sixty-five million people were estimated to have listened to President Roosevelt's declaration of a national emergency in May, 1940.

Government's duties toward the industry are much the same as those toward other public utilities: to aid in maintaining efficient service; to prevent monopolistic and discriminatory practices, so that the facilities may be open to all on equal terms; to promote good labor conditions; and to protect investors. A special problem is the safeguarding of freedom of speech and expression. The mere size of the combined telephone, telegraph, and radio systems, representing a six-billion-dollar investment in plant and equipment, and employing 437,158 persons, indicates the character of the regulatory problem.[27]

STATE AID AND REGULATION · Like the railroads, the telegraph and the telephone in their early stages fell mostly under State control. They are incorporated by the States and subject to their corporation laws. Enabling legislation was necessary for the erection of poles and other equipment along the highways, streets, and local railways, and for the exercise of the right of eminent domain for the acquisition of land. The movement for the regulation of railroads carried over to the telegraphs and telephones, and public-utility commissions were given power to regulate intrastate rates and services.

FEDERAL REGULATION · Congress in 1910 extended the interstate-commerce laws to include the telegraphs and telephones, making them subject to the same provisions as those governing the railroads respecting reasonableness of rates, nondiscriminatory service, and monopolistic practices. The first radio statute was that of 1912, which forbade any person to engage in interstate or foreign radio communication without securing a license from the Department of Commerce. By 1927 chaotic conditions had developed in the radio broadcasting business, and in that year a law of Congress established for one year the Federal Radio Commission (later made permanent), which was given the power to license stations, assign wave lengths, and perform a limited number of other regulatory functions. In 1934 the Federal Communications Act established a new Federal Communications Commission and turned over to it the enforcement of the laws regulating telegraphs, telephones, and radio broadcasting. The declared policy of the new act was "to make available so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and communication service with ade-

[26]Federal Communications Commission, *Statistics of the Communications Industry, 1941*, pp. 170, 915.

[27]Ibid. pp. 170, 221, 228.

quate facilities at reasonable charges, for the purpose of the national defense."[28] The objective was a co-ordination of all such facilities.

ORGANIZATION OF THE FEDERAL COMMUNICATIONS COMMISSION · The commission is made up of seven members appointed by the President and the Senate for overlapping terms of seven years, at an annual salary of ten thousand dollars. It has the same authority as the Interstate Commerce Commission to assign its powers to divisions, individual members, or boards of its employees; but appeals from their orders may be taken to the whole commission.

At first the commission operated largely through the three units of Broadcast, Telephone, and Telegraph; but these were later abolished, leaving the commission to function as a unit upon the recommendations of committees and individual members. Its regular staff is organized into four departments: Accounting, Statistical, and Tariff; Engineering; Law; and the Office of the Secretary. The heads of these departments meet as a committee on rules for the consideration of matters of administration and of proposals for changes in the rules and regulations of procedure. Rules governing hearings and the issuing of orders are made by the commission, subject to the restrictions of the statute. The commission was given special duties connected with the war, including the receiving, transcribing, and analyzing of foreign broadcasts; and its chairman also held the chairmanship of the Emergency Defense Communications Board.

WHAT REGULATIONS ARE TO BE ENFORCED · All common carriers engaged in interstate commerce by wire or radio are required to furnish service upon "reasonable request." All charges, practices, and classifications are required to be "just and reasonable." Discriminations and favors in these respects are forbidden, as are interlocking directorates; but consolidations may be made with the consent of the commission. In order to enforce these regulations, the commission may make investigations, require periodical or special reports, and make valuations of the property of the carriers. No new lines or extensions of lines may be made without a certificate of convenience and necessity. The commission, upon complaint and after a hearing, is authorized to prescribe "just and reasonable" charges, practices, and services, and may issue "cease and desist" orders to enforce compliance. Persons or governmental units complaining of injuries due to unlawful acts of a carrier may bring proceedings before either the commission or a court, to recover damages or reparation.

SPECIAL REGULATIONS FOR THE RADIO · Because of its late arrival on the scene and because of inherent mechanical limitations, the radio has been subjected to an unusual degree of regulation. No one without a license may broadcast between States or territories or to any foreign country or a ship at sea, or even within a state if such broadcast interferes with interstate transmission. Licenses may not be granted to any alien or represent-

[28] 48 Stat. 1064; 50 Stat. 189.

ative of a foreign state. The commission is empowered to perform various duties whose object is to establish order in the industry: to assign bands of frequencies; to determine the locations of broadcasting stations and their zones, and the services to be rendered by each; to require records of the programs; to make regulations to prevent interference; and to prescribe qualifications for station operators. The law specifically states that "no regulation or condition shall be promulgated or fixed by the Commission, which shall interfere with the right of free speech by means of radio communication."[29] The utterance, however, of any "obscene, indecent, or profane language" and advertisements of lotteries and gift schemes are forbidden. If any candidate for public office is permitted to make a speech, his rivals must be accorded equal opportunity.

In awarding licenses the commission is under obligation to give special consideration to vessels, airplanes, fire and forestry stations, and the municipal and State police. It collaborates in national and local programs for the protection of life and property, and it has certain obligations under the International Convention for the Safety of Life at Sea, formulated at London in 1929.

RESULTS · The communications industry has been more dependent on government aids and regulation than any other of comparable size. Radio broadcasting in particular could not have been built up and could not operate without central guidance and policing. While the Federal Communications Commission has been a storm center ever since its inception, the telephones and telegraphs, whose regulation had been well systematized when given over by the Interstate Commerce Commission, have largely been outside the conflict. The inherent character of the radio has all the makings of trouble for whoever attempts to play the part of guide and mentor. The advantages of local and regional control of programs are numerous and real, but run counter to considerations which point to the logic of unified control: the strictly limited number of frequencies available to any one community; the economical use of high-class talent, and the sheer waste of each station's attempting to run a round-the-clock program of its own; and the added value of a centralized system as an advertising medium, whose profits accrue to both the operators and the public.[30]

While all this seems to add up to big business and perhaps monopoly or semimonopoly, the law has charged the commission with the duty of living up to the antitrust laws and preserving competition. Control over the industry comes chiefly from the power to license. Licenses are not given or renewed as a matter of right but solely on the grounds of the "public interest, convenience, or necessity." They may be awarded only for a limited period, with no implication of a permanent right to the license or the channel. They may be refused on the ground of monopolistic

[29] 48 Stat. 1091.

[30] T. P. Robinson, *Radio Networks and the Federal Government*, pp. 112–119, 165–176.

tendencies, and may be suspended for various causes. Criticism of the commission has included its alleged favoritism in granting station licenses, but especially its attempt to maintain competition at the supposed sacrifice of efficiency and good service. The latter policy, for instance, has led it to protect the independence of individual stations from the domination of the networks, and hence to forbid network ownership of more than one station in a service area, or of any station where there is no rival standard station.

## *AIR TRANSPORTATION*

The promotion and maintenance of air navigation also have been highly dependent upon government.[31] No "rights-of-way" through the air may be held exclusively, as on land. Under the common law the landowner's title extended from the "middle of the earth to the heavens above"; but the laws and the courts hold that such ownership, like State and private ownership of the beds of navigable streams, is subject to the private and public right of navigation, under Federal regulation in the case of interstate traffic and under State regulation in that of intrastate traffic. Because of its experimental nature and the inherent danger to human life, air navigation has been expensive, and without subsidies from government could hardly have developed except with great slowness. Weather reports, atmospheric studies, meteorological and topographic maps, as well as properly equipped landing fields and beacons for air routes, are necessary adjuncts for safe and effective flying; and because of their nature and expensiveness all call for the services of government.

GROWTH AND EXTENT · With the end of the war all the conditions were present for a period of expansion comparable to that of radio in the 1920's. The equipped airways, which stood at 8252 miles in 1926, had 42,774 miles in 1944. The eastern half of the country already was covered with a network of certificated routes, while seven reached to the eastern ramparts of the Rocky Mountains and four penetrated to the Pacific coast.[32] From 1939 to 1944 the total revenue miles flown increased from 73,645,014 to 121,005,136, the number of revenue passengers from 1,303,423 to 3,359,064, and the total revenue from all sources from $47,696,563.23 to $133,981,229.48. The international air carriers also showed a large gain in that period, the passengers carried increasing from 105,548 to 306,349.[33]

STATE AIDS AND REGULATION · Both Federal and State governments have participated in the development and regulation of aviation. Thirty-seven States have given some central agency duties respecting aviation, and twenty-four have created special aviation commissions, bureaus, or boards.

[31]For a comprehensive study of the problems of air transportation cf. C. E. Puffer, *Air Transportation* (1941).

[32]J. H. Frederick, *Commercial Air Transportation*, p. 33.

[33]Civil Aeronautics Board, *Annual Report, 1944*, pp. 42, 43.

All the States except Arkansas require some form of licensing for aircraft and air pilots. Thirty-two demand a Federal license for aircraft, and thirty-three a Federal license for air pilots in intrastate commerce. Four require also a State license for aircraft, and three a State license for pilots.

The States generally have authorized cities or counties to construct and maintain airports for the free use of all. By the beginning of 1939, of a total of 1907 airports, 1046 were owned by the municipalities, 48 by the States, 26 by the Federal government, and 787 by private and commercial companies. The investment to that date totaled $326,243,111.[34] State regulatory laws cover their operation, controlling such matters as the minimum height of flight over cities and villages, liability for injuries to persons and property, and in some cases rates and services. Various bodies have proposed uniform laws covering airport aviation liability, air licensing, and navigation rules; and one or more such laws have been adopted by about half the States.[35]

FEDERAL PROMOTION AND REGULATION · Federal promotion and regulation of aviation was meager and fragmentary until the middle 1920's, being confined chiefly to subsidies for mail and military purposes. The civil program is embodied principaliy in the acts of 1926, 1938, and 1940. The question of air rights was settled by declarations of Congress that the United States possesses "complete and exclusive national sovereignty in the air space above the United States," and above all waters over which by international law it exercises jurisdiction; and that "any citizen of the United States [has] a public right of freedom of transit in air commerce through the navigable air space of the United States."[36]

An act of 1915 organized a National Advisory Committee for Aeronautics, of fifteen members drawn chiefly from scientific bureaus of the War, Navy, and other departments, to supervise and direct scientific studies of aviation; and that of 1926 placed certain administrative duties in the Department of Commerce. The more comprehensive act of 1938 established a Civil Aeronautics Authority, composed of a five-man board, which exercised mixed legislative and judicial powers with respect to economic matters and safety regulations; an administrator with executive powers; and an Air Safety Board for the investigation of accidents. A new setup was created in 1940 by means of an amendment and Presidential orders which transferred the whole organization to the Department of Commerce.[37] The Civil Aeronautics Authority is now composed of an administrator and the Civil Aeronautics Board, the Air Safety Board having been abolished.

THE ADMINISTRATOR OF CIVIL AERONAUTICS · The duties of the administrator are chiefly four: the construction and maintenance, in the United

[34]House Document No. 245, 76th Cong., 1st Sess., *Airport Survey* (1929), pp. 23, 38.
[35]*Air Commerce Bulletin*, No. 4, October 1, 1939, pp. 90, 164.
[36]44 Stat. 572; 52 Stat. 980.
[37]54 Stat. 1235 and Reorganization Plan No. IV.

States, its possessions, and the Pacific area, of the Federal airways system, including airports; the development and testing of aircraft radio equipment and devices; the examination and certification of airmen and aircraft, and enforcement of the safety rules; and the administration of the Civilian Pilot Training program. In 1939 he reported that a total of thirty-five hundred airports would reasonably meet the country's need, and in 1941 selected two hundred for construction and improvement.[38]

THE CIVIL AERONAUTICS BOARD · The Civil Aeronautics Board has mixed rule-making and administrative duties. It makes safety regulations and may, after a hearing, suspend or revoke the certificates of pilots, aircraft, or aircraft manufacturers. It authorizes air routes and air service by issuing certificates of public convenience and necessity, and, with the approval of the Secretary of State, may issue permits to foreign air carriers. The regulations of Congress for commercial air transportation are placed under its administration. These include matters of passenger and express rates, mergers and consolidations, and monopolistic practices.

THE REGULATIONS · The Civil Aeronautics Board is authorized to issue certificates variously for the manufacture and operation of aircraft and for the licensing of airmen. No aircraft may be registered unless it is owned by a citizen of the United States or if it is registered in any foreign country. To engage in transportation as a common carrier, a certificate of convenience and necessity must be obtained. Both an air-carrier operating certificate, to show that the concern is properly equipped to carry on air transportation, and a certificate of airworthiness for each aircraft are required.

Regulations much resembling those for railroads with respect to the abandonment of lines and services, discriminations and preferences, consolidations, mergers, and monopolies, interlocking relationships, and the issuance and sale of securities are embodied in the act. Just and reasonable rates and classifications must be maintained and must be posted publicly. Provision is made for co-operation between the Postmaster-General and the Civil Aeronautics Authority for the establishment of new mail routes.

GOVERNMENT SUBSIDIES · Federal mail subsidies played an important part in the development of air transportation as an "infant industry." For about eight years after their beginning in 1925 the amounts paid for carrying the mails were from two to three times the receipts from air-mail postage, but after 1937 there was a slight excess of receipts.[39] The Federal Co-ordinator of Transportation in 1940 estimated that the subsidies of government to 1938 had amounted to $120,431,000, of which $64,654,000 was paid for air-mail carriage, $22,105,000 for airports, and $33,672,000 for Federal airways and other related services.[40]

[38]House Document No. 245, 76th Cong., 1st Sess., *Airport Survey* (1929), p. xvii.
[39]J. H. Frederick, op. cit. p. 240.
[40]Federal Co-ordinator of Transportation, *Public Aids to Transportation* (1940), Vol. I, Pt. II, p. 131.

## *THE POSTAL SERVICES*

The postal service was the first venture of the United States government into the field of business enterprise, and still is its most comprehensive one. Beginning originally as a letter, or "first-class" mail, delivery service, it now includes many other functions. The registration of mail was begun in 1855; city delivery in 1863; the money-order system in 1864; rural free delivery in 1896; postal savings in 1911; and the parcel post in 1913. By 1944, 42,680 post offices with 5907 branches, 32,179 rural routes, and 3408 village and city free deliveries were carrying the mails to every populated corner of the country.[41] In 1941 nearly thirty billion pieces of mail, weighing 3,291,346 tons, were transported and delivered.

DEVELOPMENT OF THE POSTAL SYSTEM · In the early days of the colonies sporadic attempts to establish facilities for the carrying of letters were made, but were mostly of local importance.[42] The beginning of the American system dates to a patent granted by King William III in 1691 to one Thomas Neale, authorizing him to establish a postal service connecting the various colonies. In 1710 the new colonial system, by act of Parliament, was placed under the Postmaster-General of England. By 1721 the American system was paying expenses, and, under Benjamin Franklin, appointed Deputy Postmaster-General in 1753, sent a surplus annually to England. Delivery during the seventeenth century was by horse and rider; later, as the roads were somewhat improved, by stagecoach also. The Northern and Middle Atlantic cities had weekly to thrice-a-week service; those in the South, fortnightly or monthly service. A year before the Declaration of Independence the Continental Congress took over the postal system and appointed Benjamin Franklin the first Postmaster-General.

THE NATIONAL SYSTEM · The new Constitution placed among the powers of Congress one "to establish post-offices and post roads." The First Congress continued the postal legislation of the old Confederation, but in 1792 enacted a law more adequately organizing the whole service. The office of Postmaster-General was continued, and was elevated to cabinet rank in 1829, but was not made an executive department until 1872. In 1792 Congress began to establish or designate post roads and to make contributions toward their upkeep. As an educational measure, newspapers early were admitted to the mails at low rates. The increased bulk of the mails led early in the new century to the substitution of stagecoach for horse-and-rider transportation. The postal service was designed to be and was self-supporting until the depression of 1837. Popular demand led to an act of 1851 which reduced the letter rates from five to three cents for

[41]Postmaster-General, *Annual Report, 1943*, p. 1.

[42]L. R. Hafen, *The Overland Mail*, pp. 20–22. The survey of the development of the mails substantially follows this account.

distances under three thousand miles, and from ten to five cents for greater distances. The change greatly stimulated correspondence, but brought in the annual deficit which has persisted to the present day.

EXTENSION TO THE WEST · The young men who obeyed Horace Greeley's admonition to "go West and grow up with the country" soon found the hardships of frontier life alleviated by reasonably good mail connections with the people at home. The settlers and the forty-niners received monthly or semimonthly mail by the Panama routes, by ocean steamer, pack horse, and canoe, and soon by railroad across the Isthmus. The first overland mail was provided for in 1857, when Congress, for a consideration of five hundred thousand dollars, gave a company a contract to carry the mails from St. Louis to San Francisco. Called for its manager the Butterfield Overland Mail, its route, in the shape of a great fishhook, bore Southwest along the chain of army posts, over plains and deserts, through the mountains and the Apache country of Arizona to California, and thence through the great inland valley to its destination.

By 1858 there were three lines across the continent, including a slow one across the central Rockies. Most picturesque of all was the overland "pony express," established in April, 1860, which extended from the railhead at St. Joseph, Missouri, to Sacramento, California, where it connected by steamer with San Francisco. Station enclosures of logs, adobe, or stone were built every fifteen miles. The first trip took ten and a half days, with the average somewhat less in summer and longer in winter. The venture was a loser financially and lasted only nineteen months. "Big business" arrived by 1866, with five thousand miles of stage lines operated by Ben Holladay, whose large Concord coaches drawn by six horses carried mail, passengers, and express. However, in a few years Indian depredations and the extension of the railroads westward brought disaster to the stage business; and the driving of the golden spike at Promontory Point, Utah, on May 10, 1869, marked the end of this most picturesque chapter in the history of the American mails.

THE POST OFFICE DEPARTMENT · The postal services of the United States are administered by the Post Office Department, headed by the Postmaster-General, a member of the President's cabinet. Its personnel of 347,006 employees is larger than that of any other nonmilitary agency. The department is divided into six bureaus and five offices, five of the bureaus being operating units. Four of the bureaus are headed by Assistant Postmasters-General. The first is in charge of post offices, personnel, city, village, and rural delivery, dead letters, and many other matters; the second, of railway mail service, international postal service, and air mail; the third, of the postal savings system, the money-order service, registered mail, stamp transactions, parcel post, and the classification of the mail; the fourth, of engineering problems in general, including post-office quarters, motor vehicles, and traffic management. Another, the Bureau of the

Chief Inspector, as the name suggests, is in charge of the inspection force which polices the mails and investigates all violations of postal laws and regulations. The Office of the Solicitor passes on the mailability of questionable matter, renders legal opinions for the department, and in general represents it in the courts. The other offices concern the usual administrative matters of planning, budget, purchasing, and personnel.[43]

CARRIAGE OF THE MAILS · While the post office represents an instance of government ownership and operation on a large scale, on a close view it is seen to be a combination of government and private enterprise. The department is in charge of general management and planning, but the actual task of transportation, except for collection and delivery beyond the terminals, is done under contract by private carriers.

In the beginning, government hired its own men to carry the mails, usually horseback riders; but it soon turned to the contract system, dealing in turn with carriers operating by stagecoach, canal boats, river steamers and ocean vessels, railroads, and finally the airplane. In the year 1942–1943, 271 railroad companies carried mail over 568 routes totaling 174,229 miles, for which they were paid $99,179,920; and 18 airlines carried mail over 62 routes, totaling 43,304 miles, for the sum of $24,588,115. The transport of the international mails by ship and air directly added $18,535,979 more.[44]

FINANCE · The post office, with immeasurable influence on almost every phase of American life, belongs to that class of government business activities justifying subsidy if this is necessary to its full performance. As a matter of fact, it was run at a deficit for 106 out of 154 years (from 1789 to 1943). On only eleven occasions has a bookkeeping surplus been shown since 1837, the two last being in the war years of 1917 and 1943, when the rates were raised as a war measure. The deficit for 1942 was $14,139,037, and for 1943 the surplus was $1,334,551.[45] The few surpluses claimed after that time have been negligible, and no account is taken of the interest attributable to the fixed investments in buildings and other improvements. The Postmaster-General computed that free mailing privileges in 1943 cost the department $122,343,916, which, if paid, doubtless would have been sufficient to make the service self-supporting. All but a small part of this sum was due to the free mailing enjoyed by government officers and agencies, the only other sizable item being that of $1,147,679 for members of Congress under the franking privilege.[46]

THE MAILS AND THEIR POLICING · For purposes of rate-setting and speed of delivery the mails are divided into four classes. The highest rate is for

[43] *United States Government Manual, Winter, 1943–1944*, pp. 260–270; Postmaster-General, *Annual Report, 1943*, p. 119.

[44] Ibid. pp. 82, 83, 85, 119.

[45] Secretary of the Treasury, *Annual Report, 1943*, pp. 194, 525–527.

[46] Ibid. p. 456.

first-class mail, which includes letters, postal cards, and all matter wholly in script or typewriting. Second-class mail comprises all newspapers and periodicals issued at least four times a year; third-class mail, books, circulars, manuscript copy with corrected proof sheets, and all other mailable matter not included in the first two classes and part of the fourth class. The fourth class includes all matter named in the third class if weighing eight ounces or more; also farm and factory products, if not above a certain maximum size and weight. The rates of the first three classes are made irrespective of the distance carried, while those of the fourth class are based on zones. In 1939, acting under a temporary authority, the President reduced the postage rates on books to one and a half cents a pound, irrespective of the distance of the shipment. This rate was doubled later. The courts have long upheld the right of Congress to police the mails as an incident to the general postal power. Excluded from the mails are all obscene and indecent matter, tickets and advertisements of lotteries and games of chance, game killed in violation of State or Federal law; and all printed or written matter advocating forcible resistance to the government of the United States or its overthrow, or in furtherance of a scheme to defraud.[47]

PROBLEMS OF PERSONNEL · The Postmaster-General, almost from his establishment in the cabinet, has acted as the chief patronage officer of the President. Normally the chairman of the national committee of the victorious party is given the place. For instance, James A. Farley, during the first two terms of F. D. Roosevelt, combined his official post with that of chairman of the Democratic National Committee and chairman of the State Democratic committee of New York. Historically the city and village postmasterships have been regarded as the legitimate spoils of the victorious party; and the local postmaster, by custom, has been recognized as the chief local agent of the party and of the administration. As explained at an earlier point, the "Presidential postmasters," those of offices of the first, second, and third classes, are appointed by the President with the consent of the Senate and are removable by the President. Some concession to the merit system was made by an act of 1938 which provided that the postmasters of the fourth class be appointed with an indefinite tenure upon the basis of a competitive examination.[48] In 1943 the total number in that class was 15,731, and 3322 were appointed that year by the President.

SUMMARY · The postal service has been of supreme importance as a unifying influence and as an auxiliary to the industrial, commercial, and cultural interests of the country. The policy consistently has been to provide service to remote and outlying points, even at a financial loss, and to encourage the interchange of books and materials of an educational and artistic character at low rates. In 1943, 3,064,054 persons had a total of $1,577,525,610 deposited in the postal savings system. The postal income, with

[47] *United States Code*, Title 18, sects. 334–338.

[48] 42 Stat. 24; 52 Stat. 1076.

but few lapses, has increased steadily and at a greater rate than the population, growing from $437,150,212 in 1920 to $966,227,289 in 1943. The postal system, by and large, has been reasonably efficient, particularly since 1920, as a result of the partial elimination of partisan politics from the making of appointments.[49]

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[49]Postmaster-General, *Annual Report, 1943,* pp. 13, 15, 60, 527.

## CHAPTER XLVII

# *Government and Natural Resources*

The natural resources of the United States account directly for four of its greatest industries: agriculture, lumbering, mining, and the fisheries. It is correct to say that the character of the national economy for well over a hundred years was marked chiefly by the extraction and fashioning of the treasures which Nature had stored up. Government's part in their exploitation was strictly secondary to that of the individual. Its policy was directed chiefly to the encouragement of the individual in acquiring and clearing land, preparing it for tillage, and extracting and marketing the forests and minerals. Government furnished protection to the pioneers against hostile Indians, acquired title to the lands, and sold or granted them to the settlers. Not until the 1890's did the policy of "improvement" partially give way to that of "conservation." By that time the stock of lands up to the semiarid belt had run out, the seemingly inexhaustible forests had become depleted, the wild game and fish had grown scarce, and the better mineral lands had been occupied or exhausted.

CONSERVATION · The term *conservation* is descriptive of a wide variety of plans and laws whose purpose is to promote the economical use or the renewal of natural resources or to bring about an entire stoppage of their exploitation.[1] Conservation is not a separate and distinct field of government administration but rather a consideration in dealing with any of the usual subjects of legislation. Many legislative acts designed to accomplish concrete ends have conservation as a secondary object. For instance, the laws fostering agricultural production and an adequate farm income have also the objective of rebuilding soil fertility; those designed to place the coal and oil industries on a sound business basis envisage also the elimination of waste; while the various labor laws not only seek satisfactory economic and social conditions for the workers but look to the long-time conservation of human resources. On the other hand, conservation is the primary objective of many other laws, such as those relating to public health and to the protection of the forests, wild animals, and fish. Conservation obviously cuts across almost all the manifold activities of government and is best comprehended in connection with the administration of each.

[1]The volume by C. R. Van Hise, *The Conservation of Natural Resources* (1910), is still one of the best analyses of the general problem. For later accounts cf. H. E. Flynn and F. E. Perkins, *Conservation of the Nation's Resources* (1941); also O. E. Parkins and J. R. Whitaker, *Our National Resources and Their Conservation* (1939).

CONTROL OF THE LAND · The control of the land became increasingly a matter of governmental concern as mankind passed upward through the various stages of economic organization, the hunting, pastoral, and agricultural stages, and finally reached the industrial phase. Man at first merely *possessed* land, usually for brief periods, without any idea of individual ownership. Tribes laid claim to general areas for hunting and grazing purposes: the ancient Semites, for instance, to lands in Mesopotamia and Palestine; the Iroquois Indians, to the lands from western New York to the Sandusky River in Ohio; and various Southern Indian tribes, to the lands of Kentucky and the Muskingum valley in Ohio. Government first established its sovereignty over lands by discovery, conquest, or purchase, after which it became their proprietor by extinguishing the title of the natives, and finally disposed of them in parcels to individual citizens. The titles to the land of the original thirteen States and of the area west to the Mississippi are traceable to the crown of Great Britain, while those of the lands of the West and Southwest go back to grants by the French or Spanish governments or to treaties by which sovereignty over and ownership of the lands were vested in the United States.

THE NATIONAL DOMAIN · The land surface of the home territory of the United States is about 1,903,000,000 acres, of which more than one fourth is still owned by the government.[2] The Federal lands, including those held in trust for the Indians, total 430,342,295 acres; the State lands amount to 96,483,889 acres; and those included in roadways and other public facilities comprise 22,374,184 acres. Slightly more than half of the total area is in farms, including tilled, pasture, fallow, and waste lands, and woodlots. Somewhat less than 30 per cent is forest land, part of which is lightly timbered; and the remaining 17 per cent is grazing or desert land or is occupied by cities, factories, or parks.

The problems involved in the use and care of these vast areas are numerous and intimately tied in with every phase of the national life. Government policies will be considered as they relate to separate economic activities, primarily those of an extractive character, namely, agriculture, mining, and forestry.

## *AGRICULTURE*

The word *agriculture* is here used in its broadest sense, to include not only field tillage but gardening, fruit-growing, grazing, and stock-raising. Now that the unsettled lands of the world, with their store of wild game, are largely occupied, agriculture and fishing, with their processing industries, are virtually the only sources of food supply for mankind. Food production long was the chief industry of the United States, manufacturing becoming

[2]National Resources Board, *Certain Aspects of Land Problems and Government Land Policies* (1935), p. 91.

a good second only after the Civil War. In 1790 the rural population of the United States comprised 94.9 per cent of the total, and in 1860 still was 80.2 per cent. Even as late as 1900, when the percentage had sunk to 60.3, the United States was regarded as primarily an agricultural nation. The following two decades saw the final shift of economic and political power to the urban-industrial interests. The rural population, which in 1920 for the first time passed into the minority, at 48.8 per cent of the whole, by 1940 had reached the new low of 43.5 per cent.

A cross-country traveler by airplane, however, would still be struck by the comparatively small portion of the country devoted to manufacturing and by the great extent of the agricultural and forest areas. In 1940 the one hundred and forty urban districts of one hundred thousand population or more comprised nearly half of the country's population, but all together occupied a land area somewhat less than that of the State of Pennsylvania.[3] The only appreciable portion of the agricultural lands not devoted to food production is the cotton-growing and tobacco-raising regions of the South. The nonagricultural rural elements are chiefly the suburban dwellers and those engaged in mining and lumbering.

SOCIAL AND POLITICAL SIGNIFICANCE · Agriculture throughout human history in general has enjoyed a high social prestige. The ruling classes of Greece and Rome, the feudal rulers of medieval and early modern Europe, and the men who led the Revolution against Great Britain in 1776 were mostly agricultural and rural. Even a cursory examination of the records of those who led the North and the South during the Civil War would show the overwhelming predominance of men from the country and the small country towns. Agriculture is not only an industry but a way of life which generates characteristic political and social attitudes. The common law of England was the product of an agricultural society, a fact which accounted in large part for its fitness for the American scene. Individualism in thought and action was the natural outcome of the isolation of farm life and of the character of agricultural work and management. Jefferson, writing at a time when the United States was more than 90 per cent rural, expressed the belief that democratic government could exist only in such an economy.

Agricultural society is more stable than that based on manufacturing or on the purely extractive industries, where the exhaustion of the minerals or the forests may cause a wholesale shifting of population. The changes in population are more gradual, and families persist for longer periods in the same neighborhood. Agriculture, moreover, is more nearly self-perpetuating, the fertile lands, with intelligent care, remaining capable of sustaining their tillers and the neighboring villages and cities long after the boom mining communities are gone and forgotten. The element of stability in the farming communities may well serve as a bar to normal

[3]Bureau of the Census, *United States Census, 1940, Population*, Vol. I, p. 58.

progress, as frequently has been true in Europe and Asia. The high level of education and the high standard of living maintained probably account for the fact that the charge is not generally valid against the American farmer. The aggregate record of the American agricultural States as the breeding ground of new political ideas and the proving ground of political institutions is high.

LAND DISPOSAL · The United States government had lands for sale or grant in thirty-one of the States.[4] Excluded were the original thirteen, three others derived directly from them, namely, Vermont, Maine, and Kentucky, and the republic of Texas, which joined the Union retaining all its bags and baggage. Through their own original holdings or through grants subsequently made them by Congress, all the States had lands for disposal to settlers. Federal and State public policy, until the lands of the Rocky Mountains and beyond were reached, was based on the assumption of their use for agricultural purposes. The timber and mineral resources were not entirely lost sight of, but it was assumed that the greater portion of the lands eventually would be subdivided into agricultural holdings.

THE LANDS AS A SOURCE OF INCOME · Although the government's land-disposal policy in the first seventy-five years would not be rated high by the standards of social planners today, it must be judged in the light of the laissez-faire character of all governments at that period. The system employed by the English and the colonial governments, of disposal in large quantities to promoters who in turn should sell to small holders, was not abruptly broken off. The Western lands, in effect, had been pledged for the payment of the Revolutionary debt, and it was the policy of Congress to sell them for as much as could be obtained.

The land ordinance of 1785, adopted by the Congress of the Confederation, established the system of rectangular surveys for the territory north and west of the Ohio River. Alternate townships, of six square miles, were to be sold undivided at one dollar an acre, and the others in individual parcels of six hundred and forty acres. Two large tracts in southern Ohio were sold to the Ohio Company and John Cleves Symmes. The title of the State of Connecticut to a large area in northeastern Ohio, known as the Western Reserve, was recognized; that State in turn sold the land to the Connecticut Land Company. Congress in 1796 raised the price of township tracts to two dollars an acre, but little was sold at that price. In 1800 the minimum was cut to three hundred and twenty acres, with an allowance of credit up to three fourths of the purchase price. Four years later this was reduced to one hundred and sixty acres, then to eighty acres, and finally to forty acres. In 1820 the price was cut from two dollars to a dollar and a quarter an acre, which thereafter remained the government price for agricultural land outside the semiarid regions.

[4]R. M. Robbins, *Our Landed Heritage* (1942); B. H. Hibbard, *History of the Public Land Policies*, p. 1; P. J. Treat, *The National Land System, 1785–1820* (1910).

LAND FOR THE COMMON MAN · Many settlers had chosen farms, built cabins, cleared the timber, and planted fields in advance of the government land offices or in ignorance of the land laws. This left them subject to ouster by the legal purchaser, with the loss of both land and improvements. For years Western Congressmen had demanded that these "squatters," as they were called, should be given the first chance when the lands were opened for sale, and "pre-emption" laws of limited application had been passed from time to time. The general Pre-emption Act of 1841 made this the settled policy of the government. The goal of a farm for everyone who could use it was reached in the Homestead Act, of 1862, which gave one hundred and sixty acres of land, upon the payment of small fees for filing and proof, to any person who would settle on it, build improvements, and till the land for a period of five years. A later amendment made it possible to receive title to the land after fourteen months of occupancy, upon the payment of a dollar and a quarter per acre. Other innovations were the law of 1873 which permitted the homesteader to file a claim to an additional one hundred and sixty acres on the condition that he plant one quarter of it in trees; the Desert Land Act, of 1877, which allowed the settler in the semiarid regions to purchase six hundred and forty acres; and the Timber and Stone Act, of the next year, which granted another one hundred and sixty acres for the purpose of obtaining building materials.[5]

LAND MONOPOLY · Government policy until long after the Civil War did not discountenance large holdings or speculation in land. The only limit on the individual's land purchase was his financial ability. Holdings of 10,000 to 100,000 acres were numerous.[6] By 1860 almost all the lands in the three States of Indiana, Illinois, and Iowa had passed out of government hands, but it was estimated that 30,000,000 acres of the arable land was not in farms, including 6,000,000 acres held by railroads. Even the Homestead Act did not end the practice of large sales; entries ranging in size from 100,000 to 600,000 acres were made. In 1886 one English syndicate owned a tract of 3,000,000 acres. Land grants to encourage railroad-building were an important source of land monopolization. It is estimated that the government policies permitted from 200,000,000 to 300,000,000 acres of land to pass into the hands of people who had no intention of using it but intended, rather, to hold it for higher prices.

## *GOVERNMENT AND AGRICULTURE*

It has been seen that the Federal government's first influence in the field of agriculture came from its position as the principal proprietor of the unsettled lands; and that its policies, although in the beginning not

[5]R. M. Robbins, op. cit. pp. 85–90, 206–207; B. H. Hibbard, op. cit. p. 88.
[6]National Resources Board, op. cit. pp. 62–66.

well conceived, ultimately resulted in the distribution of the rich national domain in small tracts to millions of individual small farmers.[7] The power to regulate or control the tillage and general use of the lands after they passed into private possession undoubtedly lay at the core of the reserved powers of the States, which exercised the power very lightly. The State's general laws provided the basis for the legal rights of the landowner and farmer. Various aids were furnished to agriculture, but laws of a police and regulatory character were few. The first Federal legislation also was in the character of aids and promotion. Not until farm products entered widely into the channels of interstate and foreign commerce was coercive regulatory legislation attempted.

THE STATES AND AGRICULTURE · State aids to and regulation of agriculture naturally antedated Federal action. Even before Washington's inauguration voluntary associations had been formed whose object was the improvement of agriculture through the holding of fairs and exhibits, the collection of statistics, and the reading of papers. By the middle of the century some States had begun to subsidize these societies, which usually were organized on a county basis, and soon the practice became general. The first official agricultural agencies were the State boards of agriculture, whose primary duty was co-operation with the agricultural societies.[8] After the Civil War these were ordinarily superseded by departments, which, in their centralized organization and range of powers, much resembled the Federal Department of Agriculture. The first of the new type was established in 1874 by Georgia, and by 1944 only three States retained the board type of agency. The change was impelled by the need for an agency capable of administering the greatly increased load of regulatory laws and scientific aids to agriculture.[9]

AIDS AND REGULATIONS · The State and Federal programs for agriculture not only are very largely complementary to each other but contain some features of co-operative action. The State departments aid or operate fairs, exhibits, and farmers' institutes, provide extension education, and collect and disseminate crop statistics. States and cities establish farmers' markets or give encouragement to those privately run. Some States carry on propaganda for the use of their farm products at home and in distant States. All of them, through their agricultural colleges and experiment stations, carry on research and disseminate the results among the farmers. Provision is made for the inspection of livestock, orchards, and vineyards, and for their summary destruction if diseased. The regulations cover an ever-increasing field: the inspection and certification of stockfoods, fertilizers, and insecticides, and the inspection and licensing of cold-storage plants.

[7]For a good brief but comprehensive summary of the relation of government to agriculture cf. D. C. Blaisdell, *Government and Agriculture* (1940).

[8]E. Wiest, *Agricultural Organization in the United States* (1923), pp. 291–293.

[9]Council of State Governments, *Book of the States, 1943–1944*, pp. 422–423.

## *FEDERAL AIDS TO AGRICULTURE*

AGRICULTURAL EDUCATION AND RESEARCH · In 1857 Justin S. Morrill, of Vermont, introduced in the House of Representatives a bill granting to each State a block of land equal to thirty thousand acres for each of its Senators and Representatives in Congress, to be used for the establishment and maintenance of agricultural colleges. If no State had public lands within its borders, it was given "scrip," representing a claim to lands, which it might either use to locate and lay claim to lands in the newer States or sell to private individuals. The bill finally passed Congress, and was signed by President Lincoln on July 2, 1862.[10] Out of it grew in time the chain of "land grant" colleges, which have played an important part in American higher education. Such institutions as Cornell, Purdue University, and Ohio State University, and almost all the State universities of the Mountain and Far Western States, owed their beginnings to this act. Even some of the original thirteen States, which in the beginning had not approved the policy of State-supported colleges, used their funds to set up such institutions.

EXTENSION OF FEDERAL JURISDICTION THROUGH SUBSIDIES · The sponsors of this bill could not have foreseen the fateful character of the subsidy principle which it embodied. By means of the gift of money or of lands to the States, the Federal government has been able without constitutional amendment to enter fields of administration which had been reserved to the States. Senator Clay of Alabama saw the tendency of the bill at the time it was introduced. "This bill," he contended, "treats the States as agents instead of principals, as creatures instead of creators, and proposes to give them their own property and direct them how to use it."[11] In order to qualify for the subsidy, each State was required to comply with certain conditions. The proceeds from the sale of lands were to be used entirely for endowment, except an allowance of 10 per cent for the purchase of college sites and experimental farms; and at least one college had to be maintained where the leading subjects were "such branches of learning as are related to agriculture and the mechanic arts." Other requirements included the teaching of military tactics and the making of annual reports to the United States government. If any portion of the fund should be lost, the State was pledged to replace it. An amendment of 1890 provided for each institution an annual subsidy which in ten years was to amount to twenty-five thousand dollars, and which in 1907 was raised to fifty thousand dollars for each State. The act of 1890 also forbade the giving of the subsidy to any State which discriminated between races in the admission of students, but the provision of separate schools was held to be a compliance. In 1940 there were sixty-nine institutions receiving Federal funds under the law and its amendments. An Association of Land-Grant

[10]E. Wiest, op. cit. pp. 198–202. [11]Ibid. p. 200.

Colleges, organized in 1887, holds annual meetings at which their common needs and problems are discussed. The act was the basis for the establishment of colleges in some backward States, and even in some of the Western territories before they had received statehood. President James of the University of Illinois characterized it as "the beginning of one of the most comprehensive, far-reaching, and, one might almost say, grandiose schemes for the endowment of high education ever adopted by any civilized nation."[12]

AGRICULTURAL EXPERIMENT STATIONS · An act of Congress in 1887 provided annual appropriations of fifteen thousand dollars for each State for the support of agricultural experiment stations and the publishing of their reports. These were to be run in connection with the colleges founded under the Morrill Act. Studies were specified in the anatomy, physiology, and chemical composition of plants, their diseases, their adaptation to new environments, the chemistry of soils, and such other matters as might be of value to each region and climate.

The work of the stations rapidly grew in scope and importance. By 1943 the annual subsidy had risen to a total of $6,462,500, not more than 10 per cent of which may be used for the erection or repair of buildings. The Secretary of Agriculture is required to make an annual report to the Treasury Department certifying which States and territories have complied with the requirements of the law and are entitled to the subsidy. If the report is negative, the amount is put aside until the close of the next session of Congress, to which an appeal may be taken; and if the decision of Congress is against the State, the money is returned to the treasury. The secretary is required also to make an annual report to Congress respecting the receipts and expenditures of the various stations.[13]

AGRICULTURAL EXTENSION EDUCATION · The Smith-Lever Act, of 1914, further extended the program.[14] It made provision for "co-operative agricultural extension work," which was defined as "instruction and practical demonstrations in agriculture and home economics to persons not attending or resident" in the agricultural colleges. An annual appropriation, contingent on an equal contribution by the State, was pledged. This in 1943 totaled $13,834,950, which was allotted to each State in the proportion which its rural population bore to the total rural population of the nation. Each, however, is given a flat sum of ten thousand dollars outside the requirement. The scheme is co-operative in that it represents the joint efforts of the United States Department of Agriculture, the State agricultural colleges, and the farm organizations of each community. The

[12]E. Wiest, op. cit. pp. 216, 217.

[13]Bureau of the Budget, *The Budget of the United States Government, 1943*, p. 312; 43 Stat. 491.

[14]J. M. Gaus and L. O. Wolcott, *Public Administration and the United States Department of Agriculture*, pp. 38–40, 228–235; Secretary of Agriculture, *Annual Report, 1943*, pp. 169–186; Bureau of the Budget, op. cit. p. 316.

extension director of the college appoints representatives, who travel about the State giving aid in agricultural and home demonstrations and in the organization of boys' and girls' clubs.

The local leader is the county agricultural agent, whose tasks are to take to the farmer the results of scientific research, influence him to adopt scientific methods, and give advice in planting, marketing, and purchasing.[15] The wealthier counties also maintain a woman to give home demonstrations and advice in home management, including nutrition, sanitation, and co-operative buying. Both agents work through the granges and other farm organizations. The general supervision of the program is in the Office of Extension Service of the Department of Agriculture, which furnishes various services, including speakers for the farm organizations and co-operatives. The annual Federal appropriations are used for the payment of farm agents' salaries and the printing and distribution of scientific information.

AGRICULTURAL AND VOCATIONAL EDUCATION FOR THE PUBLIC SCHOOLS · The failure of some States to maintain adequate instruction in their secondary schools was responsible for the passage of the Smith-Hughes Act, of 1917.[16] This provided annual appropriations, to be matched by the States, for the payment of the salaries of teachers of agricultural subjects and for the training of such teachers, to be divided among the States in the proportion which their rural population bore to the total of the country. Other annual appropriations were authorized, to pay the salaries of teachers of trade and industrial subjects and of home economics and for the training of such teachers, the urban population of the States to be taken as the index of their subsidies. The whole scheme was placed under the supervision of a Federal Board for Vocational Education, in co-operation with corresponding State boards or authorities. Provisions, similar to those in the earlier subsidies, for Federal approval of the educational plans were included.

## *THE UNITED STATES DEPARTMENT OF AGRICULTURE*

When the Department of Agriculture was established, in 1862, it was given two functions: "to acquire and diffuse among the people of the United States useful information on subjects connected with agriculture" and "to procure, propagate, and distribute among the people new and valuable seeds and plants." Both were in the nature of aids offered to the people individually or to the States. No regulatory laws involving compulsion were turned over to the department until 1884. These two duties are the same as those which President Washington, in his last annual message to Congress, had recommended should be vested in a board: the

[15]G. Baker, *The County Agent* (1939).
[16]E. Wiest, op. cit. chap. xiii.

support by the "public purse" of an agency for the "collecting and diffusing" of information and for the encouragement of "enterprise and experiment" by the offering of premiums and "small pecuniary rewards." In 1839 Congress made its first appropriation specifically for agriculture: the sum of one thousand dollars for collecting and distributing seeds and plants, carrying on agricultural investigations, and collecting and distributing statistics. This was to be administered by the Patent Office, which continued to be in charge of all agricultural matters until 1862. By 1943 the annual appropriation for the office of the Secretary of Agriculture had grown to $613,979, while the total for all the services placed under his jurisdiction amounted to $1,082,633,689.[17] The act creating the Department of Agriculture placed it under a commissioner who in 1889 was raised to the rank of Secretary and made a member of the President's cabinet. The original conception of the department's functions was soon outgrown. It now is housed in a magnificent set of buildings and in 1944 had 76,167 employees.

ORGANIZATION · The manifold duties assigned the department by law account for its intricate organization.[18] The twenty-five to thirty major divisions comprise staff and service bureaus, and special "administrations" established by executive order for emergency purposes. The regular functions of the department fall into five chief classes: (1) scientific experimentation and research; (2) education, including extension service and information; (3) the eradication and control of plant and animal diseases and pests; (4) service activities, including food inspection and crop reporting; (5) the administration of about fifty regulatory statutes. Grouped with the department are also the Farm Credit Administration, the Rural Electrification Administration, the Commodity Credit Corporation, the Agricultural Adjustment Agency, the Farm Security Administration, and the Soil Conservation Service. The War Food Administration, Food Distribution Administration, Food Production Administration, and several other offices are emergency organizations. The regular functions are administered by about fifteen service bureaus, including those of Agricultural Economics, Animal Industry, Dairy Industry, and Human Nutrition and Home Economics. The secretary's immediate staff is made up of an undersecretary, an assistant secretary, five assistants to the secretary, and an economic adviser.

RESEARCH AND INVESTIGATION · The department, in its own laboratories and with the aid of the State experiment stations, carries on an extensive program of research.[19] Although much of this research is in basic biological and physical phenomena, the emphasis is on the activities of more immediate practical importance to agriculture. Among these are the breeding

[17]Bureau of the Budget, op. cit. pp. 299–301.
[18]*United States Government Manual, Winter, 1943–1944*, pp. 327–367.
[19]J. M. Gaus and L. O. Wolcott, op. cit. pp. 518–521.

and selection of plants and animals which will give the maximum return in food values and best resist diseases; the investigation of plant and animal diseases and their bacterial and insect carriers and how best to combat them; the study of soils and fertilizer requirements; the investigation of the chemistry of farm by-products and their possible use in manufacturing and commerce; the collection of plant specimens from all parts of the world, and the investigation of their adaptability to American climatic conditions and their commercial value; and the testing of the value of various poisons and insecticides for use against plant bacteria and pests. Contact with the State experiment stations is maintained through the Office of Experiment Stations. Aid is given in the planning of their work, and an account is kept of their expenditure of the Federal subsidies. A publication, the *Experiment Station Record*, serves as a source of information on the progress of their research projects.

THE DIFFUSION OF INFORMATION · The Extension Service, in co-operation with the directors of extension of the forty-eight States, of the territories of Alaska and Hawaii, and of the State agricultural colleges, attempts to make available the results of research and investigation to those who can put them into practice. No other department of the Federal government has so complete a network of lines reaching into every community of the country. More than two thirds of the counties have agricultural-extension agents, and one third have home-demonstration agents. The department annually distributes free approximately twenty-five million printed bulletins, circulars, and books.

QUARANTINE AND THE ERADICATION OF PLANT AND ANIMAL DISEASES · The research studies of plant and animal diseases and pests are the bases for organized campaigns of eradication. Infected animals and plants may not be shipped in interstate commerce, and the Department of Agriculture is authorized to establish quarantine lines wherever necessary. The Bureau of Animal Industry inspects livestock received at the various stockyards and supervises the disinfection of the railway cars in which they are shipped. The Bureau of Plant Quarantine inspects seeds, bulbs, and nursery stock, and may issue quarantine orders against disease-carrying and pest-carrying products from foreign countries. In all the eradication campaigns there is close co-operation with the proper authorities of the States.

THE ECONOMICS OF THE FARM · In 1922 three existing divisions of the Department of Agriculture were combined to create a Bureau of Agricultural Economics, to which was assigned the task of extending aid in matters of farm economics.[20] Studies of problems in production-planning, marketing, and financial management are carried on and made available to the farmers. Agricultural statistics, including the acreage and condition of growing crops, the number of livestock, and estimates of probable production, are collected, and literature explaining methods of keeping farm

[20]Ibid. pp. 52–54; E. Wiest, op. cit. chap. ix.

accounts is prepared and distributed. An important aid is the market news service, which is sent by flashes over ten thousand miles of leased wires and by frequent radio broadcasts.

CO-OPERATIVE MARKETING · The Capper-Volstead Act, of 1922, authorized farmers to form associations for the purpose of processing or of marketing in interstate or foreign commerce, which in effect gave an exemption from the prohibitions of the Sherman Antitrust Act.[21] Such associations, however, must be mutual and co-operative in character and may not "unduly" monopolize or restrain commerce or increase prices to the consumer. Should the Secretary of Agriculture find that such conditions exist, he may issue "cease and desist" orders and turn the matter over to the Department of Justice for prosecution.

## *RECLAMATION*

By the 1890's nearly all the lands of the United States in regions of rainfall sufficient for general agriculture had been colonized. The momentum of the historic American land quest, however, had not yet been spent; and home-seekers hopefully took up lands in the semiarid West, only to meet disaster. It was inevitable that government should attempt to enlarge the area in which farming communities could be founded. In 1847 the Mormons at Salt Lake City, without government support, had founded the first extensive project of irrigation, still the largest community project of its kind and a model of planning and construction. In 1879 a comprehensive report on the arid lands of the United States, on the basis of a ten-year study, was made by Major J. W. Powell, whose expedition was the first to explore the canyon of the Colorado River. It recommended that the public lands be divided into three classes, with appropriate legislation for each: those which could be cultivated by means of irrigation, those of value for pasturing livestock, and forest lands. Legislation early in the 1890's authorized irrigation surveys and the withdrawal from homestead of lands valuable for reservoir sites, and allocated a maximum of a million acres to each of the semiarid States for sale to farmers at a low price on condition that adequate provision be made for irrigation. This was the forerunner of one of the great legislative landmarks.[22]

THE RECLAMATION ACT OF 1902 · Government's part in the disposition of lands for agriculture in the well-watered regions was chiefly that of a benevolent landed proprietor: the determination of how much should be sold to each individual, at what price, and on what terms. Considerably more is called for in making the irrigated farm a going concern. Waters must be impounded by great dams, the land be leveled or contoured, main

[21] 42 Stat. 388.

[22] For a general history and survey of the reclamation program cf. J. W. Haw and F. E. Schmitt, *Report on Federal Reclamation, December 1, 1934* (Department of the Interior publication).

distribution canals and flumes be constructed, and an equitable distribution of costs be made among the individual farmers. All this calls for skilled engineers, competent business management, and a large capital investment. An act of 1902 and its amendments covered all these matters, and created a Bureau of Reclamation to administer the program. The net proceeds from the sale of public lands in the enumerated Western States were set aside as a "reclamation fund" to be used in the making of surveys and the construction of reservoirs and canals. Lands in the irrigation projects are sold in quarter-section lots, and the costs of operation and of amortization of the government's investment are assessed against the water-users, who may organize associations and become the legally constituted agents of the United States for collecting water dues and carrying out other matters relating to the distribution of water. The extent of the bureau's services was greatly enlarged by the Warren Act, of 1911, which permitted the building of reservoirs, in excess of the needs of the Federal projects, for the sale of water to private individuals and other users, on State lands. By 1942 the lands so irrigated amounted to 1,247,512 acres, more than 50 per cent of the total in the Federal projects.[23]

THE BUREAU OF RECLAMATION · The Department of the Interior administers the reclamation laws and projects through its Bureau of Reclamation. This agency, headed by a commissioner, maintains some fifty field offices, under the immediate direction of six regional directors, all of whose offices are located west of the Mississippi. It operates valuable properties, representing a large investment, consisting of fifty-two irrigation projects, one hundred and sixty-seven dams, and thirty power plants.

EXTENT OF RECLAMATION · The source of water in the Rocky Mountain region is the rain and snow which fall on the peaks of the higher mountain ranges. Without them the entire region would be unfit for tillage. The reclamation plans call for the damming of the mountain streams and the use of their impounded waters during the growing seasons. A striking feature of the Western landscape is the thin streak of green, with its farms, groves, and villages, lining the brown desert. By 1943 fifty-two irrigation projects were in operation in fifteen States, and nineteen more were under construction or authorized. Their waters supplied 88,050 farms, totaling 3,036,235 acres, on which lived 1,197,880 people, while the electric current generated served more than three and a half million. The total crop value of the farms of the Federal projects, which began with $244,000 in 1906, reached a new high of $155,619,716 in 1942.[24]

THE MAJOR PROJECTS · The completed Federal irrigation projects range in size from 5000 acres to the nearly 250,000 acres of the Salt River valley, the agricultural mainstay of the commonwealth of Arizona. That of the Yakima valley, Washington, is an apple-growing project, with over

[23]Secretary of the Interior, *Annual Report, 1943*, p. 71.
[24]Ibid. pp. 78, 79.

100,000 people living on its 204,409 acres. Others are the All-American Canal, which brings water from the Colorado River to the rich Imperial Valley of southern California and adjoining Arizona lands near Yuma; and the Colorado-Big Thompson project, which, by means of dams and tunnels, carries water across the Continental Divide to fertilize a large area in Colorado. Of still greater promise than any of these are two nearing completion, the Grand Coulee Dam, on the Columbia River in Washington, and the Shasta Dam, on the Sacramento River in California. The former will eventually furnish water for an empire of nearly a million and a quarter acres, while the latter, by controlling the river flow, will keep the tidal salt waters from valuable farm lands and provide irrigation for many other thousands.[25]

FINANCE · Concrete evidence of the value of the Federal investment in reclamation is the three and one-half million acres of producing farms under irrigation affording homes for one million persons. Apart from the intangible social gains and the indirect economic gains, the strictly fiscal aspect of the picture is dark in spots. As has been noted, the capital for the original construction costs of dams and ditches was to be drawn from a reclamation fund supplied from the sale of semiarid lands in the States benefiting by the projects. This was designated as an "advance," to be repaid by the landowners in annual installments, at first spread over ten years and successively extended to twenty and forty years. By 1910, however, the fund was depleted, and thereafter annual advances were made from the treasury. With the beginning of Boulder Dam and similar projects, reclamation merged with various public-works projects. In 1943 the Bureau of Reclamation operated on a budget of $90,051,000, of which only $1,066,650 was attributable to the reclamation fund.[26]

Repayments, however, were slow, whether from excessive costs of construction or from a hope that political pressure might induce Congress to reduce or entirely cancel the obligation.[27] As less advantageously located lands are brought under irrigation, the costs rise to a point where they can be met only by a subsidy from the treasury. Such must be the case with some of the projects of the 1930's, when the average cost per acre ran from a minimum of $150 to $2000, as compared with $40 to $70 following 1910. Occasional "relief" acts, postponing payment, were passed in the 1920's, and annual moratoriums became the rule for some time after 1932. By 1934 the total construction costs of completed projects totaled $228,400,000, of which $16,000,000 had been written off by Congress. This meant a cost to the average farm of $4860, of which $3600 was still

[25]Secretary of the Interior, *Annual Report, 1943*, pp. 72–77; Bureau of Reclamation, *Dams and Control Works* (1938).

[26]C. R. Van Hise, op. cit. pp. 194–198; Secretary of the Treasury, *Annual Report, 1943*, pp. 289, 623.

[27]J. W. Haw and F. E. Schmitt, op. cit. pp. 86–102.

unpaid. If the older Salt River and Carlsbad projects were not counted, which were 80 per cent paid, the average of indebtedness would be much higher. A curious contradiction of policy in the 1930's was the AAA program, with its subsidies for the reduction of agricultural production in the well-watered regions, and the reclamation subsidies for increased production in the semiarid regions.

RURAL ELECTRIFICATION. Federal promotion of rural electrification began on May 11, 1933, with the creation by Presidential order of the Rural Electrification Administration. A year later the agency was given a statutory basis, with an annual appropriation of forty million dollars for ten years; and in 1939 it was transferred to the Department of Agriculture.[28]

The Administration's duties include both planning and the making of loans, in which it is required to give preference to States and their subdivisions and to co-operative associations. Twenty-five-year loans, to be amortized by monthly payments, are made for the construction of generating plants and lines; and short-time loans are made, to finance individual investments in wiring and electrical appliances. By June, 1943, the loans of the Administration totaled $369,152,582, and more than a million homes had been served. An estimated seven million farm homes still remained without electrical services.

## *FEDERAL REGULATION OF AGRICULTURE*

Problems in the marketing of farm products brought certain aspects of agriculture within the orbit of the Federal interstate-commerce power. The Secretary of Agriculture was gradually vested with a series of regulatory functions, including the powers to issue rules and regulations, hold hearings, and institute prosecutions of offenders. The actual administration of the various regulations, of course, is in the hands of the proper bureaus, but the responsibility is his. The department now assumed coercive powers, and ceased to be simply an agency for offering services which individuals could use or not, as they pleased. A few of the more important Federal police laws will be considered.

DEALING IN AGRICULTURAL COMMODITIES · The Grain Futures Act, of 1922, was passed for the purpose of correcting abuses arising from the practice of buying and selling farm products on the commodities exchanges for future delivery. Farmers believed, as a rule, that such sales were used as a means of depressing commodity prices, particularly at the period of harvesting. The act forbade all such dealings in grains except on the "contract markets" designated and approved by the Secretary of Agriculture. Each market was required to make regular reports of all the transactions made through it; to desist from disseminating false or inaccurate reports about crops and markets; to prevent the manipulation of prices

[28]Rural Electrification Administration, *Annual Report, 1943*, pp. 18, 19.

by operators upon the board; and to permit membership and privileges to responsible co-operative farmers' associations. The United States Supreme Court, in the case of *Chicago Board of Trade* v. *Olsen* (1923), upheld the act on the ground of the power of Congress to remove obstructions to the free flow of interstate commerce.[29]

In 1936 a new Commodity Exchange Act broadened the scope to include rice, Irish potatoes, and butter and eggs, and on the whole tightened the regulations. Cheating, the making of false reports, and the bucketing of orders were specifically forbidden to traders, and all future commission merchants were licensed. Protection already had been given producers and shippers of perishable fruits and vegetables in an act of 1934, which prohibited certain practices of commission men, including the making of fraudulent statements about the condition of such commodities or the place of their origin, and the tampering with or removal of certificates of grading. Enforcement is secured through the requirement, for all such commission men and dealers, of licenses which may be revoked by the Secretary of Agriculture for cause, with an award of damages to the persons injured. Enforcement of the acts is in the hands of a Commodity Exchange Commission composed of the heads of the departments of Agriculture, Commerce, and Justice.

MEAT-PACKERS AND STOCKYARDS OPERATORS · The practices of the great meat-packing corporations and stockyards companies long had been the subject of complaint. Some of these were the concerted bidding up of prices which subsequently were suddenly lowered when trainloads of livestock reached the terminals; collusive bidding for carload lots, and the division of territory for purchases in order to avoid competition; and packer control of the storage pens, with exorbitant prices charged for storage and the feed and care of the livestock. Furthermore, the packers had created a partial monopoly in meat products and their substitutes by the manufacture of by-products, processed meats, and the operation of cold-storage plants.

The Packers' and Stockyards Act, of 1921, threw a network of regulations around both industries, comparable to those imposed on the usual public utility. Charges were to be fair and reasonable; services had to be rendered without discrimination; and price manipulations and unjust or deceptive practices were forbidden. A stockyard, in order to operate, was to be registered as a "market agency," and the Secretary of Agriculture might prescribe just and reasonable rates. Commission men were required to register and to give personal data. When the validity of the entire act was challenged as beyond Federal jurisdiction, Chief Justice Taft, speaking for the Supreme Court, declared that the stockyards and the packing

[29]262 U.S. 1 (1923). A similar act of the previous year, imposing a tax of twenty cents a bushel on all grain sold for future delivery unless the sale was made on "contract markets," was declared invalid as a penalty rather than a tax. *Hill* v. *Wallace*, 259 U.S. 44 (1922).

houses were but a "throat" through which the commerce in livestock and meat products flowed and were hence subject to Federal regulation as a phase of interstate commerce.[30]

THE GRADING AND STORAGE OF FARM PRODUCTS · Producers of farm products often suffered large losses because of dishonest grading or because the price received for large shipments had been set on the basis of the inferior quality of a small portion. Several Federal statutes attempted to do for farm products what the Bureau of Standards had accomplished for processed or manufactured goods, namely, to establish a common trade language which would accurately designate the different qualities and grades. The Grain Standards Act, of 1916, authorized the setting up of such national standards for the various grains "as the usages of the trade may warrant and permit," and required their use for all grains shipped in interstate commerce, with enforcement by licensed inspectors. A similar system for cotton was authorized by a law of 1923. Administration of both laws is assigned to the Bureau of Agricultural Economics, of the Department of Agriculture.

Subsequent acts have extended the system of standardization to all the principal field crops and to certain classes of livestock and meat products. Another phase of farm marketing was covered by an act of 1916 for the licensing and regulation of warehouses. These are inspected by the Department of Agriculture, classified as to location and facilities, forbidden to make unfair discriminations among customers with respect to charges and service, and placed under bond to secure the faithful performance of their obligations. Forms are prescribed for the warehouse receipts for goods stored, which are important papers in commercial transactions.

## *PRODUCTION CONTROL AND PRICE-FIXING*

The close of the First World War marked the end of a long epoch in American agriculture which had begun with the colonization of the country. The war emphasized and accelerated some basic changes which had been under way for two decades, besides adding new difficulties. The purchasing power of European countries, which long had taken large quantities of American grains and meat, had greatly decreased. Driven by necessity and the desire to become self-sufficient for military purposes, these countries engaged in programs of intensified food production. In the United States the introduction of motor power had wrought a revolution in the farm economy comparable to that from the same cause experienced in industry nearly a hundred years before. Production was increased and fewer workers were needed on the farms. Another factor in the maladjustment was the depletion of the soil. American agriculture by and large had been fundamentally an extractive industry. Almost anyone could

[30] *Stafford* v. *Wallace*, 258 U.S. 495 (1922).

make a living by farming. The bountiful riches of the soil, stored up in the course of unnumbered thousands of years, would yield at least a meager living without the use of science, careful management, or even great industry. The vast natural resources in soil were wasted in much the same manner (if less conspicuously) as those in the oak, maple, and white-pine forests.

No better barometer of the condition of the farm economy is available than that afforded by values and income. In 1920 the gross farm income, in terms of the inflated dollar, was $13,566,000,000, but in the succeeding year it fell to $8,927,000,000. Whereas the index number of the per capita income of the nonfarming population (based on the years 1910–1914 as 100) fell from 184.9 in 1920 to 160 in 1921, that of the farmers fell from 181.5 to 96.8.[31] Federal remedial legislation beginning under the Hoover administration, and markedly accelerated under the New Deal, for the first time attempted an intricate system of production and price control for this, the most individualistic of all American industries.

FUNDAMENTAL CHANGES · The immediate contribution of the First World War to the farmer's plight was the loss of his export market due to the impoverishment of Europe. For instance, the 1921–1922 export of 533,000,000 bushels of wheat to Europe had dwindled by 1925–1926 to 210,000 bushels. Nothing more impressively illustrates the farmer's stake in a stable and peaceful world order.

THE SHIFT IN CONSUMERS' DEMANDS[32] · The domestic market for farm products had also gradually undergone a decided change. The per capita consumption of wheat and other cereal products declined from 380 pounds in 1900 to 240 pounds in 1930. It was estimated that if the 1900 rate had been continued, 23,000,000 more acres of cereals would have been required in 1930. The place of cereals was taken by green vegetables and roots, which require a much smaller acreage. The consumption of lettuce increased from less than six pounds per capita in 1919–1920 to over thirteen pounds in 1930–1931, and that of carrots from less than two pounds in 1922–1923 to about seven pounds in 1929–1930; while the demand for tomatoes increased about 35 per cent from 1920 to 1930.

INCREASE IN FARM PRODUCTIVITY · In spite of a large growth in population and with about the same acreage in tillage, nearly 500,000 fewer men were needed to operate the farms in 1930 than in 1920. The increase in crop production per male worker between 1900 and 1930 was about 30 per cent. The chief cause was the greater use of mechanical power, which increased threefold per worker between 1900 and 1930. Between 1918 and 1932 nearly 10,000,000 horses and mules disappeared from the

[31]D. C. Blaisdell, op. cit. p. 18.

[32]This and the succeeding paragraphs on agricultural changes since 1900 follow the monograph of O. E. Baker, of the Bureau of Agricultural Economics, *Agricultural and Forest Lands*, in President's Research Committee on Social Trends, *Recent Social Trends* (1933), pp. 90–121.

farms. Gasoline took the place of grains and other fodder as a source of motive power, leaving an estimated 30,000,000 acres of crop land, as well as many million acres of pasture land, available for the production of food for human beings. Moreover, through the use of better breeds of meat and dairy animals, production was made more economical. Shifts in the kinds of crops planted, together with the more scientific use of fertilizers, accounted for other increases in food production. In short, fewer farm workers and a smaller acreage were needed to feed the nation.

DEPENDENCE ON MACHINERY · These and other factors at last had drawn the farmer definitely within the orbit of the machine economy. A greater portion of his food and clothing was purchased in the city markets, where wages and costs were relatively high, and his investment in farm machinery became increasingly heavy. All this was reflected in the increase of his business expenditures from 30 per cent of his gross income in 1909 to 47 per cent in 1939; and whereas he had formerly been only a casual customer of the banks, he now became as dependent on them for credit as the city industrialist.

SHIFT IN AREAS OF PRODUCTION · Another factor in the postwar agricultural distress was the shift in the areas of production. High prices and exhortations to produce to win the war had stimulated the extension of cultivation to the precarious semiarid belt beyond the one-hundredth meridian. An estimated thirty-three million acres of the range running from the Texas Panhandle through New Mexico, Colorado, Kansas, Nebraska, and the Dakotas were reduced to tillage by the tractor and gang plow. After one or two good crop years the lack of rainfall reduced this natural grazing ground to the condition of a "dust bowl." Furthermore, in the ten years following 1919 nearly thirty-two million acres of eroded and depleted land in Missouri, Arkansas, and other areas east of the Mississippi were abandoned as crop land. The net result was financial distress, the disruption of homes, abandonment of villages, and widespread hardship.

PRICE STABILIZATION · The distress in the Middle West was reflected in Congress by the formation of what soon came to be called the "agricultural bloc," made up first of twelve Senators and later of twenty-two, and of a similar group in the House.[33] Half a dozen minor bills for the aid of agriculture were sponsored by this group and passed; but the group gave its most ardent support to the McNary-Haugen Bill, which in one version or another haunted the halls of Congress for a decade. The bill twice passed both houses and was twice vetoed by President Coolidge. Its primary purpose, the raising of the prices of farm cereals, was to be accomplished by government purchase of the surplus and its dumping abroad, which would create a scarcity. The loss on the wheat so sold was to be borne by the growers in the form of an "equalization fee." President Coolidge

[33] A. Capper, *The Farm Bloc* (1922).

pointed out that the bill would not solve the problem, the production of a surplus, but actually aggravate it.

THE AGRICULTURAL ADJUSTMENT ACT, OF 1933 · The solution offered by President Roosevelt was embodied in the Agricultural Adjustment Act.[34] Its basic purpose was to raise the farmer's real income to the level of the five years preceding the First World War. Prices were to be raised by a decrease in supply; that is, not by dumping but by the restriction of acreage. Farm income was further to be raised by improved marketing arrangements, the elimination of unfair practices, and "benefit" payments as a compensation for leaving the lands untilled. Funds for the payments were to come from taxes levied on the first processing of farm products; for instance, the conversion of wheat into flour, the canning of vegetables, or the slaughtering of animals and preparation of meats. Administration of the program was entrusted to the Secretary of Agriculture and the Agricultural Adjustment Administration, which was organized in his department. These authorities worked through the State boards, county agents, and farmers' associations, so that every corner of the country was covered.

OPERATION OF THE ACT · Authority was given the Secretary of Agriculture to define the products which should come under the program.[35] Beginning with cotton, wheat, and tobacco, the list was gradually extended to include corn, hogs, sugar, rice, peanuts, rye, jute, and paper. Since no pretense was made that the regulation of agriculture fell under Federal jurisdiction, the whole program necessarily was based on voluntary cooperation. Contracts, running for from one to four years, were entered into between the farmer and the government under which the former promised to restrict his production in a specified degree, and the latter to pay him proportionately. Restrictions were stated in terms of acreage or products or both, with reference to a base period of years preceding. Land thus kept out of production was called "rented" or "contracted," and might be cultivated only for foods for home consumption or for soil-enriching plants.

EMERGENCY MEASURES · The adoption of the Agricultural Adjustment Act in May, 1933, came too late in the season to permit the application of its restrictions to more than a few crops. The aggravated condition of the cotton-growing industry, where the price had fallen from 29 cents a pound in 1923 to 6½ in 1932, marked it for emergency action. Contracts were hastily made with individual growers by which 10,400,000 of the 40,929,000 planted acres were plowed under; for this a "rental" of from seven to

[34] 48 Stat. 3 (May 12, 1933). The case for government control of agricultural production is stated by Henry A. Wallace, Secretary of Agriculture from 1933 to 1941, in his *America Must Choose* (1934) and *New Frontiers* (1934).

[35] This and the succeeding paragraphs follow substantially the study by E. G. Nourse, J. S. Davis, and J. D. Black, *Three Years of the Agricultural Adjustment Administration* (1937).

twenty dollars an acre was paid. The season's crop thus was reduced by an estimated 4,000,000 bales, or about 25 per cent of the expected yield. Meanwhile a program for the decrease of the stock of hogs had been put into effect. Plans were made for the purchase at premium prices of 1,000,000 brood sows and 4,000,000 pigs. These were to be slaughtered, the former for meat and the latter for reduction to inedible products. Actually 6,188,177 pigs were purchased and destroyed; but, whether from thrift or sentiment on the part of the farmers, only 220,140 brood sows were offered at the government price. With respect to the corn crop, Nature came to the rescue of the government; for drought reduced the yield to the lowest point in thirty years.

CROP REDUCTION · The system was effective in bringing about large reductions in the corn and wheat acreage for 1934 and 1935. The contracts for the corn farmer in 1934 called for an acreage reduction of not less than 20 per cent, for which the farmer was paid at the rate of thirty cents a bushel of the previous average yield of the acres taken out of cultivation; and for a 25 per cent reduction in the number of hogs produced for market, five dollars a head being paid for those not raised. The system resulted in a net reduction of 7,000,000 acres of corn, but an insignificant reduction of only about 90,000,000 bushels in output. Contracts with wheat-growers and peanut-growers followed somewhat the same line.

PROCESSING TAXES · According to the McNary-Haugen plan, the cost of the restrictive system was to be borne by the farmers; under the AAA, by the consumers of the finished products. The tax at so much a bushel or pound was paid by the millers, meat-packers, cotton-textile manufacturers, and canners, as the case might be, at the time of processing, and by them passed on to the consumers in the form of higher prices. For the year 1934 the processing taxes on corn, hogs, wheat, cotton, and peanuts amounted to $500,308,154.71.[36]

RESULTS OF THE AAA PROGRAM · An appraisal of the results of the AAA program is difficult to make, and the conclusions cannot be accepted with full confidence. The drought of several seasons played a large part in reducing production; with respect to some products perhaps a more important part than the government restrictions. Nourse and his associates, investigating for the Brookings Institution, concluded that the mechanism of production control employed by the AAA, in spite of all unforeseen factors in climatic variations, was of sufficient efficiency to warrant its use again for a short-time emergency, but not to such a degree that it "could be made practicable as a means of holding the course of production, over the years, close to a line laid out in accordance with a continuously operating economic plan."[37] They found a growing inability of the AAA to

[36]Agricultural Adjustment Administration, *Annual Report, 1934*, p. 304.
[37]E. G. Nourse, J. S. Davis, and J. D. Black, op. cit. pp. 150, 471, 473, 478.

confine its program to a planned "adjustment" program, and a tendency to distribute benefit payments ever more widely on the principle of every farmer's getting his share. On the asset side was the training in democratic and co-operative action arising from the farmer's participation in the local planning and administration of the system. The extent to which the AAA contributed to recovery is difficult to estimate, but the authors of the study believed that it "was sufficient to be significant."

INVALIDATION OF THE AAA · The Hoosac Cotton Mills, a New Hampshire concern, refused to pay the tax for the processing of cotton, thereby causing a test case to be brought before the Supreme Court of the United States.[38] That body held that the Agricultural Adjustment Act actually was a measure for the regulation of agricultural production, a subject not enumerated as a Federal power and consequently reserved to the States. While there was nothing in the Constitution to prevent the Federal government from making contracts with and paying money to such farmers as were willing, any form of compulsion was illegal. The processing tax, whose proceeds were devoted to the payment of benefits under the act, was a form of compulsion, like all taxes, and consequently rendered the whole law invalid.

CROP CONTROL THROUGH SOIL-CONSERVATION BENEFITS · At the time of this decision there was in operation a "Soil Conservation Service" set up under a statute of April 27, 1935, which provided that farmers might be given payments for co-operating in a soil-conservation program. As amended on February 29, 1936, the scheme aimed at production control by means of subsidies administered by the individual States.[39] The stated purposes of the act, however, were these: the preservation and improvement of soil fertility, the promotion of the economical use of land, the protection of the navigability of rivers and harbors against soil erosion, and, somewhat inconsistently (a repetition of one of the provisions of the old AAA), the increase of the "purchasing power" of the farmers to the 1909–1914 level. States were required to submit plans for such conservation programs, whereupon the Secretary of Agriculture should apportion the appropriated funds among them, taking into consideration the acreage and the value of the chief soil-depleting crops and the total crop acreage. Payments were made by the State to the farmer, not outwardly for the reduction of crop acreage but for conservation and the prevention of erosion, one means to this end being actual crop reduction and the planting of the acreage to grasses and soil-building plants. The new scheme was hurriedly passed and was less carefully designed to accomplish a well-planned objective than the Agricultural Adjustment Act, but it was effective in making a wide distribution of funds.

[38] *United States* v. *Butler*, 297 U.S. 1 (1936).
[39] 49 Stat. 163; 49 Stat. 1148.

## *THE "EVER-NORMAL GRANARY"*

The farm-control system of today is an outgrowth of the experimentation beginning with the Agricultural Marketing Act, of 1929, and extending through the F. D. Roosevelt administration. It is a combination of crop and marketing control, subsidy by means of loans for production and for soil conservation, and crop insurance. Secretary of Agriculture Henry A. Wallace thus characterized it in a report to the President:

> This term ["ever-normal granary"] is a good short description of the whole process. As the words imply, it covers far more than the concept of the first emergency period, when the predominant purpose was adjustment to the fact of a smaller world market. It promotes jointly the interest of producer and consumer through means that protect both parties—namely, the reciprocal action of acreage adjustment and crop storage. . . . It rejects the notion that farm welfare always requires acreage reduction and looks instead to the production of different crops in the proper amounts and proportions. Moreover, it looks toward the stabilization of supplies through the conservation of the soil and soil productivity.[40]

The heart of the system is the Agricultural Adjustment Act, of 1938, whose avowed object was that of "conserving . . . national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch resources in the public interest."[41]

CROP CONTROL · Owing to the dubious right of the Federal government directly to restrict farm production, the indirect means of subsidy and punitive taxation, as well as the regulation of interstate commerce, are employed. Subsidies to the individual farmer for soil-conservation plantings are given upon condition of obedience to certain regulations. At the proper season the Secretary of Agriculture makes a finding as to the acreage needed for the year in the light of various conditions, including the reserves on hand. This acreage is then divided among the various producing counties of the United States on the basis of the acreage seeded during the preceding ten years. The next step is the allotment of the county's acreage to the various farms, which is done with the co-operation of local committees. No national program of crop restriction, however, may go into effect unless approved by two thirds of the producers of the product in question, as shown in a secret referendum vote. Five farm products are eligible to the control scheme: corn, wheat, rice, cotton, and tobacco.

ENFORCEMENT · The crop restrictions are binding on all producers upon their acceptance by the two-thirds vote. But what if a farmer stands upon his "natural right" to plant what he pleases? This is taken care of by assigning a marketing as well as an acreage allotment to each farm, sales

[40]Secretary of Agriculture, *Annual Report, 1938*, p. 11.
[41]52 Stat. 31 (February 16, 1938).

in excess of which are subject to a penalty of so much per unit; for instance, fifteen cents a bushel for corn, and two to three cents a pound for cotton. Such violators, moreover, are not eligible for crop loans or soil-erosion benefits.

PARITY PAYMENTS · The term *parity payments* covers a system of subsidies. *Parity* is defined as a price (for example, for corn) which will give a purchasing power, with respect to articles which farmers buy, equivalent to that of the price paid in the base period of 1909–1914. Whenever the Secretary of Agriculture finds that the price of a commodity falls below this standard, he is empowered to make payments to each farmer equal to the deficiency. For the war year 1942–1943 such parity payments amounted to $197,481,980.46.[42] The ascertainment of parity is made by means of a compilation of the prices of farm products and of manufactured goods, but except in a limited range, must always be chiefly in the nature of guesswork.

SOIL AND WATER CONSERVATION · The program, instituted under the act of 1935, is featured also by an extensive system of subsidies.[43] The act recognized the wastage of soil and water as a "menace to the national welfare" and proposed a permanent system for their conservation. Specifically the things to be accomplished were the preservation of national resources, the control of floods, the maintenance of the navigability of rivers and harbors, the protection of the public lands and the public health, and the relieving of unemployment. The very great powers of approving the conservation plans and allotting funds were assigned to the Secretary of Agriculture, who acts through the Soil Conservation Service of his department. An interesting feature of the system is the series of area, county, and State committees of participating farmers and ranchers, who work with the Service in both advisory and administrative capacities.

SUBSIDIES · Federal subsidies are given to individual farmers, both owners and tenants, and in lump sums to the States whose conservation plans have been approved by the Secretary of Agriculture. In 1943 more than nine hundred soil-conservation districts were in existence in the States whose laws authorized them, which included approximately 540,000,000 acres and 2,500,000 farms. The mention of a few of the items for which subsidies are granted will show the breadth of the program. In 1943 these included the purchase of fertilizers and that of seed for soil-conserving crops, the construction of storage tanks and wells, the moving of earth and gravel, the destruction of noxious weeds, the establishing of fireguards, contour plowing and terracing, the planting of home gardens, the removal of stones from grazing lands, and the storage of silage. The agricultural-conservation payments in 1942–1943 amounted to $373,212,215.[44]

[42]Agricultural Adjustment Administration, *Annual Report, 1943*, p. 20.
[43]49 Stat. 163.
[44]Agricultural Adjustment Administration, *Annual Report, 1943.*

FINANCING THE FARM PROGRAM · The task of making the proper payments to millions of individuals, including division between farm proprietors and tenants, and of deciding what constitutes a soil-depletion or soil-conservation crop or device, is one of almost inconceivable magnitude. That abuses, injustice, and waste should be frequent is inevitable. While, as now constituted, the program is regarded as a permanent institution, no provision has been made for its financing other than the appropriations out of general tax income and borrowed funds. The annual cost is very large, amounting in 1943 to $638,709,513.45, or about one seventh of the total Federal budget of the Harding and Coolidge administrations.[45] Whether public opinion will long support so great a burden is extremely doubtful.

CROP INSURANCE · The third important feature of the farm production-control program is the system of crop insurance, which so far has been applied only to wheat. Losses from flood, drought, hail, insects, and winter-killing, in fact, from practically all enemies of good crops, are insured against up to 50 to 75 per cent of the normal yield.[46] Premiums are payable either in cash or in a wheat equivalent; and the wheat premium is stored as a part of the nation's "ever-normal granary." When crops fall below the insured amount, the stored grain is sold in sufficient quantity to make good the deficiency. The annual premium is set at the point of the estimated average annual loss of the individual farmer. He may go several years without a loss; but when one does come, he is able to draw on the accumulated reserves for compensation. The object is to level out the lean and the fat years. As stated by Secretary Wallace, "the net flow is into the reserves in good years, and out of the reserves in years of severe crop failures." This phase of the farm-control system is administered by a Federal Crop Insurance Corporation, all of whose stock is owned by the government.[47]

## *MINING*

As with agriculture, the Federal government's influence over mining came chiefly from its position as proprietor of the unused or unworked lands. The precious metals were confined chiefly to the regions beyond the Mississippi, which at the time of the first discovery of gold were owned by the Federal government, except for some lands in California, New Mexico,

[45]Ibid. The appropriations of 1941–1942 directly for the subsidization of farm production, but not including various others, such as those for farm credit, totaled $775,863,819. The two largest items were $499,388,671 for conservation, including $25,000,000 for administrative expenses and $212,000,000 for parity payments. The sugar bounty was $47,962,910, and crop insurance $8,559,827, with smaller sums for land utilization, farm forestry, and orchard rehabilitation. *The Budget of the United States Government, 1943*, p. 299.

[46]52 Stat. 72.

[47]Cleveland *News*, October 14, 1944, p. 2.

and Arizona held by virtue of grants and purchases from the Spanish and Mexican governments. The richest part of the gold lands of the 1849 discovery was on the estate of John Sutter; but he was powerless to stem the tide of frenzied gold-seekers who staked claims and dug and carried off the gold wholly without regard to his ownership. The Western lands generally were regarded as a sort of *terra naturae*, the chief obstacle to the possession of whose riches was the wild Indian and not the shadowy government at Washington.

DISPOSAL OF MINERAL LANDS · The Ordinance of 1787 had reserved to the government "one-third part of all gold, silver, lead and copper mines, to be sold or otherwise disposed of as Congress shall hereafter direct." Later laws reserved from sale all lands containing salt springs and licks and lead mines; but soon those yielding lead and copper were offered at minimum prices of two and a half to five dollars an acre. In 1850 a ruling by the Attorney-General that the restrictions on sales did not apply to iron-ore lands resulted in the loss of considerable revenue to the government, and the acquisition of the iron-ore lands by a few large owners. An act of 1864 authorized the sale of coal lands to the highest bidder or to the pre-emptor at twenty-five dollars an acre.

FORMULATION OF A GENERAL POLICY · In the absence of law, miners' associations in the trans-Mississippi region had devised a crude but fairly satisfactory set of rules governing the discovery, possession, and working of mining claims. They had organized by districts, electing in each a recorder to keep the records. Finally, in 1866, Congress acted to bring a semblance of order into the situation. A law of that year provided that the valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, should be "free and open to exploration and purchase" by citizens of the United States and those who had declared their intention to become such. Such explorations and purchases were to be governed by law, "and according to the local customs or rules of miners in the several mining districts", so far as these were not inconsistent with the laws of the United States. The right of possession and enjoyment of claims already located on the public lands was confirmed. In 1910 government began the policy of reserving for itself the subsoil mineral rights of lands sold for agricultural purposes. Mineral lands, except those reserved, may be leased to individuals, and proper royalties are exacted.[48]

THE BUREAU OF MINES · The chief Federal agency dealing with the mining industry is the Bureau of Mines, of the Department of the Interior, established by act of Congress in 1910. Because the subject is chiefly a matter of State jurisdiction, the bureau's field of regulatory and coercive action is very limited. Its duties fall chiefly under the headings of scientific and industrial research, safety and health education, mining promotion

[48]For an exhaustive description of the mineral industries of the United States cf. the annual volumes of the Department of the Interior, *Minerals Yearbook*.

and economics, and conservation. It investigates the various methods of mining and the types of machinery used; collects statistics on the economics of mineral production, including use and marketing; makes field explorations for the discovery of new mineral resources; conducts research in metallurgy and the physical and chemical properties of coal; inspects mines, investigates mine accidents, and conducts health and safety campaigns; operates a helium plant; and in general co-operates with the bureaus of mines of the several States. Its Safety Division gives training courses in first aid and mine-rescue work for thousands of miners and for persons preparing to give such instruction. In 1942–1943 the bureau operated on a budget of $12,525,365 and had 2104 full-time employees.[49]

## *THE COAL INDUSTRY*

The coal industry was in a depressed condition during the entire period between the two world wars. Until 1873 the United States annually had imported more coal than it exported, but thereafter the production greatly increased in response to the demands of the new industries. The peak production of 1918, amounting to 678,212,000 tons, was far beyond the normal postwar needs; but self-limitation was difficult, because of the large number of mines. Besides the larger commercial operators, thousands of farmers had small mines on their land, which they worked for their own and their neighbors' use. Not only the cessation of the wartime needs but competition with oil and gas lessened the demand. The use of mining machinery, moreover, helped to reduce the demand for labor, which declined from 759,000 in 1920 to 646,000 in 1930. The inevitable result was price-cutting, which brought disaster to owners and laborers alike. The average price per ton at the mines, which had been $3.75 in 1920, reached a low of $1.78 in 1930.[50]

PRICE AND PRODUCTION CONTROL · The coal industry was one of those regulated by code under the National Industrial Recovery Act, of 1933, in the matters of amount of production, prices, and wages and hours of labor. Upon the invalidation of this act by the Supreme Court in 1935, its place was taken by the Bituminous Coal Conservation Act.[51] This embodied the principles of limitation of output, price-setting, wage and hour regulation, and conservation. The country was divided into twenty-four producing districts, to each of which was allocated a quota of the estimated total of coal needed for the year, after which each mine of the district was given its allocation. Prices and wages were set and labor regulations made for each of the districts. General administration of the

[49]Secretary of the Interior, *Annual Report, 1943*, pp. 94, 95.

[50]For an analysis of the situation of the coal industry in the early 1920's cf. E. E. Hunt and others, *What the Coal Commission Found* (1925).

[51]49 Stat. 991.

system was entrusted to the National Bituminous Coal Commission, of five members appointed by the President for terms of five years, which worked through an organization of the "code producers" of each district. Conservation was to be furthered by the creation of a National Bituminous Coal Reserve, to consist of lands taken from the national domain or purchased from private owners.

Since mining as a form of production always had been considered outside interstate commerce, an indirect method of Federal enforcement had to be found. Resort was had to a tax of 15 per cent, levied on the sale price of coal at the mine, of which 90 per cent would be rebated should the operator become a "code producer," or adherent of the plan. In the case of *Carter* v. *Carter Coal Co.* (1936)[52] the Supreme Court adhered to its traditional ruling. "Mining brings the subject matter of commerce into existence. Commerce disposes of it," it said. As to the tax, this in reality was a penalty to enforce compliance with the regulations of the act and consequently was void.

THE BITUMINOUS COAL ACT OF 1937 · A new law was speedily enacted which repeated substantial parts of the first but sought to evade the constitutional difficulties by omitting the minimum-wages and maximum-hours provision.[53] A Bituminous Coal Commission was set up in the Department of the Interior, but in 1939 was abolished in favor of a Bituminous Coal Division headed by a director. The country is divided into twenty-three coal-producing districts, each with its district board of "code members," and ten price-fixing areas. The district boards recommend minimum prices, but price-setting is entirely in the hands of the Coal Division. Labor is given the same guarantees as those of the National Labor Relations Act, and the producers are restrained by a list of thirteen "unfair" methods of competition. Enforcement is guaranteed by the imposition of a 19½ per cent tax on coal at the mines for all producers not "code members," a measure which was upheld by the Supreme Court as a regulation of interstate commerce.

PRICE-FIXING · The most important and difficult of the Coal Division's tasks is the setting of minimum and maximum prices. Cost of mining must be computed for each district and for each of the numerous grades of coal, but the whole process is complicated by the element of transportation costs, which always is a large factor in price for such cheap and bulky commodities as coal. In 1937 a schedule of prices was announced, but was abandoned after widespread protests. Later price schedules, however, were more carefully drawn and received general approval. The increased demand after 1940, due to the requirements of the war, transformed the problem from one of restriction to one of stimulation of production. The price problem became merged with the general problems of

[52] 298 U.S. 238 (1936).

[53] 50 Stat. 72 (April 26, 1937); H. D. Koontz, *Government Control of Business*, pp. 635–654.

the Office of Price Administration. Considering the nature of the industry, it seems highly probable that some system of control will remain a permanent part of the national regulatory system.

## *PETROLEUM AND GAS PRODUCTION*

The chief motives for government regulation of the oil and gas industries have been conservation and the support of prices and wages.[54] The oil-producing and gas-producing States generally had passed anti-waste laws forbidding the leaving of the wells unplugged or unstopped. In the beginning no attempt was made to restrict commercial production; but in 1915 Oklahoma forbade the extraction of oil and gas to the point of economic waste, which was defined as production in excess of reasonable market demands. In time other States followed with similar legislation.

NATIONAL ACTION · The first step toward national action was the appointment by President Coolidge, on December 19, 1924, of a Federal Oil Conservation Board, consisting of the Secretaries of War, the Navy, the Interior, and Commerce serving ex officio. Adequate Federal remedial legislation seemed impossible because oil production was a matter of State jurisdiction, and concurrent action of the seven States which produce about 95 per cent of the nation's total was difficult to obtain. The National Industrial Recovery Act gave the President power to prohibit the transportation of oil and oil products in interstate commerce if such had been produced or withdrawn from storage in excess of the amount permitted by State law, and, furthermore, authorized him to set up a petroleum code, as in the case of all other industries, which might include the setting of an annual production quota and its allocation among the producing States. This power over oil shipments in interstate commerce was set aside in 1935 by the Supreme Court as an attempt of Congress to delegate its legislative powers to the President. Congress, however, promptly tackled the problems again in a law of the same year. Contraband oil and gasoline, or that produced in excess of what is permitted by the laws of any State, is banned from interstate and foreign commerce; "certificates of clearance" may be required before such products may be moved from any producing State; and all shipments must be registered. The President may set aside the prohibition if he finds that production has been unduly restricted. He has delegated the administration of the law to the Petroleum Division of the Department of the Interior.

THE INTERSTATE OIL COMPACT COMMISSION · The compact-making or treaty-making power of the States has been used in an interesting attempt

[54]The volume of the Temporary National Economic Committee, *Petroleum Industry Hearings* (1942), contains a wealth of facts on all aspects of the industry. Cf. also John Ise, *The United States Oil Policy* (1926).

to regulate oil production.[55] On February 16, 1935, the so-called "Treaty of Dallas" was signed by four oil-producing States, and on the August 27 following was ratified by Congress. Later adhesions brought the number up to seven, but the important producing States of California and Louisiana remained outside. Eight articles make up the imposing document. The reason set forth for the compact is "to conserve oil and gas by the prevention of physical waste thereof from any cause"; but the purposes of price-fixing, monopoly, and regimentation were specifically disclaimed. Each State is pledged to enact laws punishing waste, setting quotas of production, and denying "contraband" oil and gas access to commerce.

The spirit of the compact is one of voluntary co-operation. Any oil-producing State may become a member by signing the compact, but none is forced to join. The Interstate Oil Compact Commission, made up of one member from each State, chooses a chairman and vice-chairman from its own membership and employs a secretary. Regular quarterly meetings are held. It has no powers of compulsion. It investigates methods for the conservation of oil and gas resources and recommends measures for adoption by the individual States. It receives monthly reports from the Petroleum Economics Division of the Bureau of Mines, which are transmitted to the member States, setting forth the production and the stocks on hand in each, an estimate of the national need for petroleum and its products during the ensuing month, and an estimate of what each State will produce. The commission thus is a device of self-government, a clearinghouse for information, and, to a certain extent, a pressure agency for remedial State legislation.

### *THE FORESTS AND FOREST INDUSTRIES*

The American forests are valuable social assets for at least five important reasons. They are the source of one of the chief materials used in building and manufacturing, in spite of the decline of 40 per cent in the per capita use of lumber from 1900 to 1930. Wood still is widely used as fuel in rural districts. The forests act as regulators of the streams, slowing up the flow of rainfall from the watersheds, and thus evening out the crest of the floods and improving the navigability of the streams. They are a safeguard, particularly in rolling country, against soil erosion. Finally, they furnish attractive recreational areas, as well as shelters for game. Since the maintenance of adequate forest resources necessarily involves great areas of land which yield little if any financial return, and requires management lasting over several generations, government participation on a large scale is logical and necessary.

Government's relation to the forest problem has been (1) proprietarial, entailing the management and disposal of its own lands; (2) protective,

[55]Interstate Oil Compact Commission, mimeographed reports.

in devising means of saving the forests, both private and public, from fires and disease; (3) promotive, encouraging the enlargement, culture, and preservation of the forests; and (4) economic, providing for the cutting of trees in such manner as to avoid waste and yield an adequate supply of lumber for the years to come.

FORESTS IN THE UNITED STATES · The heritage of the people who settled this country included nearly 850,000,000 acres of forest.[56] Today about 615,000,000 acres, or about one third of the country's area, are classed as forest land, much of which, however, is not of commercial value for lumber production. Seventy-three million acres produce so little that they are practically a no-man's land; 175,000,000 are good chiefly for cord wood; and only 215,000,000 bear trees of saw-log size. About 11,000,000 acres are withdrawn from commercial production, in parks and other reservations. Nearly two thirds of the commercial saw timber is located on the Pacific coast, chiefly in the Northwest, and another large block is in the Old South. Almost two thirds of the lumber produced each year comes from these two regions. As to ownership, 435,000,000 acres are in private hands, another 158,000,000 belong to the Federal government, and 22,000,000 belong to the States.

DISPOSAL OF FOREST LANDS · The eastern half of the United States, with the exception of small spots, originally was forest-covered. It has been seen that this area was disposed of principally as farm land, the valuable saw timber being ruthlessly cut in order that crops might be planted. When the older settled regions began to need more lumber than they could furnish, there was a scramble for the valuable white-pine timber lands of Minnesota, Wisconsin, and Michigan. Large areas, valuable chiefly for timber and stone, were opened to entry under the Pre-emption and the Homestead Acts. Although there were national laws forbidding the taking of timber from the public lands, these laws were largely ignored, because public opinion regarded the property as free goods to which the pioneer was entitled to help himself. When Congress at length, in 1878, legalized this attitude, the legislation served only as an excuse for still greater depredations by corporations, speculators, and mill-owners.

The Timber and Stone Act, of 1878, which authorized the sale of timber lands in tracts up to one hundred and sixty acres at a minimum price of two and a half dollars, was adopted for the purpose of supplying the needs of the farmers for fuel and building material.[57] Lax enforcement, however, permitted the seizure by speculators of great areas of valuable timber land, which rapidly were stripped of their treasures. Penniless workmen were

[56]National Resources Board, *Forest Land Resources, Requirements, Problems, and Policy* (1935), pp. 44–47; O. E. Baker, *Agricultural and Forest Land*, in President's Research Committee on Social Trends, *Recent Social Trends*, pp. 114–118; John Ise, *The United States Forest Policy*; J. Cameron, *The Development of Government Forest Control in the United States* (1928); C. R. Van Hise, op. cit. pp. 208–218.

[57]20 Stat. 90.

hired to make entry on the lands, which immediately were transferred to their backers. One lumber concern by this means acquired one hundred thousand acres of valuable redwood in California. Although the rate of two and a half dollars per acre had been intended only as a minimum, it actually operated as the normal price. In 1923, after the act had been in force for forty-five years, more than twelve and a half million acres of the public domain had been sold for the paltry sum of thirty-five million dollars.

THE NATIONAL FORESTS · The foundations of our present magnificent national-forest system was laid in an act of 1891 passed on the initiative of the American Association for the Advancement of Science. The President was given wide discretion in building up the system. He might by proclamation declare as national forests tracts of public lands which were wholly or in part covered with timber, whether of commercial value or not. President Harrison promptly set aside 13,416,710 acres as the beginning of the national forests; Grover Cleveland added 39,103,030; and successive additions by Presidents and by Congress brought the total by 1940 to 176,567,095 acres, located in forty-two States and two territories.[58]

ACQUISITION OF FOREST LANDS · The National Resources Committee, as the result of a comprehensive study, recommended that the national forests should be enlarged to include 257,000,000 acres, and that those of the States and localities should comprise 82,000,000 acres, a measure which would involve the reduction of privately owned tracts from 444,000,000 to 257,000,000 acres.[59] Public ownership facilitates the planting of trees in partly forested and in cut-over and treeless areas for future generations. A regular program of enlargement of the national forests was instituted by the Weeks Act, of 1911, which created a National Forest Reservation Commission to pass on all proposals for forest-land purchases.[60] Composed of the Secretaries of War, the Interior, and Agriculture and of two members of the Senate and two of the House, it serves as a connecting link between the executive branch and Congress. On its recommendation, lands frequently are transferred between the national forests and the National Park Service and private owners. The commission was ordered to formulate a master chart for the establishment of a great system of forest reserves for the Appalachian region, reaching from New Hampshire to South Carolina. Such lands have been gradually acquired, but even yet about three fourths of the national forests are in the Rocky Mountain and Pacific States.

THE FOREST SERVICE · The Department of Agriculture is clothed with the general duty of administering the one hundred and sixty national forests and the numerous laws regulating them. The immediate task is in the hands of the Forest Service, established in 1906 and headed by a

[58]C. R. Van Hise, op. cit. pp. 215–218; Chief of the Forest Service, *Annual Report, 1940*, p. 29.
[59]National Resources Board, op. cit. p. 56.
[60]36 Stat. 962.

Chief. Under him are ten regional foresters, each in charge of an administrative division, to whom are responsible the supervisors of the various forests. The Service operates twelve forest and range experiment stations, twenty-six tree nurseries, and a Forest Products Laboratory.

FUNCTIONS · In essence, the task of the Forest Service is the management of the national forests, including co-operation with the State authorities and private owners. Safeguarding against fires and pests is one of its more important duties. An elaborate system of lookout stations, connected by wire or radio, and modern fire-fighting equipment are employed. The extent of the problem is suggested by the 291,140 acres burned over in 1939, at a loss of $1,827,300. The forest-culture function includes the collecting of seeds, the planting of trees, and the removal of brush, dead timber, and saw trees for sale. In one year the Service planted 155,774 acres with seedlings grown in its nurseries. Motor transport now permits selective logging, by means of which, instead of "clear-cutting," isolated mature trees may be removed, leaving room for the younger ones to grow. In 1939–1940 the receipts for sales of timber and forest products totaled $3,943,023.[61] The Service determines the capacity of the forests for grazing, and issues permits which annually accommodate more than a million cattle and five million sheep. It is concerned also with wild life in the national forests, where drastic measures sometimes are necessary to cut down overpopulation.

THE STATE FORESTS · Colonial and State promotion of forests naturally preceded that of the national government. The colony of Pennsylvania set aside tracts of forest lands known as "Penn's Woods," and Massachusetts authorized the establishment of co-operative "common woods." In early years several of the States, notably New York, Massachusetts, and Pennsylvania, legislated to encourage the preservation of forests. Led by Nebraska in 1861, a number of States offered tax reductions for lands on which a specified number of trees had been planted. A New York commission in 1873 recommended that private lands reverting to the State through tax delinquencies be retained instead of being resold, and within a decade nearly half a million acres were thus acquired. State interest in forestry was manifested by the establishment of departments or commissions dealing with the subject. In 1911 twenty-five States had such agencies; in 1937 the number had increased to forty-two; and in 1944 only four States (all, except Missouri, with extensive Federal forests) were without them. Today forty of the States have forests, seven (headed by New York, with two and a half million acres) possessing holdings of over one million acres each.[62]

[61] Chief of the Forest Service, *Annual Report, 1940*, pp. 32, 36.

[62] Ibid.; National Resources Board, op. cit. pp. 92–97; Department of Agriculture, *A National Plan for American Forestry;* Council of State Governments, *Book of the States, 1943–1944*, pp. 438, 439.

FEDERAL-STATE CO-OPERATION · Federal stimulation and aid are responsible for a considerable portion of the State programs. The Weeks Act, of 1911, besides giving blanket consent to interstate compacts for forest-fire protection, established a Federal-State co-operative system for that purpose conditioned on State contribution of one half of the cost. Much more important is the Federal control exerted over State-forest administration by means of subsidies for the purchase of forest lands, which are conditioned on the conclusion of a contract between the State and the Secretary of Agriculture. The secretary may purchase lands for the State forests in such amount as he deems the State able "to administer, develop, and manage" in the proper manner. The State, on its part, must agree to establish the office of State forester, work out plans for forest areas, pass laws restoring suitable tax-delinquent lands to the State, establish satisfactory standards of management, and make periodic reports to the Secretary of Agriculture. The United States keeps title to the lands until the full purchase price has been paid by the State. By 1938 thirty-two States had qualified for the benefits of the act.

## *THE NATIONAL PARKS*

The idea of a national park was conceived in 1870 by men of an exploring expedition seated about a campfire in the Yellowstone region. It became concrete two years later in an act of Congress, sponsored by this group, which set aside the region as "a public park or pleasure-ground for the benefit and enjoyment of the people." In 1890 and the following years lands for several other of the best-known parks were withdrawn from entry and reserved. The parks long were administered in a haphazard manner, and were patrolled by troops until 1913, when the National Park Service of the Department of Agriculture was constituted. A new feature was added in 1906, when the President was given authority to set aside "historic landmarks, historic and prehistoric structures and other objects of scientific interest" situated on the public lands as "monuments."[63]

NATIONAL PARK SERVICE · The National Park Service, headed by a director, now administers the twenty-five major national parks and eighty-five national "monuments," besides the military parks, battlefield sites, and national cemeteries. Its duties in the main are those befitting the management of the world's largest recreational enterprise. Each park is in charge of a commissioner or superintendent, who in turn is directly responsible to one of the four regional offices. The Secretary of Agriculture is given extensive power to make rules and regulations for the use and management of the parks, the violations of which are punishable.

[63]Two excellent illustrated studies of the public lands used for recreational purposes are National Resources Committee, *Recreational Use of Land in the United States* (1938), and Department of the Interior, *A Study of the Park and Recreational Problem of the United States* (1941).

FUNCTIONS · Other than that of recreation and pleasure, the national parks serve many purposes. Together with the national forests, they constitute the major part of the national program for the propagation and conservation of forest resources and wild life. An extensive educational program is carried out under the guidance of a Branch of Research and Education. A nature guide service interprets the park phenomena by means of lectures and museum exhibits. Facilities are afforded for the study of forestry and of biological and geological phenomena. As stated by the director, the national parks and monuments are a "segment of the Federal estate that has been chosen for preservation so that this and future generations will see the untamed America that was, and understand the compelling influence that built and strengthened the Nation."[64]

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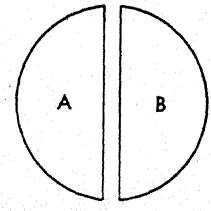
# VII

## THE CITIZEN AND HIS GOVERNMENT

*A survey of the American system of government, it seems, logically should conclude with that with which it began, the citizen. It requires little reflection to see that a member of a democracy has civic obligations of two sorts. He participates in the government by voting or otherwise, and he yields obedience to the government as a member of the community. He both governs and is governed; he gives and he receives. In the first capacity he may join political clubs or a political party, help in election campaigns, pass petitions, vote for public officers, contribute to public opinion, and perhaps hold public office himself. In the second capacity he is in a passive role. He must yield obedience to the laws; pay taxes or make loans to the government; submit to numerous business, educational, health, and labor regulations; and, if of proper age, render military service. He is also the beneficiary of many valuable services rendered by the government, such as aids in the conduct of his business, public utilities, justice rendered in the courts, and a variety of cultural and educational advantages. Both aspects of his civic situation raise profound questions of individual duty and obligation.*

OBLIGATIONS OF THE CITIZEN

Arising from participation in the government: public opinion, campaigns, elections, voting




Arising from obedience to the government: law observance, taxpaying, military service, enjoyment of public services

CHAPTER XLVIII

# *The Obligations of Citizenship*

"The truth is that in our governments the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater, for the people possess, over our constitutions, control in act, as well as right. . . . There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution: if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government. . . . From their [the people's] power, as we have seen, there is no appeal: to their error, there is no superior principle of correction."

These are words used in explaining the new Constitution to his fellow Pennsylvanians by James Wilson, next to James Madison the person most influential in its drawing. On the individual citizens of such a political system plainly rests a great responsibility. If from their errors of judgment there is no appeal, then it behooves each to perform his civic duties as wisely as may be. The obligations of citizenship cannot be appreciated by a mere enumeration: they are relative to the social and economic institutions of society and contingent upon fundamental moral principles.

POLITICAL OBLIGATIONS ARE RELATIVE · Nearly all the philosophers who have written comprehensively about politics emphasize the necessary correspondence between the type of citizen and the state of which he is a part, or vice versa, the type of state and its characteristic citizen. Both Plato and Aristotle, for instance, held that for the aristocratic state there would be the aristocratic citizen; for the tyrannical state, the tyrannical citizen; for the oligarchical state, the oligarchical citizen; and so on. Washington, Jefferson, Adams, Madison, and others of their time keenly appreciated that the free commonwealth which they had helped to found could not endure without a free citizenry qualified by education, morality, and economic well-being. Plainly the democratic state is both a consequence of such citizens and a constant incentive to their further improvement.

IS DEMOCRACY A FINALITY? · Is the democratic state, such as the United States, the ultimate answer to mankind's political destiny or only a way mark in an endless succession? History has no record of an institution which has existed continuously from the beginning. Institutions arise in

response to human needs and flourish so long as they fulfill those needs reasonably well. The student of history is cognizant of the kaleidoscopic changes in political institutions. City states, kingdoms, empires of continental breadth, feudal principalities, and national states have come and gone. Political democracy, however, is not a form of government but a principle. Majority government has existed and still exists under various forms, and the unending problem of the future is the modification of present forms and the discovery of new ones to make it more effective. Democracy as it evolves can always use the maximum of the human virtues available: morality, education, wisdom, tolerance, self-restraint, economic ability, and appreciation of the fine arts, not in a select few but in the people as a whole. Not tied to any particular form of government, its goal at any one time will always be well in advance of the state of mankind's perfection. What else than political democracy could so reasonably be urged as the ultimate political institution of mankind?

DEMOCRACY VERSUS BENEVOLENT DICTATORSHIP · It may be argued that the goals of individual perfection and social progress might be attained as readily by a benevolent dictatorship of the one or the few as by political democracy, and perhaps more speedily. Such unquestionably was the belief of substantial portions of the German and Italian peoples after the First World War, in which period the cause of democracy lost ground on a larger scale than at any time since the French Revolution. The character of business and production resulting from the advance of science, that is to say, the necessity for bigness, nation-wide planning, and over-all control, lends force to the argument for dictatorial control and the surrender of self-government. Nondemocratic government, however, whether of the agricultural, the feudal, the early factory, or the technological age, seems to carry the seeds of its own destruction. The seeds are the neglect of the individual in favor of the rulers or the more powerful pressure groups. This can be visualized by reference to the two half circles at the top of this section, used to illustrate the two aspects of individual responsibility. In the benevolent dictatorship the obligations of semicircle *A* do not exist; there are left only the passive ones of *B*, namely, obedience to the laws, taxpaying, military service, and the obligation arising from the benefits, benevolent or otherwise, which government offers the citizen. The typical citizen of this type of state may be well fed, well clothed, well housed, and adequately provided with cultural opportunities; but his abilities for participation in the government having atrophied through disuse, he is an easy victim of whatever propaganda the dictator may subject him to. The frailty of the supreme direction by a few, even if this direction is benevolently intended, is the narrowing of the field from which wisdom may be drawn. Government by able and sincere technicians, unchecked by the participation of the masses, may move as swiftly to disaster as to brilliant if temporary success.

## *OBLIGATIONS AS A PARTICIPANT IN GOVERNMENT*

"Oh, he is a good citizen" is a frequently used stereotype. It may be the judgment passed on a neighbor who provides well for his family, pays his debts, subscribes dutifully to the local charities, respects the rights of his fellows, fights shy of litigation, but remains aloof from politics except perhaps to cast his vote. The expression implies a reservation, as well it may; for the person in question in effect has resigned that half of his civic obligations which concerns his participation in the work of governing. He might make an equally "good citizen" of an authoritarian or dictatorial state. If he became the predominant type even in America, democracy would cease to exist. As a matter of fact, he is only one of many million Americans who either do not perform their civic duties of this type or, through ignorance, prejudice, or selfishness, perform them badly.

POLITICAL ACTIVITY · The greatest mistake in understanding and prophecy made by the very wise men who wrote the Constitution was with respect to political parties. They seem to have conceived of a democracy composed of isolated, unorganized individuals who would form their judgments independently of each other. The ink was hardly dry on the Constitution before concerted political action began. American as well as foreign experience has demonstrated that the political party is an institution without which democracy cannot exist. The political party not only is the means for the translation of majority opinion into the actual operations of government but it is the chief recruiting and inciting agency for political activity among the citizens. Its fundamental place in the American system is its sole and sufficient claim to a decent share of the interest, time, and efforts of all members of society.

THE INDEPENDENT VERSUS THE REGULAR · "I always vote for the man and not for the party" is a sentiment often expressed, and usually with something akin to self-righteousness, by many persons who class themselves as socially minded or intellectually emancipated. It well represents the individualistic point of view held by the founders of the Republic. The consequence of its universal acceptance would be the disappearance of political parties, leaving government to small blocs none of which would be competent to speak for the majority. It ignores the advantages of organization and of compromise for the sake of subordinating the lesser and attaining a few paramount public policies. A more rational course for the intellectual would be his active participation in the local activities of one of the political parties. By working from within he would be able to influence policy and encourage better candidates for public office. Leadership of municipal, county, and even State party organizations too often is left to persons incompetent, lacking in vision, sometimes venal, and unrepresentative of the general party membership. The fault is not with the political party as an institution but with the failure of citizens to recognize

or live up to their obligations. The other extreme, however, an unmitigated adherence to the dictates of party leadership, also would bring evils in its train. A measure of independent voting by regular party members is a legitimate instrument for enforcing responsible party leadership.

THE TWO-PARTY SYSTEM · Some competent observers have noted (early in 1945) an unprecedented weakness in party organization both in the localities and in Congress, which is attributed to complex factors such as the emergencies of the great depression and of the Second World War and the long continuance of one party in power. Another factor is that the constitutional system does not afford to the defeated candidate for President a secure position as leader of the opposition. Neither Davis or Smith for the Democrats nor Hoover, Landon, or Willkie for the Republicans was generally accorded by his fellows a place of party leadership during the four years succeeding his defeat. And yet few things in the realm of politics have been more conclusively demonstrated than the value of an organized, well-led, and responsible opposition. Not only does such an opposition serve to keep the government alert but it vitalizes the two-party system. The normal outcome of the bloc, or multiple-party, system, as the European experience since 1900 indicates, is unstable administration, political turmoil, minority rule, or resort to dictatorship.

VOTING · The exercise of the suffrage would seem to be the irreducible minimum of the citizen's political duties. With forty-seven million voting in the hotly contested Presidential election of 1944 out of a possible maximum of nearly eighty million, it is evident that performance falls considerably short of the ideal. Some reformers, disturbed about this failure, have urged the use of compulsion. Such proposals, however, seem to be ill-founded. By and large the rule of natural selection operates in the exercise of the suffrage. Voting implies the formation of judgments on personalities and on economic, social, and political questions which often are of extreme intricacy. The unqualified person is probably uninterested; and the intelligent and well informed who fail to cast their ballots demonstrate an insensibility to social responsibility which does not bode well for their value as voters. The use of force to compel the exercise of the most essential act of a free democracy would be the acme of contradictions.

OFFICE-HOLDING · The obligation to seek office is one which each person must settle for himself. Usually there is no dearth of those willing to do so, but often there is a dearth of the properly qualified. The question of personal obligation sometimes arises at the insistence of public-spirited friends. President Roosevelt, for instance, in 1936 urged the aged George Norris, distinguished by his achievements as a statesman, to run again for the office of United States Senator. English and American law generally recognize the legal obligation of a person to serve when elected. In practice, however, prosecutions to enforce office-holding are rare, restricted chiefly to a few minor posts, such as that of constable or road overseer. A

member of the British House of Commons may not resign, but there is a device softening the rigor of the rule. He may secure appointment to the Stewardship of the Chiltern Hundreds, an office without duties, from which he later may resign.

LOYALTY TO AMERICAN INSTITUTIONS · The alien who applies for American citizenship is required to pledge fidelity to the principles of the Constitution and forswear attachment to the country of his origin. Certainly the obligation of the native-born should be no less. The state is essentially an association of human beings on a grand scale, and, like those of smaller size, such as clubs and societies, it cannot prosper without the loyalty of all its members to the principles and purposes for which it was founded. While differences of opinion on details are inevitable and desirable, a consensus on essentials is necessary. The American political creed is succinctly stated in the constitutions and has been elaborated in the pronouncements of statesmen and in landmark acts of Congress. Loyalty does not preclude agitation to modify existing institutions, provided that such efforts are confined to persuasion and other peaceful means. The anti-syndicalism laws of various States, which generally have been upheld by the United States Supreme Court, are based on this premise.

EDUCATION FOR CIVIC DUTIES · Democratic government, that is, government by majority rule, necessarily includes the right of the majority to make mistakes as well as wise decisions; and this freedom is sometimes pointed to with great satisfaction by idealists. Obviously there is no virtue in making mistakes unless they educate for the future and lead to the path of wisdom. That mistakes are often made in the choice of public officials and in the adoption of policies needs no proof. Mistakes in mass judgment when government has few functions, and no immediate threat to national security from abroad impends, may not entail serious consequences; otherwise the privilege may prove expensive. The apathy of the French and the British public in the face of the Nazi threat a few miles away brought temporary ruin to France and near destruction to the British Commonwealth of Nations. American public opinion was no better, but the consequences were less serious because of the ocean barriers.

In the modern democratic commonwealth, both for domestic and for foreign affairs, mass opinions and decisions cannot safely be left to instinct and traditional slogans. Neither can they be taken wholesale from a few statesmen and politicians; for, in a regime of universal suffrage, leaders are always at hand ready to ride to power on the wave of any popular opinion, however deeply rooted it may be in ignorance and prejudice. In the long run there is no other safeguard against erroneous mass opinions than a wide diffusion of education. This the public and private school systems of the country are attempting to accomplish.

Greater even than his obligation to electioneer and to vote is the citizen's obligation to do those things intelligently. In spite of the vast sums

spent on education, accomplishment falls far short of the ideal. What should be the character and the content of civic education? Certainly it should aim at a general understanding of the nation's history and of its economic, political, and social institutions. Should education include indoctrination with the American principles of government? The European dictatorships quickly seized all institutions of formal education and those for the diffusion of information in order to control the thinking of their peoples. Government-controlled education in a democracy as well as in a dictatorship has its dangers. Democracy, based on the concept of the advancement of the masses, has nothing to fear from unrestricted freedom of teaching. A more pressing need, perhaps, than any change in the spirit and content of American civic education is its adaptation for the purposes of the adult. Institutes on civic questions, discussion forums, and adult education in general are constructive steps in that direction. The labor unions, with their well-stocked treasuries and the shorter hours of employment of their members, have here a magnificent opportunity to pioneer in an almost untried field.

TOLERANCE · One of the plainest teachings of mankind's political experience is the inherent difficulty of government in a state composed of diverse races and nationalities, and the virtual impossibility of maintaining democratic government under such conditions. The cause lies in the sharply differing mores, group ethics, and traditions, which render difficult a consensus on public questions. The United States has sizable segments of the various nationalities of Europe and Africa, but the situation is alleviated by two circumstances: the common language and the firm establishment of an American nationality before large new elements came in. A cardinal civic virtue in any democracy (particularly in America, with its varied national elements) is that of tolerance. Tolerance calls for a frank realization on the part of everyone that the various races and religions should be left free, within the framework of the American scheme of government, to live according to their own lights. That is the presumption on which the Constitution was drawn, and civic morality can hardly call for less. Tolerance assumes that the greatest good is to be obtained only through the free development of the talents and cultural ideas which the several races and nationalities have brought to these shores. It does not, however, necessarily imply a freedom to develop within the United States isolated culture islands which may stand in the way of the necessary political unity.

## *OBLIGATIONS AS ONE OF THE GOVERNED*

The average American suffers much in comparison with the typical citizen of the northern and western European states in the matter of methodical obedience to the laws. America has a higher homicide rate

than any other advanced nation. Lynch law, now happily on the wane, was an outgrowth of the frontier. Compliance with municipal ordinances in the smaller matters of snow removal from sidewalks, regard for traffic regulations, and the disposal of waste and rubbish is indifferent. The prohibition of the traffic in intoxicating liquors, placed in the Constitution by the votes of nearly all the States, furnished the world an example of lawbreaking on a grandiose scale, which will long remain memorable.

Is the citizen who is afforded a large power in the control of the government inherently a poor subject? Perhaps a better explanation in the case of the United States is the unparalleled freedom which generations of Americans enjoyed in the exploration and conquest of a great continent. Government always was far distant and played an inconspicuous part. The Frenchman De Tocqueville, visiting the United States in the 1830's, was amazed at the absence everywhere of the usual evidences of government, such as obtrusive functionaries and uniformed officials. Law on the frontier was administered by local officials free of central authority or by the impromptu efforts of the citizens themselves. Judge Roy Bean, administering justice in his "Jersey Lily" saloon, the only "law west of the Pecos," was a symbol of a long era in which law observance was a matter of sheer expediency rather than the niceties of civic obligation.

OBEDIENCE TO LAW · Obedience to law is a basic obligation of citizenship. Without it government would cease to exist; and slack or indifferent obedience is a distinct encouragement to social dissension. In a state which engages in extensive economic activities, obedience becomes of supreme importance. It may well be argued that law observance is not only an expedient civic duty but a moral obligation as well. The state represents the collective efforts of all the people; its laws, those rules of conduct which time and experience have shown conducive to the welfare of all. The lawbreaker is in the position of one who enjoys the benefits of the collective efforts but seeks to withhold his individual contribution to the general welfare. Sometimes, however, not mere selfishness but individual conscience runs counter to the law's mandates. William Lloyd Garrison attacked the Constitution as "an agreement with hell and a covenant with death" because it recognized the institution of slavery; and even so responsible a statesman as William H. Seward talked of a "higher law" for the same reason. While democratic government strives as far as possible to respect the conscience and peculiar tenets of minority groups, there are limits beyond which it cannot give indulgence to acts growing out of such conscience and beliefs.

TAXPAYING · Government in the United States, as has been shown, even in peacetime takes about one fifth of the total income of the citizens. The obligation to contribute to its upkeep is one which no citizen can logically deny and one which government surely will not permit him to repudiate. The obligation steadily increases as he becomes more and more

the recipient of positive benefits and services which formerly he had to provide for himself. Delinquency in taxpaying puts a person on about the same level as that of a person who goes to a party and seeks to evade paying for his part of the refreshments. Formerly the citizen's taxes paid chiefly for things which seemed somewhat remote: peace, order, safety, education for his children, national security, and the instrumentalities of justice. Now they go also for paved highways; statistical aids in the conduct of his business; order and co-ordination in transportation, mining, and agriculture; the preservation and fostering of the natural resources for the benefit of his children and grandchildren; hospitals and well-stocked libraries; and even band concerts and art museums. In times of emergency his financial obligations to the common treasury extend to the making of loans.

MILITARY SERVICE · The security of the state from attack from within and without must of necessity remain the paramount obligation. States may be well-governed in the main, but meet with disaster from without as did Denmark, Norway, Belgium, and Holland in 1940. The obligation of military service is as old as the political organization of mankind, extending to the primitive levels of the clan and the tribe. Great Britain, because of its insular position, and the United States because of its two-ocean ramparts, long enjoyed favored positions unrivaled by that of any other large state. The lack of need for large military establishments permitted the young men to pursue their education or vocations without interruption for service in the army. A still more important benefit was the evolution of a social system in which the military order was strictly subordinate to the civil, and in which war was not rationalized as a good in itself. Even as late as the decade of the 1930's the American people as a whole had not realized that this great boon had passed away. Now the implications of the airplane, with its enormously increased range, speed, and power, and of the atomic bomb, with its inconceivable potentialities for destruction, are understood by everyone. National self-interest, aside from all altruistic sentiments, is a sufficient basis for the popular demand for an organization to keep the peace of the world. Upon the sincerity and vigor of its support by the four leading powers rests the future of universal military training in the United States.

GOVERNMENT SERVICES · There is another field of civic obligations which are not legal or obligatory but chiefly moral and utilitarian. To the governed are offered many services and aids which he may use or not, as he pleases. The education of his children is a legal obligation up to a certain level, but he may use other means than the tax-supported schools. Health and sanitation services in part are in the same category. But the businessman may avail himself of the reports and statistics of the Bureau of Foreign and Domestic Commerce; the shipper, of the weather reports, the Federal merchant marine, or the parcel post; and the farmer, of the

scientific findings of the government experiment stations—each to such extent as he wishes. There is a general obligation to co-operate to a reasonable degree in making effective those services which have been established for the good of the social and economic order. Should the citizen believe that they are burdensome or ineffective, it is his privilege to work for their modification or abolition by law.

CIVIC RESPONSIBILITY · Both in totalitarianism and in democracy the citizen owes obedience to the state. In the former he owes obedience alone, for which devotion to the person of the *Führer*, *duce*, or emperor may be sufficent justification; in the latter he owes obedience coupled with responsibility, because the obedience which he renders is to laws of which he is a joint author. In a land of universal suffrage no one can escape a measure of responsibility either for acts of commission or for acts of omission by the government. Voting is an exertion of power, and power without responsibility is intolerable. When the citizen consciously assumes due responsibility for the political institutions of which he is a part, he crosses the line separating the mere hangers-on from those who are members in spirit.

The distinction is sometimes made between *social* responsibility, or what is owed society or mankind in general, and *civic* responsibility, or what is owed the state. Many persons devote themselves with enthusiasm to the discharge of the former, such as aid of the poor and the unfortunate or the eradication of disease, while with respect to the latter their efforts are nominal or half-hearted. Doubtless even in a country of majority rule the standards of civic obligation tend to lag behind those of moral obligation. The state, of course, does not attempt to cover in its laws the whole field of human conduct, but rather to maintain conditions in which the good life can exist. If at any given point the laws of the state conflict with moral precepts, the remedy, although it may be a tardy one, is in the hands of the voters. By and large one's civic obligations blend with his general moral obligations, and in the discharge of either he may find opportunity to exercise the virtues of altruism, benevolence, and social co-operation.

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# EPILOGUE

*This is the character of the American commonwealth—to use the words of Hobbes, "of that great Leviathan, or rather (to speak more reverently) of that Mortall God to which we owe under the Immortall God our peace and defense." Created by the political union of the American people, in peace it is the custodian of their liberties, order, and well-being; in war it may forge the thunderbolt to strike across the seas to the farthest parts of the earth. Its armor consists of certain principles of right and justice. Embodied in its structure is much of the accumulated wisdom and prudence of generations of men. Beside it the individual seems puny and small.*

*And yet the individual does not exist for the state but the state for the individual. Under no other conception can the good life exist. The only justification for the state is its ability to create and maintain conditions under which the individual may live happily and develop to the fullest the abilities with which he is endowed. This conception not only is sound in ethics but is practical and utilitarian. Upon the free exercise of invention, initiative, and the imagination depend those things which enrich the life of all. For this are needed the conditions of peace and order which only government can create, but also freedom from its undue restrictions. State regulation which creates conditions under which all races and creeds may thrive, and all individuals, no matter how humble, may develop their talents, adds to the store of material and intellectual riches which eventually benefit every member of the community. But state action which attempts to substitute the ideas of a few government officials for the genius of the millions is the direct road to general material and intellectual impoverishment. With this proposition perhaps very few Americans would disagree. The disagreement comes over the proper location of the line between government authority and the freedom of the individual. The answer can be determined by no simple formula and perforce must be settled by trial and error. When legitimate doubt arises American tradition would seem to dictate that the method of freedom rather than of force should be chosen.*

# APPENDIX

## *Constitution of the United States*

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

### ARTICLE I

SECTION 1 · All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2 · The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers,[1] [which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons].[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. [The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative: and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.][3]

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION 3 · The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,][4] for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the ex-

[1]Modified by the Sixteenth Amendment.
[2]Superseded in part by the Fourteenth Amendment.
[3]Obsolete.
[4]Repealed in 1913 by the Seventeenth Amendment.

piration of the fourth year; of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; [and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies].[1]

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments: When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief-Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4 · The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, [and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day].[2]

SECTION 5 · Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6 · The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

[1]Modified by the Seventeenth Amendment.
[2]Modified by the Twentieth Amendment.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION 7 · All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8 · The Congress shall have power:

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9 · [The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.][1]

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex-post-facto law shall be passed.

[No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.][2]

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10 · No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships-of-war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

[1]Obsolete. [2]Modified by the Sixteenth Amendment.

## ARTICLE II

SECTION 1 · The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows:

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.][1]

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

[1]Superseded by the Twelfth Amendment.

SECTION 2 · The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3 · He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4 · The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III

SECTION 1 · The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2 · The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;[—between a State and citizens of another State;][1]—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

[1]Modified by the Eleventh Amendment.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3 · Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

## ARTICLE IV

SECTION 1 · Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2 · The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

[No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.][1]

SECTION 3 · New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4 · The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

## ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by

[1]Obsolete.

the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided [that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article;] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## ARTICLE VI

All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth.

In witness whereof, we have hereunto subscribed our names.[1]

GEORGE WASHINGTON,
*President, and Deputy from Virginia.*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS AND RATIFIED BY THE LEGISLATURES OF [OR CONVENTIONS IN] THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE I[2] · Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

ARTICLE II · A well-regulated militia being necessary to the security of a free State the right of the people to keep and bear arms shall not be infringed.

[1]The names have been omitted.

[2]Congress, on September 25, 1789, proposed twelve articles of amendment to the Constitution. Ten became effective by the ratification of the eleventh State, Virginia, on December 15, 1791, there being fourteen States in the Union. These constitute the so-called Bill of Rights.

ARTICLE III · No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war but in a manner to be prescribed by law.

ARTICLE IV · The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V · No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI · In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII · In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of common law.

ARTICLE VIII · Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX · The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X · The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1] · The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any of the United States by citizens of another State, or by citizens or subjects of any foreign state.

ARTICLE XII[2] · The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—the president of the Senate shall, in the presence of the Senate and House

[1]Proposed March 4, 1794; ratified by the necessary number of States February 7, 1795. Proclaimed by President Adams January 8, 1798.

[2]Supersedes the third paragraph of Article II, section 1, of the original Constitution. Proposed December 9, 1803; proclaimed September 25, 1804.

of Representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the [fourth day of March next following],[1] then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII[2] · *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[3] · *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

*Section 2.* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive or judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Section 3.* No person shall be a senator or representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

*Section 4.* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing

[1]Changed to January 20 by the Twentieth Amendment.
[2]Proposed January 31, 1865; proclaimed December 18, 1865.
[3]Proposed June 13, 1866; proclaimed July 28, 1868.

insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

*Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1] · *Section 1.* The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

*Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2] · The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[3] · The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[4] · [*Section 1.* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

*Section 2.* The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

*Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.]

ARTICLE XIX[5] · *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX[6] · *Section 1.* The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of senators and representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

[1]Proposed February 26, 1869; proclaimed March 30, 1870.
[2]Proposed July 12, 1909; proclaimed February 25, 1913.
[3]Proposed May 13, 1912; proclaimed May 31, 1913.
[4]Proposed December 18, 1917; proclaimed January 29, 1919.
[5]Proposed June 4, 1919; proclaimed August 26, 1920.
[6]Proposed March 2, 1932; proclaimed February 6, 1933.

*Section 2.* The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

*Section 3.* If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

*Section 4.* The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

*Section 5.* Sections 1 and 2 shall take effect upon the fifteenth day of October following the ratification of this article.

*Section 6.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three fourths of the several States within seven years from the date of its submission.

ARTICLE XXI[1] · *Section 1.* The eighteenth amendment to the Constitution of the United States is hereby repealed.

*Section 2.* The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

*Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[1]Repeals the Eighteenth Amendment. Proposed February 20, 1933; proclaimed December 5, 1933.

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